DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 08-1371
Title: Christian Legal Society Chapter of the University of California, Hastings College of the Law, aka Hastings Christian Fellowship, Petitioner
v.
Leo P. Martinez, et al.
Docketed: May 7, 2009
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (06-15956)
Decision Date: March 17, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
May 5 2009	Petition for a writ of certiorari filed. (Response due June 8, 2009)
May 29 2009	Order extending time to file response to petition to and including July 8, 2009, for all respondents.
Jun 8 2009	Brief amici curiae of National Association of Evangelicals, et al. filed.
Jul 3 2009	Waiver of right of respondent Hastings Outlaw to respond filed.
Jul 8 2009	Brief of respondents Hastings College of Law in opposition filed.
Jul 21 2009	Reply of petitioner Christian Legal Society Chapter of the University of California, Hastings College of the Law, aka Hastings Christian Fellowship filed. (Distributed).
Jul 22 2009	DISTRIBUTED for Conference of September 29, 2009.
Oct 5 2009	DISTRIBUTED for Conference of October 9, 2009.
Oct 13 2009	DISTRIBUTED for Conference of October 19, 2009.
Oct 26 2009	DISTRIBUTED for Conference of October 30, 2009.
Oct 29 2009	Letter received October 29, 2009 from counsel for the petitioner. (Distributed)
Nov 2 2009	DISTRIBUTED for Conference of November 6, 2009.
Nov 9 2009	DISTRIBUTED for Conference of November 13, 2009.
Nov 9 2009	Record Requested.
Nov 13 2009	Record received from the US Court of Appeals for the Ninth Circuit (1 envelope).
Nov 30 2009	DISTRIBUTED for Conference of December 4, 2009.
Dec 1 2009	Record received from the U.S. District Court for the Northern District of California (1 envelope).
Dec 7 2009	Petition GRANTED.
Dec 29 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for Hastings College of Law respondents.

Jan 12 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including January 28, 2010.
Jan 12 2010	The time within which to file respondents' briefs on the merits is extended to and including March 8, 2010.
Jan 26 2010	Joint appendix filed (2 volumes).
Jan 28 2010	Brief of petitioner Christian Legal Society Chapter of the University of California, Hastings College of the Law, aka Hastings Christian Fellowship filed.
Feb 3 2010	Brief amicus curiae of Cato Institute filed.
Feb 3 2010	Brief amici curiae of Liberty Counsel, et al. filed.
Feb 4 2010	Brief amicus curiae of Center for Constitutional Jurisprudence filed.
Feb 4 2010	Brief amici curiae of American Center for Law and Justice, et al. filed.
Feb 4 2010	Brief amicus curiae of Justice and Freedom Fund filed.
Feb 4 2010	Brief amicus curiae of Baptist Joint Committee for Religious Liberty, et al. in support of neither party filed.
Feb 4 2010	Brief amicus curiae of Gays & Lesbians for Individual Liberty filed.
Feb 4 2010	Brief amici curiae of Students for Life America, et al. filed.
Feb 4 2010	Brief amici curiae of Michigan, et al filed.
Feb 4 2010	Brief amici curiae of Pacific Justice Institute and Christian Service Charities filed.
Feb 4 2010	Brief amici curiae of American Islamic Congress, et al. filed.
Feb 4 2010	Brief amici curiae of Foundation for Individual Rights in Education and Students for Liberty filed.
Feb 4 2010	Brief amicus curiae of Boy Scouts of America filed.
Feb 4 2010	Brief amici curiae of Association of Christian Schools International, et al. filed.
Feb 4 2010	Brief amici curiae of Evangelical Scholars (Officer and 24 Former Presidents of the Evangelical Theological Society), et al. filed.
Feb 4 2010	Brief amicus curiae of Union of Orthodox Jewish Congregations of America filed.
Feb 4 2010	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed.
Feb 4 2010	Brief amicus curiae of Advocates International filed.
Feb 4 2010	Brief amicus curiae of United States Conference of Catholic Bishops filed.
Feb 4 2010	Brief amici curiae of Christian Medical and Dental Associations, et al. filed.
Feb 4 2010	Brief amicus curiae of The Rutherford Institute filed.
Feb 4 2010	Brief amici curiae of Commissioned II Love, et al filed.
Feb 4 2010	Brief amicus curiae of Agudath Israel of America filed.
Feb 16 2010	SET FOR ARGUMENT ON Monday, April 19, 2010.
Mar 5 2010	CIRCULATED.
Mar 8 2010	Brief of respondent Hastings Outlaw filed. (Distributed)
Mar 8 2010	Brief of respondents Hastings College of the Law filed. (Distributed)
Mar 15 2010	Brief amicus curiae of Association of American Law Schools filed. (Distributed)
Mar 15 2010	Brief amici curiae of State Universities and State University Systems filed. (Distributed)
Mar 15 2010	Brief amici curiae of Commonwealth of Massachusetts, et al. filed. (Distributed)
Mar 15 2010	Brief amicus curiae of Associated Students of the University of California,

	Hasting College of Law filed. (Distributed)
Mar 15 2010	Brief amici curiae of American Humanist Association, et al. filed. (Distributed)
Mar 15 2010	Brief amici curiae of American Jewish Committee, et al. filed. (Distributed)
Mar 15 2010	Brief amici curiae of American Council on Education, et al. filed. (Distributed)
Mar 15 2010	Brief amici curiae of International Municipal Lawyers Association, et al. filed. (Distributed)
Mar 15 2010	Brief amicus curiae of American Law Teachers filed. (Distributed)
Mar 15 2010	Brief amici curiae of National LGBT Bar Association, et al. filed. (Distributed)
Mar 15 2010	Brief amici curiae of Anti-Defamation League, et al. filed. (Distributed)
Mar 15 2010	Brief amici curiae of Lambda Legal Defense and Education Fund, Inc., et al. filed. (Distributed)
Mar 15 2010	Brief amicus curiae of American Bar Association filed. (Distributed)
Mar 15 2010	Brief amicus curiae of Center for Inquiry filed. (Distributed)
Mar 15 2010	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Mar 15 2010	Brief amici curiae of National School Boards Association, et al. filed. (Distributed)
Apr 2 2010	Reply of petitioner Christian Legal Society Chapter of the University of California, Hastings College of the Law, aka Hastings Christian Fellowship filed. (Distributed)
Apr 19 2010	Argued. For petitioner: Michael W. McConnell, Stanford, Cal. For respondents: Gregory G. Garre, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

NELL NEWTON, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred when it held, directly contrary to the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), that the Constitution allows a state law school to deny recognition to a religious student organization because the group requires its officers and voting members to agree with its core religious viewpoints.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is the Christian Legal Society Chapter of the University of California, Hastings College of the Law.

Respondents are Nell Newton, Chancellor and Dean of the University of California, Hastings College of the Law; Jacqueline Ortega, Director of Student Services for the University of California, Hastings College of the Law; Donald Bradley, Tina Combs, Maureen E. Corcoran, Marci Dragun, Carin T. Fujisaki, Claes H. Lewenhaupt, James E. Mahoney, Brian D. Monaghan, and Bruce L. Simon, the Board of Directors of the University of California, Hastings College of the Law, in their official capacities.

Respondent-Intervenor is Hastings Outlaw, a student organization at the University of California, Hastings College of the Law.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner Christian Legal Society Chapter of the University of California, Hastings College of the Law, states that it is an unincorporated student organization and is a chapter of the national Christian Legal Society, which is a 501(c)(3) organization, incorporated in Illinois, with no parent or publicly held company owning 10% or more of its stock.

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In the Supreme Court of the United States

No. _____

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

NELL NEWTON, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Ninth Circuit is unreported and reprinted in Appendix (App.) 1a-3a. The opinion of the district court is unreported and reprinted in App. 4a-70a.

JURISDICTION

The U.S. Court of Appeals for the Ninth Circuit issued its panel decision on March 17, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND UNIVERSITY REGULATIONS

The text of the First and Fourteenth Amendments to the United States Constitution is found in App. 71a. The College's policies governing the registration of student organizations are set forth in App. 72a-98a.

STATEMENT OF THE CASE

This case involves the Hastings College of the Law's denial of recognition to a student organization, the Christian Legal Society ("CLS"), because the organization draws its officers and voting members from among those who share the group's core religious commitments. The court below held that Hastings' application of its Nondiscrimination Policy to deny CLS recognition did not violate the group's First and Fourteenth Amendment rights. App. 2a-3a. The material facts of this case are undisputed.

1. Hastings' Registration of Student Organizations

Each year, Hastings grants "Registered Student Organization" ("RSO") status to a broad range of student groups. It does so to promote "the expression of a variety of viewpoints." App. 82a. RSO status is available to any group of Hastings students, staff, or faculty, even a "group" composed of a single individual. App. 82a-83a. During the 2004-05 academic year (when the instant dispute arose), Hastings recognized approximately sixty

RSOs. CLS is the only group from which Hastings has ever withheld recognition.

RSOs form to express viewpoints on topics such as politics, religion, culture, and human sexuality. App. 109a-150a. RSOs include Respondent-Intervenor Hastings Outlaw (a group advocating for the interests of homosexual and bisexual students), the Black Law Students Association, the Clara Foltz Feminist Society, Silenced Right: National Alliance Pro-Life Group, Law Students for Choice, Hastings Republicans, Hastings Democratic Caucus, and the Vietnamese American Law Society. App. 109a-150a.

RSO status gives groups access to meeting space and to means of communicating with the campus community. App. 7a-8a, 85a. Among these channels of communication are: (1) participating in the annual Student Organizations Fair where student organizations recruit first-year students; (2) placing announcements in the law school newsletter; (3) posting announcements on bulletin boards; (4) sending fliers through law school mailboxes; (5) emailing messages to all members of the law school community through the student government; and (6) appearing in lists of student organizations in law school publications. RSO status also allows a group to apply for student activity fee funding and travel funds. App. 7a-8a.

Hastings disclaims all sponsorship of RSOs. It requires them to inform their members and third parties that they are not sponsored by the College. App. 83a, 85a-86a.

To seek RSO status, a group submits a registration form, a licensing agreement for use of the College name and logo, and its constitution to the Office of Student Services. App. 83a-84a. Hastings requires groups to include its Nondiscrimination Policy in their constitutions. The Policy provides:

> The College is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, College-owned student residence facilities and programs sponsored by the College, are governed by this policy of nondiscrimination. The College's policy on nondiscrimination is to comply fully with applicable law.
>
> The University of California, Hastings College of the Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.

App. 8a-9a, 88a.

Although the Nondiscrimination Policy enumerates only nine protected categories, Hastings asserts that it requires RSOs to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs." App. 9a. Hastings explains "for

example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization." E.R. 341.

Hastings has recognized many groups whose constitutions provide that their officers and voting members should agree with their organizations' missions and viewpoints. For instance, Silenced Right states, "So long as individuals are committed to the goals set out by the leadership, they are welcome to participate and vote in Silenced Right elections." App. 143a. Hastings Democratic Caucus mandates that "any full-time student at Hastings may become a member . . . so long as they do not exhibit consistent disregard and lack of respect for the objective of the organization." App. 118a. Respondent-Intervenor Outlaw's constitution states that officers may be removed for "working against the spirit of the organization's goals and objectives." App. 138a. The Vietnamese American Law Society provides membership to any Hastings student "so long as they do not exhibit a consistent disregard and lack of respect for the objective of the organization." App. 147a. The Association of Trial Lawyers of America at Hastings directs that members must "adhere to the objectives of the Student Chapter as well as the mission of ATLA." App. 110a. The Hastings Motorcycle Riders Club expects members to "own[] or ride[] a motorcycle or scooter, or ha[ve] an interest in such activities." App. 132a.

2. Christian Legal Society

Founded in 1961, Christian Legal Society is a nationwide association of lawyers, law students, law professors, and judges who profess faith in Jesus Christ. Its purposes include providing a means of society, fellowship, and nurture among Christian lawyers; encouraging, discipling, and aiding Christian law students; promoting justice, religious liberty, and biblical conflict resolution; and encouraging lawyers to furnish legal services to the poor. App. 99a-100a.

In furtherance of its purposes, the national Christian Legal Society maintains attorney and law student chapters across the country. Petitioner CLS is the law student chapter of the national organization at Hastings. App. 99a-108a. The mission of the CLS chapter is to maintain a vibrant Christian law fellowship that enables its members, individually and as a group, to fulfill Christ's mandate to love God and to love their neighbors as themselves. App. 99a.

CLS welcomes all Hastings students to attend and participate in its meetings and other activities. CLS wants persons who are not CLS members to come, listen, and participate in hopes they will be persuaded to agree with CLS's religious viewpoints. For example, CLS sponsors speakers to address integrating Christian faith with legal practice at lectures that are open to all. The chapter invites students to attend Good Friday and Easter Sunday church services where Christian beliefs are presented. The group also hosts several dinners

throughout the school year, all of which are open to any student, without regard to his or her beliefs or conduct. App. 13a.

CLS, however, does not allow nonmembers to vote on chapter decisions or lead the group. CLS has only one category of membership: voting membership. Voting members are eligible to choose the group's officers, stand for election to officer positions, amend the group's constitution, vote on chapter business, and teach weekly Bible studies. Covering a variety of topics, the Bible studies are centered on the Christian beliefs reflected in CLS's Statement of Faith.

A student who wishes to become a voting member of CLS must affirm a commitment to the group's foundational principles by signing the national CLS Statement of Faith. App. 12a, 100a-102a. A shared devotion to Jesus Christ is reflected in the Statement of Faith, the affirmation of which indicates a member's commitment to beliefs commonly regarded as orthodox in the Protestant evangelical and Catholic traditions. App. 11a-12a, 100a-101a. An individual raised in a faith other than Christianity is eligible for voting membership if he or she affirms the Statement's orthodox Christian tenets. Conversely, a person raised as a Christian is not eligible if he or she no longer can affirm the Statement of Faith. App. 100a-103a.

In light of contemporary controversies regarding human sexuality within various religious denominations, national Christian Legal Society reaffirmed in March 2004 its understanding of

biblical principles of sexual morality and explained how that understanding derives from its Statement of Faith. It stated, "In view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership." App. 11a-12a.

A person who advocates or unrepentantly engages in sexual conduct outside of marriage between a man and a woman is not considered to be living consistently with the Statement of Faith and, therefore, is not eligible for leadership or voting membership. A person's mere experience of same-sex or opposite-sex sexual attraction does not determine his or her eligibility for leadership or voting membership. CLS individually addresses each situation that arises in a sensitive Biblical fashion. App. 11a-12a.

3. Hastings' Denial of RSO Status to Christian Legal Society

Early in the 2004-05 school year, CLS chapter vice president Dina Haddad inquired of the Hastings Director of Student Services, Judy Chapman, about the process for registering CLS as an RSO. Haddad informed Chapman that the group was a local chapter of the national Christian Legal Society. Handing Haddad a copy of the College's Nondiscrimination Policy, Chapman cautioned her that national organizations like the Christian Legal Society often have membership or leadership policies

that conflict with the Nondiscrimination Policy. App. 12a-13a.

Shortly thereafter, Haddad applied to the Office of Student Services for travel funds to cover a portion of the costs for her and CLS president Isaac Fong to attend Christian Legal Society's 2004 annual conference. Chapman granted Haddad and Fong $250.00. App. 12a-13a.

Haddad submitted CLS's registration materials, including its constitution, to the Office of Student Services. After reviewing the CLS constitution, Chapman determined that the constitution likely ran afoul of Hastings' Nondiscrimination Policy and referred the matter to Hastings' General Counsel, Elise Traynum, for review. App. 12a-13a. Traynum subsequently concluded that CLS's constitution violated the religion and sexual orientation provisions of Hastings' Nondiscrimination Policy. App. 12a-13a.

CLS provided Chapman a letter prepared by counsel that explained that all students are welcome to attend and participate in CLS's meetings. The letter described CLS's shared belief in certain core religious principles, as well as the application of those principles to the subject of human sexuality, and explained how compliance with these principles was among the criteria for choosing officers and voting members. App. 12a-13a. The letter did not persuade Hastings to change course.

As the only group from which Hastings has ever withheld recognition, CLS cannot meet as an

officially recognized student organization. It cannot utilize the various means by which RSOs communicate with the campus. In addition, CLS is denied student activity fee funding and travel funds. After Hastings denied recognition, Chapman informed Haddad that the $250.00 previously granted for travel had been withdrawn. App. 12a-13a.

Denying CLS access to communication channels, reserved meeting space, and funding places CLS at a singular disadvantage in comparison to other student groups, all of whom are free to communicate their messages and viewpoints while receiving the benefits of official recognition.

4. Jurisdiction and Proceedings in the District Court

CLS filed suit in district court under 42 U.S.C. § 1983, challenging Hastings' denial of recognition as a violation of the group's expressive association, free speech, free exercise of religion, and equal protection rights.[1] The district court had jurisdiction under 28 U.S.C. § 1343 and 28 U.S.C. § 1331.

The district court granted Hastings Outlaw leave to intervene. Outlaw claimed two interests: (1) its members must be able to become officers and voting

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[1] This petition will emphasize the clear circuit conflict with respect to the expressive association claim. However, CLS also pursues in this Court each of its other constitutional claims, including the claim that Hastings' refusal to recognize CLS was viewpoint discriminatory and unreasonable in light of the purposes of the speech forum, violated the Free Exercise Clause, and violated the Equal Protection Clause.

members of any group on campus, including CLS; and (2) its members do not want their student activity fees supporting an organization they find offensive.

On cross-motions for summary judgment, the district court ruled in favor of Hastings and Outlaw. The court held that the Nondiscrimination Policy did not regulate CLS's speech, but rather its conduct. App. 27a (citing *United States v. O'Brien*, 391 U.S. 367 (1968)).

The court then offered a number of alternative holdings. First, it held that even if the Policy regulates speech, it still passes constitutional muster. The court determined that Hastings "created a limited public forum and, thus, the restrictions on access to this forum are permissible so long as they are viewpoint-neutral and reasonable." App. 30a. The court acknowledged that the Nondiscrimination Policy "may affect a group with a certain perspective or belief system" but this fact "does not render the policy viewpoint based." App. 34a. Moreover, "Hastings' requirement of compliance with its Nondiscrimination Policy is a reasonable regulation," because it is "consistent with and furthers [Hastings'] educational purpose." App. 38a.

Second, the court held that Hastings' application of its Nondiscrimination Policy did not violate CLS's right of expressive association. App. 42a. Contradicting the Seventh Circuit's opinion in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), the court held that this Court's decisions

in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), did not apply because Hastings' rule governed access to a speech forum and to the benefits of recognition.

Third, the court held that even if *Dale* and *Hurley* applied, "there is no evidence that complying with the Nondiscrimination Policy, and taking the risk that a non-orthodox Christian, gay, lesbian, or bisexual student become[s] a member or officer, [] by their presence alone, would impair CLS's ability to convey its beliefs." App. 59a.

The district court also rejected CLS's Free Exercise Clause and Equal Protection Clause claims.

5. Proceedings in the Court of Appeals

CLS appealed to the Ninth Circuit, which, after briefing, postponed oral argument pending its resolution of *Truth v. Kent School District*, 499 F.3d 999 (9th Cir. 2007), *withdrawn*, 524 F.3d 957 (9th Cir. 2008), *amended by* 542 F.3d 634 (9th Cir. 2008), *reh'g denied*, 551 F.3d 850 (9th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3531 (U.S. Mar. 10, 2009) (No. 08-1130). Because the court below based its ruling solely on the *Truth* decision, it is necessary to review the various opinions in *Truth* in order to understand the ruling below.

In *Truth*, a school district denied recognition to a high school Bible club, named Truth, partly because it limited voting membership and officer positions to those who shared the group's religious beliefs and

limited non-voting "general" membership to those who "desire[d] . . . a relationship with Jesus Christ." *Truth*, 499 F.3d at 1009. Truth's general members could not vote on club matters, hold office, or lead club meetings, including Bible study or prayer. *Id.* at 1009, 1014. Like the CLS chapter in the instant case, Truth would allow non-members to freely attend meetings and activities.

In its first opinion, the Ninth Circuit ruled that the school district could deny Truth recognition because of its general membership requirement. *Id.* at 1015. It did not reach the voting membership and leadership issue. *Id.* The court held that requiring Truth to accept "general members" who did not "desire . . . a relationship with Jesus Christ" would *not* affect Truth's expression. *Id.* at 1014-15. The court explained that "[t]he First Amendment interest implicated by [*Hurley* and *Dale*] is not present here. The general members do not control the club's Bible study and prayer functions. They do not lead the club in its activities. They cannot vote." *Id.* at 1014.

The Ninth Circuit then distinguished *Walker*, 453 F.3d 853, on the basis that, unlike the CLS chapter in that case, Truth had no "First Amendment interest with respect to the denial of . . . recognition on account of *the general membership restrictions*." *Truth*, 499 F.3d at 1015 (emphasis added).

While Truth's petition for rehearing en banc was pending, the panel withdrew its initial opinion and substituted a new opinion. The substituted opinion no longer separately analyzed Truth's expressive

association claim. Instead, the Ninth Circuit considered *only* whether the school district's application of its nondiscrimination policy to Truth's general membership requirements was viewpoint neutral and reasonable in light of the purpose served by the speech forum, holding that it was. *Truth*, 524 F.3d at 973.

Truth again petitioned for rehearing en banc. While that petition was pending, the panel amended its substituted opinion, adding a two-judge concurrence that addressed the lack of expressive association analysis in the prior opinion. Acknowledging that "[e]xpressive association may be burdened when the state requires a group to change its membership criteria," the concurrence nonetheless asserted that when the government restricts access to a limited public forum in a way that interferes with a group's expressive association, "we apply the lesser standard of scrutiny," i.e., viewpoint neutrality and reasonableness. *Truth*, 542 F.3d at 651, 652 (Fisher & Wardlaw, JJ., concurring).

Likewise, the concurrence attempted to distinguish *Walker*, claiming that "[a]lthough the Seventh Circuit applied strict scrutiny in addressing this [expressive association] claim, it notably stated that it could not even determine, on the limited record before it, whether the university had created an open, limited, or nonpublic forum." *Id.* at 652 n.1 (Fisher & Wardlaw, JJ., concurring) (citing *Walker*, 453 F.3d at 866). In other words, the concurrence asserted that the label attached to the speech forum

dictated whether a court should undertake expressive association analysis.

The Ninth Circuit subsequently denied en banc review. In dissent, Judges Bea and O'Scannlain observed that *Truth* "clearly establishe[d] a circuit conflict" with *Walker*. *Id.* at 857 (Bea & O'Scannlain, JJ., dissenting from denial of reh'g en banc). The dissent observed:

> [t]he essential problem with the majority is that it applies a *Rosenberger* "free speech" analysis (when the content of the speech is known and is outside a reasonably set topic area) to what is a *Dale* "freedom of association" case (which deals with the formulation of the content of such speech).

Id. at 853 (Bea & O'Scannlain, JJ., dissenting from denial of reh'g en banc).

Having disposed of *Truth*, the Ninth Circuit scheduled oral argument in this case. One week after oral argument, the court issued a two sentence opinion citing *Truth*, 542 F.3d 634, and affirming the decision of the district court. App. 2a-3a. Applying "the lesser standard of scrutiny" utilized in *Truth*, the Ninth Circuit held that Hastings' denial of recognition of CLS was "viewpoint neutral and reasonable." App. 2a-3a. Without analysis, the Ninth Circuit extended *Truth* from the high school to the law school context and disregarded its own repeated distinction in *Truth* between "general membership" and officers and voting membership. The court did not analyze whether Hastings' refusal

to recognize CLS infringed its right of expressive association.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision in this case squarely conflicts with the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), on the issue of whether a religious student group—indeed, an indistinguishable chapter of the same national organization—may draw its officers and voting members from among those who share its core religious commitments. The decision also conflicts with the Second Circuit's decision upholding, under the federal Equal Access Act, 20 U.S.C. §§ 4071-4074, the right of a high school religious student group to require its officers to affirm its religious viewpoints. *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 872-73 (2d Cir. 1996). *See also id.* at 856-57 (calling the Equal Access Act "an analog to the First Amendment[]").

The Ninth Circuit's ruling also conflicts with two independent lines of this Court's cases. First, this Court has consistently protected an expressive association's First Amendment right to deny leadership and membership to persons who could adversely affect the association's ability to express its message. *See, e.g., Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995); *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981). *See also Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

Second, this Court has consistently required public universities to recognize disfavored student organizations, including religious groups, under the First Amendment's protection of both the rights of expressive association and free speech. *See Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169 (1972). *Cf. Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990). Simply by requiring religious groups to open their leadership and voting membership to persons of different or anti-religious beliefs, public education officials could easily circumvent this Court's critical protection of religious groups' access to public educational facilities from which they have too often been discriminatorily excluded. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar*, 454 U.S. 263.

In addition, the impact of the decision is substantial. It affects approximately three million students at hundreds of higher educational institutions in the Ninth Circuit. Many colleges and universities undermine the freedom of student religious groups to choose their leaders and members, often resulting in litigation. Because of the Ninth Circuit's decision, national organizations like CLS cannot maintain uniform national membership criteria for all their chapters.

This Court should grant the petitions in both this case and in *Truth v. Kent School District*, No. 08-1130 (Mar. 10, 2009), in order to fully resolve this

burgeoning national problem and provide guidance to the courts below.

A. THE NINTH CIRCUIT'S DECISION SQUARELY CONFLICTS WITH THE SEVENTH CIRCUIT'S DECISION IN *CHRISTIAN LEGAL SOCIETY v. WALKER*, 453 F.3d 853 (7th Cir. 2006).

In *Christian Legal Society v. Walker*, the Seventh Circuit confronted a case with identical material facts and legal claims. It came to a diametrically opposite result from that reached by the Ninth Circuit in this case.

The dean of Southern Illinois University School of Law derecognized the Christian Legal Society chapter because he believed its requirement that officers and voting members share its religious viewpoints violated the school's antidiscrimination policy. *Walker*, 453 F.3d at 857-58. The chapter sued, raising expressive association and free speech claims. The Seventh Circuit properly applied this Court's precedents to the expressive association claim before separately applying forum analysis to the free speech claim. *Id.* at 861-67.

With regard to CLS's expressive association claim, the Seventh Circuit correctly applied *Dale*, 530 U.S. 640, and *Hurley*, 515 U.S. 557, to determine whether the law school's application of its antidiscrimination policy to the chapter "affect[ed] in a significant way the group's ability to advocate its viewpoint." *Walker*, 453 F.3d at 861-63 (internal citations and quotations omitted). "To ask this

question," according to the court, "[wa]s very nearly to answer it." *Id.* at 862. The court concluded, "[i]t would be difficult for CLS to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct." *Id.* at 863. Indeed, "[t]he only apparent point of applying the policy to an organization like CLS is to induce CLS to modify the content of its expression or suffer the penalty of derecognition." *Id.*

Following *Dale*, the Seventh Circuit then correctly applied strict scrutiny. *Id.* "In order to justify interfering with CLS's freedom of expressive association, [the law school]'s policy must serve a compelling state interest that is not related to the suppression of ideas and that cannot be achieved through a less restrictive means." *Id.* The court held that the school had identified no interest in applying its policy to the chapter. *Id.*

Walker is on all fours with this case. Yet the Ninth Circuit reached a contrary result. Diverging from this Court's expressive association jurisprudence, the Ninth Circuit failed to consider whether Hastings' application of its Nondiscrimination Policy to CLS "affect[ed] in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648. Nor did the Ninth Circuit apply the requisite level of scrutiny—strict scrutiny. Instead, following the erroneous approach of *Truth v. Kent*, the court refused separately to consider *all* of CLS's claims—expressive association, free speech, free exercise of religion, and equal protection—and asked only

whether Hastings' application of its policy to CLS was "viewpoint neutral and reasonable." App. 2a-3a.

In conflict with *Walker* (and the controlling Supreme Court precedent underlying *Walker*), the Ninth Circuit's decision merits this Court's review. It creates a circuit split such that chapters of the same national organization have vastly different constitutional rights based on where in the country they are located.

B. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE SECOND CIRCUIT'S DECISION IN *HSU v. ROSLYN UNION FREE SCHOOL DISTRICT NO. 3*, 85 F.3d 839 (2d Cir. 1996).

The Ninth Circuit's decision also creates a conflict with the Second Circuit's decision in *Hsu*, 85 F.3d 839, that a school could not require a student religious group to extend officer positions affecting its religious message to those who did not share its core religious commitments.

The school district conditioned its recognition of a high school Bible club on the club's willingness to open its officer positions to students who disagreed with the club's Christian beliefs. *Id.* at 850. The club sued under the Equal Access Act and the First Amendment. *Id.* The school district primarily argued that it was "applying its nondiscrimination policy neutrally to all after-school clubs." *Id.* at 859. Because *all* clubs were forbidden from discriminating on the basis of religion in the selection of their officers, the school district argued,

the club was receiving "equal access" consistent with the Equal Access Act. *Id.* at 859-60.

Rejecting this contention, the Second Circuit held that the district violated the club's rights under the Act. The court explained that, like the First Amendment, "the Act contains an implicit right of expressive association." *Id.* at 856-57, 859. Relying on *Roberts v. U.S. Jaycees*, 468 U.S. 609, the Second Circuit considered whether the district's refusal to allow the club to limit its leadership to Christians would "impair the ability of the original members to express only those views that brought them together." *Id.* at 859 (internal quotations and emphasis removed). The court held that "when an after-school religious club excludes people of other religions from conducting its meetings, and when that choice is made to protect the expressive content of the meetings, a school's decision to deny recognition to the club because of the exclusion" violates the Equal Access Act. *Id.*

The Second Circuit stated that to "focus on the even application of [the school district's] nondiscrimination rule misses the point." *Id.* Rather, the proper question is whether application of the nondiscrimination policy "impede[s] [the club] from expressing the beliefs that it was formed to express." *Id.* at 860.

The Ninth Circuit adopted the very analysis the Second Circuit rejected in *Hsu*. The Ninth Circuit held that Hastings' allegedly evenhanded application of its policy to *all* student groups rendered its treatment of the CLS chapter constitutional. App.

2a-3a. The court below failed to consider whether application of the Policy to CLS impedes the expression of its religious beliefs, contradicting the Second Circuit's approach in *Hsu* and leading to a contrary result. Nor did the court analyze Hastings' interest in prohibiting CLS from selecting leaders and voting members on the basis of religion.

That the Second Circuit based its decision on the Equal Access Act rather than the First Amendment does not diminish the conflict between *Hsu* and the decision below for two reasons. First, as this Court observed in *Mergens*, the Act is an extension of *Widmar*'s free speech protection of college religious student groups to secondary school religious student groups. 496 U.S. at 234-35. Similarly, the *Hsu* court deemed the Act "an analog to the First Amendment[]" and concluded "the Act contains an implicit right of expressive association." 85 F.3d at 856-57, 859. Second, the Ninth Circuit itself conceded the conceptual similarity of the Equal Access Act to the First Amendment when it rejected *law students' First Amendment claims* based in part on its holding in *Truth* denying *high school students' their Equal Access Act right* to require that their group's general members agree with the group's basic religious viewpoint.

Because the Ninth Circuit improperly ignored the policy's impermissible impact on CLS's expressive association rights, its decision directly conflicts with that of the Second Circuit.

C. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS PROTECTING THE RIGHT OF AN EXPRESSIVE ASSOCIATION TO CONTROL ITS MESSAGE IN *BOY SCOUTS OF AMERICA v. DALE*, 530 U.S. 640 (2000), AND *HURLEY v. IRISH-AMERICAN GAY, LESBIAN & BISEXUAL GROUP OF BOSTON*, 515 U.S. 557 (1995).

The freedom of association "has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy*, 408 U.S. at 181; *Roberts*, 468 U.S. at 622. "If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect." *Rumsfeld v. Forum for Academic & Inst. Rights*, 547 U.S. 47, 68 (2006). This Court's "cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities." *Widmar*, 454 U.S. at 269, citing *Healy*, 408 U.S. at 180.

The right of expressive association protects an organization's liberty to define and control its leadership and membership. "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." *La Follette*, 450 U.S. at 122 n.22 (quotation omitted). *See also Cal. Democratic Party v. Jones*, 530 U.S. 567, 574-75 (2000). Expressive association protects the right of anti-war groups to refuse voting

membership to ROTC candidates, environmental groups to deny leadership positions to persons who dispute the existence of global warming, Democratic groups to reject Republicans as voting members, or Jewish groups to deny leadership to Holocaust deniers.

In *Dale*, this Court held unconstitutional the application of New Jersey's Law Against Discrimination to force the Boy Scouts to accept a self-identified homosexual person as an assistant scoutmaster. 530 U.S. at 654. The key inquiry is whether compliance with a governmental regulation will "significantly affect" the association's ability "to advocate public or private viewpoints." *Id.* at 650. This Court thus considered whether "Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not promote homosexual conduct as a legitimate form of behavior." *Id.* at 653 (quotation and citation omitted). This Court directed the lower courts to "give deference to an association's assertions regarding the nature of its expression . . . [and its] view of what would impair its expression." *Id.* The Court concluded that the Scouts sought to "teach[] that homosexual conduct is not morally straight," *id.* at 651 (quotation and citation omitted), and that forcing the Scouts to include a homosexual scout "would . . . surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs." *Id.* at 654.

This Court then examined whether the government's application of its nondiscrimination law to the Scouts satisfied strict scrutiny.

Specifically, the government must demonstrate that the regulation "serve[s] compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 648. This Court held that "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." *Id.* at 659.

Similarly, in *Hurley*, this Court unanimously held that Massachusetts could not apply its antidiscrimination law to require a veterans organization to include a pro-homosexual contingent in its parade. *Hurley*, 515 U.S. at 566. The Court concluded that the application of the law to the parade organizers interfered with "the choice of a speaker not to propound a particular point of view." *Id.* at 575. The homosexual advocacy group, according to this Court, could be "refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.* at 580-81. Applying strict scrutiny, this Court determined that no "legitimate interest [had] been identified in support of applying the Massachusetts statute in this way to expressive activity like the parade." *Id.* at 578.

The court below engaged in *no analysis* of CLS's primary claim that requiring it to accept as leaders and voting members persons who reject its religious viewpoint would affect its message and thereby violate its freedom of expressive association. App.

2a-3a. This Court's decisions in *Dale* and *Hurley*, however, require the application of strict scrutiny. *See Walker*, 453 F.3d at 861-63.

The district court below *did* engage in expressive association analysis. However, that court's analysis directly contradicted this Court's approach in *Dale*, *Hurley*, and *Healy v. James* in four distinct ways. App. 38a-62a. First, the district court attempted to distinguish *Dale* by claiming that "CLS was not being forced, as a private entity, to include certain members or officers" but merely losing the benefits of recognition unless it accepts as leaders and voting members persons who do not agree with its religious viewpoints. App. 40a. In *Healy*, however, this Court rejected a university's claim that denial of recognition was "indirect interference" with expressive association and, therefore, constitutionally permissible. *Healy*, 408 U.S. at 183.

Second, deeming CLS's expression to be conduct rather than expression, the district court applied the test from *United States v. O'Brien*, 391 U.S. 367 (1968). App. 43a-46a. In *Dale*, this Court explicitly rejected the *O'Brien* test as "inapplicable." *Dale*, 530 U.S. at 659.

Third, the district court below ruled that even if *Dale* and *Hurley* applied to CLS's expressive association claim, "there is no evidence that complying with the Nondiscrimination Policy, and taking the risk that a non-orthodox Christian, gay, lesbian, or bisexual student become[s] a member or officer, [] by their presence alone, would impair CLS's ability to convey its beliefs." App. 59a. Of

course, to the contrary, this Court in *Dale* instructed lower courts to "give deference to an association's assertions regarding the nature of its expression . . . [and its] view of what would impair its expression." *Id.* at 653.

Fourth, the district court below simply asserted that Hastings had "a compelling interest . . . in contrast to *Dale*." App. 61a. In *Dale*, this Court mandated that the government *demonstrate* that the application of a nondiscrimination law to an expressive association "serve[s] compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648 (quotation omitted). The district court failed to require Hastings to make such a showing.

The decision below cannot be reconciled with this Court's protection in *Dale* and *Hurley* of expressive associations' control of their messages through selection of leaders and members.

D. THE NINTH CIRCUIT'S DECISION EVISCERATES THIS COURT'S PROTECTION OF RELIGIOUS STUDENT GROUPS' ACCESS TO UNIVERSITY FACILITIES AND FUNDING IN *WIDMAR v. VINCENT*, 454 U.S. 263 (1981), AND *ROSENBERGER v. RECTOR OF THE UNIVERSITY OF VIRGINIA*, 515 U.S. 819 (1995).

For decades, religious student groups have struggled to secure fair treatment from public university administrators. They have turned to the federal courts—including this Court—to vindicate their constitutional rights. Upholding the First Amendment, this Court has protected the rights of religious student groups. This Court should not tolerate the decision below's adoption of a ready road map for circumventing this Court's protection of religious speech.

Specifically, the Ninth Circuit's ruling renders toothless this Court's decisions in *Rosenberger* and *Widmar*, in which this Court protected the right of religious student groups to recognition. In *Widmar*, this Court held that a university violated the free speech rights of a religious student group when it conditioned access to meeting space on not engaging in "religious worship or religious teaching." *Widmar*, 454 U.S. at 265. *See Mergens*, 496 U.S. at 234-35. In *Rosenberger*, this Court held that a university violated the free speech rights of an evangelical Christian publication when it denied student activity funds because of the publication's "religious editorial viewpoints." *Rosenberger*, 515 U.S. at 834-37. *Cf.*

Mergens, 496 U.S. at 247 (Equal Access Act required school officials to grant religious student group official recognition).

Ironically, when public universities marginalize student religious groups, they undercut the rationale for encouraging the formation of student groups in the first place. As this Court has recognized, the "avowed purpose" for recognizing student groups is "to provide a forum in which students can exchange ideas." *Widmar*, 454 U.S. at 272 n.10. *See also Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) (purpose of University's student activity fee forum was "facilitating the free and open exchange of ideas by, and among, its students"); *Rosenberger*, 515 U.S. at 834 (purpose of university's forum was to "encourage a diversity of views from private speakers"). By ensuring the inclusion of religious voices in *Widmar* and *Rosenberger*, this Court has enhanced and enriched the discussion of controversial issues on campus.

The same dynamic is at work in this case. Punishing religious student groups for organizing around shared religious commitments decidedly does not facilitate the free and open exchange of ideas. Groups like CLS require adherence to their core viewpoints in order to safeguard the integrity and coherence of their distinctive messages. Such a practice is not invidious discrimination, but instead a good faith effort to maintain expressive identity. It is no different than the Hastings Democratic Caucus insisting that its members support Democratic Party ideals or the Hastings Motorcycle Club requiring that members profess a commitment to riding

motorcycles. To penalize a religious group like CLS for maintaining its religious identity is patently unreasonable. Yet the Ninth Circuit allows a university to withhold recognition of a religious student group unless it surrenders its ability to protect its religious identity and viewpoint, thereby stifling the free exchange of ideas on campus. *Rosenberger*, 515 U.S. at 831-32 (when university denies funding to religious publications, "debate is skewed in multiple ways").

Whether Hastings attempts to deny access to CLS through the exclusion of *speech* from a religious perspective, as in *Widmar* and *Rosenberger*, or the exclusion of *leadership* and *membership* criteria incorporating a religious perspective, the effect is the same: denial of recognition to a student organization because of its religious viewpoint. Accordingly, Hastings' use of its Nondiscrimination Policy to deny CLS registration is nothing more than "a thinly-veiled attempt to circumvent *Widmar* because of disagreement with its equal-access-for-religion result." Michael S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 675 (1996). *Cf. Mergens*, 496 U.S. at 245 (warning against allowing school districts to circumvent equal access).

E. PUBLIC UNIVERSITY OFFICIALS' DENIAL OF RECOGNITION TO RELIGIOUS STUDENT GROUPS BECAUSE THEY REQUIRE THEIR LEADERS AND VOTING MEMBERS TO SHARE THEIR RELIGIOUS VIEWPOINTS IS A RECURRING AND PERVASIVE NATIONWIDE PROBLEM.

The Ninth Circuit has given public university officials the green light to derecognize religious student groups simply because they require their officers and voting members to agree with their core religious convictions. Within the Ninth Circuit alone, the decision below affects over three million students enrolled at approximately 317 public institutions of higher learning, or approximately 23% of the nation's college, university, and graduate students.[2] This case will reverberate nationally because it has been closely watched. *See, e.g.*, Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889, 892 n.4 (2009) (collecting selected articles on topic); Ryan C. Visser, Note, *Collision Course?:* Christian Legal Society v. Kane *Could Create a Split over the*

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[2] These figures are calculated from the 2000 United States census. U.S. Census Bureau, Census 2000 Summary File 3 (SF 3) - Sample Data, QT-P19. School Enrollment: 2000, at http://factfinder.census.gov (click "get data" under "Decennial Census," then click "Census 2000 Summary File 3 (SF 3) - Sample Data," then click "Enter a Table Number," then enter "QT-P19" and press Enter, then select State, and select Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington and click Show Result; see figures for college, undergraduate, graduate, and professional school students at public schools).

Right of Religious Student Groups to Associate in the Face of Law School Antidiscrimination Policies, 30 Hamline L. Rev. 449 (2007); Note, *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations,* 118 Harv. L. Rev. 2882 (2005); Patricia A. MacLean, *Law School Need Not Support Religious Club that Discriminates*, National Law Journal, Mar. 23, 2009, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202429159976 (last visited Apr. 9, 2009); Burton Bollag, *Choosing Their Flock*, Chronicle of Higher Education, Jan. 28, 2005, *available at* http://chronicle.com/free/v51/i21/ 21a03301.htm (last visited Apr. 30, 2009).

Unfortunately, the clear circuit split here is not the product of a few outlying universities. To the contrary, several similar cases have reached federal court. In February 2009, relying on the Ninth Circuit's ruling in *Truth,* a district court held that California State University could deny recognition to four Christian organizations because they required members and officers to agree with the groups' religious viewpoints. *Every Nation Campus Ministries at San Diego State Univ. v. Achtenberg,* 597 F. Supp. 2d 1075 (S.D. Cal. 2009), *docketed on appeal sub nom. Alpha Delta Chi-Delta Chapter v. Reed,* No. 09-55299 (9th Cir. Feb. 27, 2009).

In November 2008, relying on the district court decision below and the *Truth* decision, a magistrate judge recommended that the district court deny a constitutional challenge to the University of Montana School of Law's derecognition of a CLS

chapter because of its religious requirements for membership and leadership. *Christian Legal Soc'y v. Eck*, No. 07-154 (D. Mont. Nov. 14, 2008). The district court has not issued a final decision.

In a case currently pending in the Eleventh Circuit, the University of Florida denied recognition to Beta Upsilon Chi ("BYX"), a religious student organization, because it required voting members and officers to affirm its orthodox Christian viewpoint. Denying a preliminary injunction, the district court held that the university's denial of recognition did not violate BYX's rights of expressive association and free speech. *Beta Upsilon Chi, Upsilon Chapter at the Univ. of Fla. v. Machen*, 559 F. Supp. 2d 1274 (N.D. Fla. 2008). The Eleventh Circuit granted an injunction pending appeal and heard oral argument on December 10, 2008. *Machen*, No. 08-13332 (11th Cir. Jul. 30, 2008). (After argument, the University claimed to change its policy and filed a motion to dismiss the appeal as moot, which is pending.)

In 2007, a district court granted a preliminary injunction against the University of Wisconsin to prevent it from requiring a Catholic organization to include non-Catholics as members. *Univ. of Wis.-Madison Roman Catholic Found. v. Walsh*, No. 06-649, 2007 WL 1056772, at *4 (W.D. Wis. Apr. 4, 2007).

A district court granted a preliminary injunction against the University of North Carolina when it denied recognition to a Christian student organization because the group required its officers

and members to agree with its religious viewpoints. *Alpha Iota Omega Christian Fraternity v. Moeser*, No. 04-765, 2005 WL 1720903, at *1 (M.D.N.C. Mar. 2, 2005). After the university adopted a new policy allowing all groups to "limit membership and participation in the organization to students who, upon individual inquiry, affirm that they support the organization's goals and agree with its beliefs," the case was dismissed as moot. *Alpha Iota Omega Christian Fraternity*, 2006 WL 1286186, at *3 (M.D.N.C. May 4, 2006).

CLS student chapters across the nation have had to resort to litigation after being threatened with loss of access to campuses because of alleged discrimination based on religion or sexual orientation. For example, at Washburn University School of Law, a student, who explicitly rejected CLS's statement of faith, filed a religious discrimination complaint against the CLS chapter because it refused to allow him to lead its Bible studies after he led a study contrary to CLS's religious viewpoints. The university restored recognition only after CLS filed suit. *Christian Legal Soc'y Chapter of Washburn Univ. Sch. of Law v. Farley*, No. 04-4120 (D. Kan. Sept. 16, 2004).

The University of Minnesota Law School threatened to deny recognition to the CLS chapter because it required its voting members and officers to subscribe to a statement of faith. Paulsen, *supra*, at 675. Although it relented in response to a letter from a faculty member, the university subsequently denied another religious group recognition because it refused to state in its constitution that its

membership was open to all students regardless of religion or sexual orientation. *Maranatha Christian Fellowship v. Regents of the Bd. of the Univ. of Minn. Sys.*, No. 03-5618 (D. Minn. Oct. 24, 2003). The university then changed its policy to allow religious student groups to "require their voting membership and officers to adhere to the organization's statement of faith and its rules of conduct." Student Unions & Activities, *Registration and Classification of Student Groups, in Student Unions & Activities Policy Handbook, available at* http://www.sao.umn.edu/groups/handbook/classification.php (last modified Apr. 15, 2008).

Even a law school that had a nondiscrimination policy that specifically exempted religious groups insisted that a CLS chapter pledge not to discriminate on the basis of religion. After suit was filed, the University of Toledo Law School reaffirmed its religious exemption and agreed that religious groups could cite to the Bible in their constitutions. *Christian Legal Soc'y Chapter of the Univ. of Toledo v. Johnson*, No. 05-7126 (N.D. Ohio Jun. 16, 2005).

In the early 1990's, state universities began to enforce policies prohibiting discrimination on the basis of sexual orientation against student groups whose religious principles teach that "homosexual behavior [is] a sin that disqualifies those who practice it from membership or leadership within the group." Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369 (1994). Professor Bainbridge

described the University of Illinois's derecognition of CLS when its student leaders "refused to sign a University pledge to refrain from discrimination on the basis of sexual orientation." *Id.* at 370.

In a similar dispute, Arizona State University College of Law eventually conceded that CLS's practice did not constitute discrimination on the basis of sexual orientation and granted recognition to religious groups that limited voting membership and leadership to students sharing the same religious beliefs. *Christian Legal Soc'y Chapter at Ariz. State Univ. v. Crow*, No. 04-2572 (D. Ariz. Nov. 17, 2004).

Unfortunately, other student groups sometimes actively pressure a law school to deny CLS the same recognition they enjoy. For example, in 2003, a member of the Outlaw chapter at Ohio State University's Moritz College of Law filed a formal complaint demanding that the law school derecognize the CLS chapter because its officers and members signed a statement of faith agreeing, among other things, to comply with scriptural standards of sexual morality. *See* Jeff Polesovsky, *GLBT Group Files Formal Complaint Against CLS*, The Lantern, Nov. 18, 2003, *available at* http://www.thelantern.com/main.cfm?include=detail&storyid=560959 (last visited Apr. 9, 2009). When university officials threatened to withdraw recognition, CLS filed suit. *Christian Legal Soc'y Chapter of the Ohio State Univ. v. Holbrook*, No. 04-197 (S.D. Ohio 2004). In response, the university amended its policy to allow religious student groups to "adopt a nondiscrimination statement that is

consistent" with their sincerely held religious beliefs. Ohio Union, Student Organization Registration Guidelines, at 7, *available at* http://ohiounion.osu.edu/studentorgs/orgs_manage.asp#newreq (last visited Apr. 9, 2009).

Recently, the Iowa Campaign for Human Rights student group at University of Iowa School of Law circulated a petition urging the university to deny funds to the CLS chapter. Adam Sullivan, *UI Christian Legal Society's Funding Under Fire*, Daily Iowan, Mar. 3, 2009, *available at* http://www.dailyiowan.com/2009/03/03/Metro/10365.html (last visited Apr. 30, 2009). On other occasions over the past six years, the university or the student government has threatened to penalize CLS.

CLS also has faced recognition issues at the law schools of Florida State University, the University of Oklahoma, the University of Pittsburgh, the University of New Mexico, the University of Idaho, and the University of South Carolina.

Other religious student groups have faced similar threats of derecognition. For example, the Muslim Student Association at Louisiana State University was derecognized in 2003 after thirty years on that campus. LSU required all groups to place a nondiscrimination policy regarding religion and sexual orientation in the groups' constitutions, which the Muslim group refused to do because of its religious beliefs. Press Release, Foundation for Individual Rights in Education, Victory for Religious Freedom at Louisiana State University (Mar. 17,

2005), *available at* http://www.thefire.org/index.php/article/5436.html (last visited Apr. 30, 2009).

In addition to its lawsuit in the Eleventh Circuit against University of Florida, BYX was forced to litigate after the University of Georgia denied recognition on the ground that the Christian group required its officers and members to agree with its core religious viewpoints. *Beta Upsilon Chi v. Adams*, No. 06-104 (M.D. Ga. 2006). BYX has experienced recognition threats at Louisiana State University, Auburn University, and the University of Missouri.

ReJOYce in Jesus Campus Fellowship was threatened with denial of recognition by Georgia Institute of Technology because the group required its voting members to affirm its statement of faith. The Georgia Attorney General issued an opinion that the university's failure to recognize the religious student group violated its free speech rights. Ga. Op. Att'y Gen. 97-32 (1997). The group experienced a similar problem at the University of California, Berkeley.

DiscipleMakers Christian Fellowship was forced to file suit against Pennsylvania State University after university officials insisted that the group discriminated on the basis of religion in officer positions. In settlement, the university agreed to exempt religious groups from the nondiscrimination requirement. *DiscipleMakers v. Spanier*, No. 04-2229 (M.D. Pa. 2005).

The Christian Medical and Dental Association ("CMDA") chapter at the University of North Dakota was threatened with derecognition by the student government because CMDA requires its officers to share its religious viewpoints. CMDA also encountered problems at the College of Medicine and Dentistry of New Jersey and at Virginia Tech.

The conflict between the decision below and the Seventh Circuit's *Walker* decision means that national religious organizations, including CLS, cannot maintain uniform national membership criteria across their different campus chapters. In reality, religious student organizations are again being expelled from the public university campus—the quintessential "marketplace of ideas."

F. THE COURT SHOULD GRANT THE PETITIONS IN BOTH THIS CASE AND IN *TRUTH v. KENT SCHOOL DISTRICT*, NO. 08-1130 (MAR. 10, 2009).

The Bible club in *Truth* filed a petition for a writ of certiorari in this Court on March 10, 2009. *Truth*, No. 08-1130 (Mar. 10, 2009). *See supra* at pp. 12-15. The complementary facts in *Truth* and this case militate in favor of granting both petitions so that this Court can fully resolve the problem and provide guidance to the lower federal courts.

The *Truth* case, of course, involves a high school, rather than a university. Therefore, the Equal Access Act applies in *Truth*, whereas the Act is inapplicable to universities and graduate schools. 20 U.S.C. § 4071(a). This Court may well decide *Truth*

solely on *federal statutory* grounds applicable only to *secondary* schools, leaving unresolved the circuit conflict over *First Amendment* protection at the *university* level of a religious group's right to draw its officers and voting members from among those who share its core religious commitments. It would be an odd result if religious associations were protected under the Equal Access Act in secondary schools, but their First Amendment protection at the college level was left uncertain.

Furthermore, this case directly raises an issue that *Truth* expressly left open: whether requiring a religious student group to accept *officers and voting members* who disagree with the group's core religious commitments violates the First and Fourteenth Amendments. The *Truth* decision is explicitly limited to the club's "general membership restrictions." *Truth,* 542 F.3d at 644, 647. To be sure, the Ninth Circuit erred in *Truth* by diminishing the associational import of Truth's "general members"; it most certainly erred in the instant case, where CLS had elevated associational interests in its voting members and leaders, who elect officers, stand for election, amend the group's constitution, lead Bible studies, vote on chapter business, organize group activities, and invite guest speakers for weekly meetings and campus-wide events. Without explanation, the Ninth Circuit in this case extended its *Truth* decision to CLS's selection of voting membership and leadership.

By granting both petitions, the Court would have before it the full breadth of the issues upon which the circuit courts have split and which continue to

vex school administrators and lower courts. The Court could provide meaningful guidance to lower courts, as well as national student organizations and education officials carefully watching this issue.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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May 5, 2009

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, aka Hastings Christian Fellowship,

Plaintiff - Appellant,

v.

MARY KAY KANE, in her official capacity as Chancellor and Dean of University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law; MAUREEN E. CORCORAN; EUGENE L. FREELAND; CARIN T. FUJISAKI; JOHN T. KNOX; JAN LEWENHAUPT; JAMES E.

No. 06-15956
D.C. No. CV-04-04484-JSW

MEMORANDUM*

FILED
MAR 17 2009
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

MAHONEY; BRIAN D. MONAGHAN; BRUCE L. SIMON; JOHN K. SMITH; TONY WEST, in their official capacities as the Board of Directors of the University of California, Hastings College of the Law,

Defendants - Appellees,

HASTINGS OUTLAW,

Defendant-intervenor - Appellee.

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Argued and Submitted March 10, 2009
San Francisco, California

Before: **KOZINSKI**, Chief Judge, **HUG** and **BEA**, Circuit Judges.

The parties stipulate that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group. The conditions on recognition are therefore viewpoint neutral and reasonable. Truth v.

Kent Sch. Dist., 542 F.3d 634, 649–50 (9th Cir. 2008).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

CHRISTIAN LEGAL SOCIETY CHAPTER
OF UNIVERSITY OF CALIFORNIA,
HASTINGS COLLEGE OF THE LAW, a/k/a
HASTINGS CHRISTIAN FELLOWSHIP,

Plaintiff,

v.

MARY KAY KANE, et al.,

Defendants.

No. C 04-04484 JSW

**AMENDED ORDER RE
MOTIONS FOR SUMMARY
JUDGMENT**

This Amended Order is issued to correct a clerical error Defendants brought to the Court's attention. In the Court's original order, the header "Hastings' Nondiscrimination Policy Regulates Speech" should have read "Hastings' Nondiscrimination Policy Regulates Conduct." The Court issues this amended order solely to correct this clerical error.

Now before the Court is the motion for summary judgment filed by plaintiff Christian Legal Society Chapter of University of California, Hastings College

of the Law, a/k/a Hastings Christian Fellowship ("CLS") and cross-motions for summary judgment filed by defendants Mary Kay Kane, Judy Chapman, Maureen E. Corcoran, Eugene L. Freeland, Carin T. Fujisaki, John T. Knox, Jan Lewenhaupt, James E. Mahoney, Brian D. Monaghan, Bruce L. Simon, John K. Smith, and Tony West (collectively "Hastings" or "Hastings Defendants") and intervenor-defendant Hastings Outlaw ("Outlaw"). Having carefully reviewed the parties' papers and considered their arguments and the relevant legal authority, and good cause appearing, the Court hereby DENIES CLS's motion for summary judgment and GRANTS Hastings' and Outlaws' cross-motions for summary judgment.[1]

---

[1]Hastings objects to portions of the Declaration of Steven H. Aden submitted by CLS. Outlaw joined in the evidentiary objections. The Court sustains the objection based on lack of personal knowledge to paragraph 13 of the Aden Declaration to the extent it declares that the "Hastings Republicans is (sic) a chapter of California College Republicans and as such, abides by its constitution" and the portion of Exhibit K attaching the Constitution of the California College Republicans. The Court overrules the remaining evidentiary objections.

Since the hearing on the cross-motions, the parties have each filed several requests for leave to file supplemental authority. To the extent the parties seek leave to provide briefing on the supplemental authority and on the issues raised by the parties' cross-motions, the requests are DENIED. To the extent the parties merely seek leave to file additional authority, the Court has reviewed and considered the new authority, and thus DENIES the requests as MOOT.

FACTUAL BACKGROUND

This case concerns whether a religious student organization may compel a public university law school to fund its activities and to allow the group to use the school's name and facilities even though the organization admittedly discriminates in the selection of its members and officers on the basis of religion and sexual orientation.

CLS is an unincorporated student organization comprised of students attending University of California, Hastings College of the Law (the "Law School"). (Joint Stipulation of Facts for Cross-Motions for Summary Judgment ("Joint Stip."), ¶ 1.) The mission of CLS is "to maintain a vibrant Christian Law Fellowship on the School's campus which enables its members, individually and as a group, to love the Lord with their whole beings–hearts, souls, and minds–and to love their neighbors as themselves." (*Id.*, Ex. E.) In the beginning of the 2004-2005 academic year, CLS applied for, but was denied the privilege of becoming a recognized student organization at the Law School. (*Id.*, ¶¶ 38-42.)

University of California, Hastings College of the Law is a public law school located in San Francisco and is part of the University of California school system. (*Id.*, ¶ 2.) Mary Kay Kane is the Chancellor and Dean of the Law School. Judy Chapman is the Director of the Office of Student Services, and the remaining defendants, Maureen E. Corcoran, Eugene L. Freeland, Carin T. Fujisaki, John T.

Knox, Jan Lewenhaupt, James E. Mahoney, Brian D. Monaghan, Bruce L. Simon, John K. Smith, and Tony West, are members of the Board of Directors of the Law School. (*Id.*, ¶¶ 3-5.)

The Hastings Defendants permit student organizations to register with the Office of Student Services. (*Id.*, ¶ 6.) Student organizations must be registered in order to gain access to the following benefits: (a) use of the Law School's name and logo; (b) use of certain bulletin boards in the basement of Snodgrass Hall; (c) eligibility for a Law School organization email address; (d) eligibility to send out mass emails through the Associated Students of the University of California at Hastings; (e) eligibility for a student organization account with fiscal services at the Law School; (f) eligibility to apply for student activity fee funding; (g) eligibility to apply for limited travel funds; (h) ability to place announcements in the Hastings Weekly, a weekly newsletter prepared and distributed by the Office of Student Services; (I) eligibility to apply for permission to use limited office space; (j) eligibility for the use of an organization voice mailbox for telephone messages; (k) listing on the Office of Student Services' website and any hard copy lists, including the Student Guidebook and admissions publications; (l) participation in the annual Student Organizations Faire; and (m) use of the Student Information Center for distribution of organization materials to the Law School community. (*Id.*, ¶ 9.) Registered student organizations may also apply for permission to use the Law School's rooms and audio-visual equipment for meetings. The Hastings

Defendants have extended this benefit to CLS even though it is not a registered student organization. (*Id.*, ¶ 10.) The Hastings Defendants provide non-registered organizations access to certain bulletin boards and chalk boards at the Law School to make announcements. (*Id.*, ¶ 11.) Although the Hastings Defendants informed CLS that it could use the facilities at the Law School for its meetings, CLS never requested to use such facilities during the 2004-2005 academic year. (*Id.*, ¶¶ 58, 61.)

As a condition of becoming a "registered student organization," the Hastings Defendants require a student organization to comply with the Law School's Policies and Regulations Applying to College Activities, Organizations and Students, which requires, *inter alia*, registered student organizations to abide by the Policy on Nondiscrimination ("Nondiscrimination Policy"). (*Id.*, ¶¶ 12, 14.) The Nondiscrimination Policy provides:

> The College is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, College-owned student residence facilities and programs sponsored by the College, are governed by this policy of nondiscrimination....
>
> The University of California, Hastings College of the Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual

> orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.

(Id., ¶ 15.) Hastings requires registered student organizations to allow any student to participate, become a member, or seek leadership positions, regardless of their status or beliefs. (*Id.*, ¶ 18.)

From the 1994-1995 academic year to the 2003-2004 academic year, a student organization calling itself either Hastings Christian Legal Society or the Hastings Christian Fellowship was a registered student organization at Hastings. (*Id.*, ¶ 22.) From the 1994-1995 academic year through the 2001-2002 academic year, the student organization used a set of bylaws which appear to be an old version of the chapter bylaws distributed by the National Christian Legal Society. (*Id.*, ¶ 23.) These bylaws provided that the objectives of the organization were to "encourage those who identify themselves as followers of Jesus Christ to more faithfully live out their commitment in their personal and academic lives, to prepare members for future lives as Christian attorneys, and to provide a witness and outreach for Jesus Christ in the Hastings community." (*Id.*, Ex. C.) The bylaws required voting members to acknowledge in writing their agreement with the following "Statement of Faith":

> Trusting in Jesus Christ as my Savior, I believe in:
>
> - The Bible as the inspired word of God;

- The Deity of our Lord, Jesus Christ, God's son;
- The vicarious death of Jesus Christ for our sins; His bodily resurrection and His personal return.
- The presence and power of the Holy Spirit in the work of regeneration.
- Jesus Christ, God's son, is Lord of my life;

(*Id.*, Ex. C.) However, there is no evidence that Hastings Christian Legal Society or the Hastings Christian Fellowship ever enforced this requirement. (*Id.*, ¶ 57.) Moreover, the bylaws also stated that the members and the organization would "comply with the Policies and Regulations Applying to College Activities, Organizations, and Students." (*Id.*, Ex. C.)

During the 2002-2003 and 2003-2004 academic years, the student organization used a different set of bylaws. These bylaws provided: "HCF welcomes all students of the University of California, Hastings College of law." (*Id.*, ¶ 25.) This organization did not exclude members on the basis of religion or sexual orientation. (*Id.*)

During the 2003-2004 academic year, approximately five to seven students attended their meetings and events. (*Id.*, ¶ 26.) During that year, one of the participants in the meetings was an openly lesbian student and two were students who held beliefs inconsistent with what CLS considers to be orthodox Christianity. (*Id.*, ¶¶ 27-28.)

At the end of the 2003-2004 academic year, Isaac Fong ("Fong"), Dina Haddad ("Haddad") and Julie Chan ("Chan") became the leaders of the Hastings Christian Fellowship. Fong and Haddad decided to affiliate their student organization officially with a national organization known as the Christian Legal Society ("CLS-National"). (*Id.*, ¶ 30-31.) CLS-National requires its formally-associated student chapters to use a specific set of bylaws. (*Id.*, ¶ 32, Ex. E.) The bylaws require any student who wants to become a member to sign a "Statement of Faith" which provides:

> Trusting in Jesus Christ as my Savior, I believe in:
>
> - One God, eternally existent in three persons, Father, Son and Holy Spirit.
>
> - God the Father Almighty, Maker of heaven and earth.
>
> - The Deity of our Lord, Jesus Christ, God's only Son conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
>
> - The presence and power of the Holy Spirit in the work of regeneration.
>
> - The Bible as the inspired Word of God.

(*Id.*, ¶ 33.) CLS will not permit students who do not sign the Statement of Faith to become members or officers. CLS also bars individuals who engage in "unrepentant homosexual conduct" or are members of religions that have tenets which differ from those set forth in the Statement of Faith from becoming members or officers. (*Id.*, ¶¶ 34-35.) The bylaws also pronounce a "code of conduct" for officers which provides that officers "must exemplify the highest standards of morality as set forth in Scripture." (*Id.*, Ex. E at 2.)

While only actual members of CLS may vote for or remove officers, stand for election to become an officer, or vote to amend the organization's constitution, CLS's meetings and activities are open to all students, regardless of their religion or sexual orientation. (*Id.*, ¶ 36.)

In early September 2004, CLS also applied to the Office of Student Services for travel funds to attend CLS-National's annual conference, and initially, Hastings informed CLS that such funds were being set aside for CLS. (*Id.*, ¶ 37.) On September 17, 2004, CLS submitted its registration form and set of bylaws to the Office of Student Services. (*Id.*, ¶ 38.) Hastings informed CLS that its bylaws did not appear to be compliant with the Nondiscrimination Policy, in particular the religion and sexual orientation provisions, and invited CLS to discuss changing them. Hastings further advised CLS that to become a recognized student organization, CLS would have to open its membership to all students irrespective of their religion or sexual orientation.

(*Id.*, ¶¶ 39-41.) Subsequently, due to CLS's failure to become a registered student organization, Hastings informed CLS that the travel funds previously set aside for CLS had been withdrawn. (*Id.*, ¶ 42.)

Despite not being a recognized student organization, throughout the 2004-2005 academic year, CLS held weekly Bible-study meetings, and hosted a beach barbeque, a Thanksgiving dinner, a campus lecture on the Christian faith and legal practice, several fellowship dinners, an end-of-year banquet, and several informal social activities. CLS also invited Hastings students to attend Good Friday and Easter Sunday church services with the organization. (*Id.*, ¶ 44.) The Bible studies were led by one of CLS's officers, but any attendee or member was welcome to lead the group in prayer, share prayer requests, and otherwise participate in prayer. (*Id.*, ¶¶ 49, 51.)

Between nine to fifteen Hastings students regularly attended CLS's meetings and activities during the 2004-2005 academic year. (*Id.*, ¶ 48.) Julie Chan, CLS's treasurer, resigned from her position and membership in January 2005. In addition to CLS's officers, one other student became an official member of CLS during the academic year. (*Id.*, ¶¶ 47-48.) No known non-Christian, gay, lesbian, or bisexual students sought to join CLS as a member or officer, or attend any of its meetings during the 2004-2005 academic year. (*Id.*, ¶¶ 50, 54.) As of October 2005, seven Hastings students, including three officers, joined CLS as members for the 2005-2006 academic year. (*Id.*, ¶ 64.)

CLS filed a complaint in this action asserting that Hastings is violating: (1) CLS's rights to freedom of expressive association pursuant to the First Amendment of the United States Constitution; (2) CLS's free speech pursuant to the First Amendment; (3) the Establishment Clause of the First Amendment; (4) the Due Process Clause of the Fourteenth Amendment; (5) the Free Exercise Clause of the First Amendment; and (6) the Equal Protection Clause of the Fourteenth Amendment. On April 12, 2005, the Court granted a motion by Hastings to dismiss CLS's establishment, due process, and equal protection claims, but granted CLS leave to amend its equal protection claim. On May 3, 2005, CLS filed an amended complaint which asserts an amended equal protection claim. CLS, Hastings, and Outlaw have each filed cross-motions for summary judgment on each of CLS's claims for free speech, expressive association, free exercise and equal protection.

ANALYSIS

A. Legal Standard on Summary Judgment.

A principal purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

A party moving for summary judgment who does not have the ultimate burden of persuasion at trial, must produce evidence which either negates an essential element of the nonmoving party's claims or show that the non-moving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). A party who moves for summary judgment who does bear the burden of proof at trial, must produce evidence that would entitle him or her to a directed verdict if the evidence went uncontroverted at trial. *C.A.R. Transp. Brokerage Co., Inc. v. Darden*, 213 F.3d 474, 480 (9th Cir. 2000).

Once the moving party meets his or her initial burden, the non-moving party must go beyond the pleadings and by its own evidence "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). In order to make this showing, the non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). It is not the Court's task to "scour the record in search of a genuine issue of triable fact." *Id.* (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)). If the non-moving party fails to make this showing, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. An issue of fact is "genuine" only if there

is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is "material" if it may affect the outcome of the case. *Id.* at 248. "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the nonmoving party." *Freeman v. Arpaio*, 125 F.3d 723, 735 (9th Cir. 1997).

B. Cross-Motions for Summary Judgment.

CLS contends that Hastings' enforcement of its Nondiscrimination Policy, and its refusal to grant CLS an exception to exclude students on the basis of religion and sexual orientation, infringes its members' rights to free speech, free association, free exercise, and equal protection. As set forth below, the Court finds that Hastings' uniform enforcement of its Nondiscrimination Policy infringes none of these constitutional rights.

1. First Amendment: Free Speech.

a. Regulation of Conduct.

i. Hastings' Nondiscrimination Policy Regulates Conduct.

The parties dispute whether Hastings' Nondiscrimination Policy regulates speech or conduct. The Nondiscrimination Policy prohibits discrimination on the basis of religion and sexual orientation, among other categories. (Joint Stip., ¶

15.) Courts have consistently held that regulations prohibiting discrimination, similar to Hastings' Nondiscrimination Policy, regulate conduct, not speech. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995); *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984); *Jews for Jesus, Inc. v. Jewish Cmty Relations Council of New York*, 968 F.2d 286, 295 (2d Cir. 1992).

In *Roberts*, two local chapters of the United States Jaycees ("Jaycees") had been admitting women as full members for years, in violation of the Jaycees' organization's bylaws restricting "regular" membership to men between the ages of 18 and 35. *Roberts*, 468 U.S. at 613-14. When the Jaycees sought to revoke the charters of the local chapters, members of the chapters filed complaints alleging the exclusion of women from full membership violated the state Human Rights Act, which prohibited discrimination in public accommodations on the basis of race, color, creed, religion, disability, national origin or sex. *Id.* at 614-15. The Supreme Court found that "[o]n its face," the state anti-discrimination statute "[did] not aim at the suppression of speech, [did] not distinguish between prohibited and permitted activity on the basis of viewpoint, and [did] not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria." *Id.* at 623. The Court further found that the goal of the statute was to eliminate discrimination and assure the state's citizens equal access to publicly available

goods and services and that this goal was "unrelated to the suppression of expression." *Id.* at 624.

In *Jews for Jesus*, under the threat of an economic boycott from the Jewish Community Relations Council of New York ("JCRC") and other organizations, a resort cancelled a contract to provide meals and accommodations to a non-profit religious corporation, Jews for Jesus, Inc. *Jews for Jesus*, 968 F.2d at 290. Jews for Jesus and a member of the organization argued that the JCRC aided or incited the resort to deprive them of their right to public accommodations without discrimination on the basis of race and/or creed under state law. *Id.* at 293. The state statute at issue prohibited discrimination in public accommodations on the basis of race, creed, color, or national origin. *Id.* at 293. The Second Circuit rejected the JCRC's contention that the state anti-discrimination statute was unconstitutional as applied because it impermissibly regulated its "speech" in applying economic pressure on the resort. *Id.* at 295. The court found that the state statue prohibiting discrimination on the basis of, among other things, race and religion, was "plainly aimed at conduct, *i.e.*, discrimination, not speech." *Id.*

In *Hurley*, Massachusetts enforced a state statute prohibiting discrimination in public accommodations against a group of private citizens in an unincorporated association, the South Boston Allied War Veterans Council ("Council"), who were organizing a St. Patrick's Day parade. *Hurley*, 515 U.S. at 561. Gay, lesbian, and bisexual descendants

of Irish immigrants formed an organization called GLIB "to march in the parade as way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals." *Id.* When the Council refused to allow GLIB to participate in the parade, GLIB and several of its members filed an action against the Council alleging it violated the state public accommodations law which prohibited discrimination on the basis of sexual orientation. *Id.* The state trial court agreed with GLIB and rejected the Council's claim that requiring it to admit GLIB would violate its First Amendment rights because the Council's parade had a wide variety of themes and conflicting messages. *Id.* at 562.

The Supreme Court found that the public accommodations law "[did] not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals." *Id.* at 572. Nevertheless, the Court reversed the state court's ruling because of the "peculiar" manner in which the statute had been applied. *Id.* The Court found that parades are a form of expression and that the selection of a parade's contingents is entitled to protection under the First Amendment. *Id.* at 568-70. The Court held that every contingent participating in the parade affects the message conveyed by the private organizers, and thus, the state court's application of the statute essentially required the Council to alter the expressive content of its parade. *Id.* at 572-73. It was significant to the Court's analysis that the dispute did not concern an attempt to exclude participation of all openly gay,

lesbian, or bisexual individuals from marching in approved parade units. In fact, the Council expressly disclaimed any intent to exclude gay, lesbian or bisexual individuals from participating generally. Rather, the Court found that the Council was concerned with excluding a group from marching behind a particular banner. *Id.* at 572.

The Supreme Court recently reiterated the distinction between regulating speech and conduct in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S.Ct. 1297 (2006), when it affirmed the enforcement of the Solomon Amendment against law schools with policies that prohibit discrimination on the basis of, among other things, sexual orientation. The Solomon Amendment provides that "if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution will lose certain federal funds." *Id.* at 1302. The Supreme Court rejected the argument by an association of laws schools and law faculties that requiring law schools with anti-discrimination policies to provide the same level of access to the military recruiters as employers who do not discriminate on the basis of sexual orientation infringed the association's members' First Amendment rights. The Court held that:

> [t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally

> mandated employment policy, all the while retaining eligibility for federal funds. ... As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do* – afford equal access to military recruiters – not what they may or may not *say*.

Id. at 1307 (emphasis in original); *see also Evans v. City of Berkeley*, 38 Cal. 4th 1, 40 Cal. Rptr. 3d 205, 212 (2006) (holding that a city's requirement that an organization comply with a nondiscrimination resolution did not require the organization to espouse or denounce any particular viewpoint).

Akin to *Hurley*, *Roberts*, *Jews for Jesus*, and *Evans*, the Court finds that on its face, Hastings' Nondiscrimination Policy targets conduct, *i.e.* discrimination, not speech. As in *Rumsfeld*, the Court finds that the Nondiscrimination Policy regulates conduct, not speech because it affects what CLS must *do* if it wants to become a registered student organization – not engage in discrimination – not what CLS may or may not *say* regarding its beliefs on non-orthodox Christianity or homosexuality.

In *Hurley*, even though the Court found that the anti-discrimination statute did not target speech on its face, the Court focused on the "peculiar" application of the statute to require a private entity organizing a parade to admit a group seeking to march behind a particular banner. Significantly, the private group expressly disclaimed any intent to

exclude all openly gay, lesbian, or bisexual individuals from participating in other approved parade contingents. *Hurley*, 515 U.S. at 572-73. In contrast to *Hurley*, CLS is not excluding certain students who wish to make a particular statement, but rather, CLS is excluding all students who are lesbian, gay, bisexual, or not orthodox Christian.[2]

The facts in this case further demonstrate that Hastings' Nondiscrimination Policy is directed at conduct, not speech. Notably, here, a predecessor of CLS met as a recognized group on Hastings' campus for the previous ten years. (Joint Stip, ¶ 22: "From the 1994-1995 academic year to the 2003-2004 academic year, a student organization calling itself either Hastings Christian Legal Society ("HCLS") or the Hastings Christian Fellowship ("HCF") existed as a registered student organization at Hastings."). The predecessor group did not exclude members on the basis of religion or sexual orientation. (*Id.* at 25.)

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[2] Although CLS argues that it does not discriminate on the basis of sexual orientation, but merely excludes students who engage in or advocate homosexual conduct, (CLS Mot. at 22), this is a distinction without a difference. *See Lawrence v. Texas*, 539 U.S. 558, 583 (2003 (O'Connor, J., concurring) (rejecting attempt to distinguish statute discriminating against "homosexual conduct" from one discriminating on the basis of sexual orientation: "While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the State] sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."); *see also Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005) (finding "no appreciable difference between an individual ... being persecuted for being a homosexual and being persecuted for engaging in homosexual acts").

As long as the organization admitted all students who wanted to join, it was free to express any ideas or viewpoints. It was not until CLS refused to comply with the Nondiscrimination Policy that Hastings withheld recognition. (*Id.*, ¶¶ 33-35, 39-41.)

At the hearing on these motions, CLS argued that Hastings' enforcement of its Nondiscrimination Policy suppressed CLS's speech that "homosexuality is not Christian." First, as discussed above, the evidence does not show that CLS has been precluded from expressing any particular idea or viewpoint. Rather, to become a recognized student group, Hastings requires that CLS merely refrain from excluding students on the basis of their religion or sexual orientation. Second, even if the record could be construed to support CLS's position that its "speech" regarding homosexuality has been suppressed, CLS has not shown that the Nondiscrimination Policy targets speech as opposed to conduct. As the Supreme Court stated in *R.A.V.*, if the government regulates conduct for reasons unrelated to its expressive content, such conduct does not become shielded from regulation merely because it expresses a discriminatory idea or philosophy. *R.A.V v. City of St. Paul*, 505 U.S. 377, 390 (1992); *see also Jews for Jesus*, 968 F.2d at 295 ("simply because speech or other expressive conduct can in some circumstances be the vehicle for violating a statute directed at regulating conduct does not render that statute unconstitutional.").

Therefore, the Court concludes that on its face and in its application to CLS, the Nondiscrimination Policy regulates conduct, not speech.

ii. Analysis Pursuant to *United States v. O'Brien*.

Because the Court finds that the Nondiscrimination Policy regulates conduct, the Court will analyze whether CLS's free speech rights have been infringed pursuant to the standard from *United States v. O'Brien*, 391 U.S. 367 (1968), which sets forth the standard for determining when government regulation of conduct violates First Amendment speech protections. *See Jews for Jesus*, 968 F.2d at 295 (analyzing constitutionality of nondiscrimination statute under *O'Brien* standard); *Presbytery of New Jersey of the Orthodox Presbyterian Church v. Florio*, 902 F. Supp. 492 (D.N.J. 1995) (same). Under *O'Brien*, governmental regulation of conduct is valid, even if it incidentally restricts speech, so long as: (1) the regulation is within the constitutional power of the government; (2) it furthers an important or substantial government interest; (3) the government interest is unrelated to the suppression of free expression; and (4) the incidental restriction on the alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377.

States have the constitutional authority and a substantial, indeed compelling, interest in prohibiting discrimination on the basis of religion

and sexual orientation. *See Roberts*, 468 U.S. at 624 (holding that the state had a compelling interest "of the highest order" in eradicating sex discrimination); *see also Jews for Jesus*, 968 F.2d at 295 ("New York has the constitutional authority to prohibit, and a substantial, indeed compelling, interest in prohibiting racial and religious discrimination in obtaining public accommodations."); *Presbytery of New Jersey*, 902 F. Supp. at 521 (finding state interest in eliminating discrimination on the basis of, *inter alia*, sexual orientation, was "not only substantial but also [could] be characterized as compelling"); *Gay Rights Coal. of Georgetown Univ. Law Center v. Georgetown Univ.*, 536 A.2d 1, 38 (D.C. 1987) ("The eradication of sexual orientation discrimination is a compelling governmental interest."). The interest in prohibiting discrimination is particularly critical in the context of education. *See e.g., Grutter v. Bollinger*, 539 U.S. 306, 331-32 (2003) ("ensuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective ... . [N]owhere is the importance of such openness more acute than in the context of higher education.") (quotations and internal citations omitted); *see also Butt v. State of California*, 4 Cal. 4th 668, 680 (1992) ("In view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis.").

Moreover, "[t]h[e] governmental interest in prohibiting such discrimination ... is not directed at

or related to suppression expression." *Jews for Jesus*, 968 F.2d at 295; *see also Roberts*, 468 U.S. at 624 (goal of eliminating discrimination "is unrelated to the suppression of expression"); *Presbytery of New Jersey*, 902 F. Supp. at 521 (same). Therefore, the Court concludes that the Policy prohibiting discrimination on the basis of religion and sexual orientation, among other categories, is within the Hastings' constitutional authority as a state institution, and that the Nondiscrimination Policy furthers a governmental interest unrelated to the suppression of free expression – protecting students from discrimination. Furthermore, as discussed above, the facts here, including Hastings' recognition of a predecessor of CLS for the previous ten years, confirm that Hastings' Nondiscrimination Policy is directed at conduct unrelated to the suppression of expression. (Joint Stip, ¶¶ 22, 25, 33-35, 39-41.) Thus, the first three prongs of the *O'Brien* test have been satisfied.

With respect to the last prong of the *O'Brien* test, courts have found that the incidental restrictions on free speech rights when a government enforces an anti-discrimination statute against an organization seeking to exclude individuals were no greater than essential to the furtherance of the state's interest in prohibiting discrimination. *See Jews for Jesus*, 968 F.2d at 296 (holding the nondiscrimination statute was "no broader than necessary to further the legitimate goal of eradicating discrimination."); *see also Evans*, 40 Cal. Rptr. 3d at 217 (holding that requiring a group to agree in advance not to discriminate was "a reasonable and narrowly

tailored step to implement the diversity and nondiscrimination provisions" of a city resolution). "[A]n incidental burden on speech is no greater than essential, and therefore permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Rumsfeld*, 126 S.Ct. at 1311. The Hastings' Nondiscrimination Policy easily meets this standard. Hastings' interest in eradicating discrimination would certainly be achieved less effectively without a policy which prohibits the harmful conduct. Moreover, the Court notes that the Nondiscrimination Policy only targets the conduct of discrimination. As long as student groups do not exclude students based on the prohibited categories, the groups are free to express any beliefs or perspectives they choose. Thus, the Court finds Hastings' implementation of its Nondiscrimination Policy the most direct method of achieving Hastings' goal of eradicating harmful discrimination.

Accordingly, the Court concludes that Hastings' enforcement of its Nondiscrimination Policy meets all four prongs of the *O'Brien* test, and thus, does not unconstitutionally infringe CLS's freedom of speech.

b. Regulation of Speech.

Alternatively, even if Hastings' Nondiscrimination Policy may be construed as regulating speech directly, it still passes constitutional muster. The validity of Hastings restricting access to its campus, and the level of

scrutiny the Court must apply, turns on the type of forum Hastings has created. *See DiLoreto v. Downey Unified School Dist. Bd. of Ed.*, 196 F.3d 958, 964 (9th Cir. 1999) ("The existence of a right to access to a public property and the standard by which limitations upon such right must be evaluated differ depending upon the character of the property at issue."). The parties dispute whether the forum at issue is a "designated public forum" or a "limited public forum." As the Ninth Circuit summarized in *DiLoreto*:

> Forum analysis divides government property into three categories: public fora, designated public fora, and nonpublic fora. ...
>
> A traditional public forum, such as a public park or sidewalk, is a place that has traditionally been available for public expression. ... Regulation of speech in a traditional public forum is permissible "only if ... narrowly drawn to achieve a compelling state interest. ... When the government intentionally opens a nontraditional forum for public discourse it creates a designated public forum. ... Restrictions on expressive activity in designated public fora are subject to the same limitations that govern a traditional public forum.
>
> All remaining public property is classified as nonpublic fora. The government may limit expressive activity in nonpublic fora if the

> limitation is reasonable and not based on the speaker's viewpoint.

Id. at 964-65 (quotations and citations omitted). A "limited public forum" is "a type of nonpublic forum that the government has opened to certain groups or to certain topics." *Id.* at 965. Restrictions on expression in limited public forums are governed by the same standards that apply to nonpublic forums, *i.e.*, "restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible." *Id.*[3]

"Generally, school facilities may be deemed to be public forums only if school authorities have by policy or practice opened those facilities for indiscriminate use by the general public." *DiLoreto*, 196 F.3d at 966 (quotations and citations omitted). There is no evidence before the Court, and CLS does not contend, that Hastings has *indiscriminately* opened up its campus and allowed registration, and the attendant benefits, to the public generally. Nor is there evidence that any group of students may

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[3] CLS argues that the contours between the terms "designated public forum" and "limited public forum" have not always been clear and that the terms may be used interchangeably, but the Ninth Circuit has made clear that in this circuit, these terms have different meanings. *See Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001). As the *Hopper* court explained "a limited public forum is a sub-category of a designated public forum that the government has intentionally opened up to certain groups or certain topics. ... In a limited public forum, restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible." *Id.* at 1074-75 (quotations and citations omitted).

register. Rather, it is undisputed that Hastings restricts registration to student organizations that comply with Hastings' Policies and Regulations Applying to College Activities. (*See* Stip. Facts, ¶ 12.) Hastings also requires student organizations to comply with the Nondiscrimination Policy and to open their membership to all students. (*Id.* at ¶¶ 14, 17.) Moreover, registration is restricted to non-commercial student groups. (*Id.*, Ex. B at 62.) Finally, the Supreme Court and the Ninth Circuit have held that where a college or university creates a fund available for student organizations, as Hastings has done here, it creates a limited public forum. *See Board of Regents of the Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 229-30 (2000); *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1039 (9th Cir. 1999); *see also Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829-31 (1995) (applying standards applicable to limited public forums to restrictions on student activity fund available for student groups that, among other things, comply with certain procedural requirements). Therefore, the Court concludes that Hastings created a limited public forum and thus, the restrictions on access to this forum are permissible so long as they are viewpoint-neutral and reasonable.

i. Viewpoint Neutrality.

Viewpoint discrimination occurs when the government targets "particular views taken by speakers on a subject." *Rosenberger*, 515 U.S. at 829. If the rationale for the restriction on expressive

activity is the "specific motivating ideology or the opinion or perspective of the speaker," then the government has engaged in viewpoint discrimination. *Id.*

In *Rosenberger*, student groups at the University of Virginia were eligible to submit bills for reimbursement if they became a "Contracted Independent Organization" ("CIO"). *Id.* at 823. An organization entitled Wide Awake Productions ("Wide Awake") met all the requirements to be qualified to become a CIO and receive reimbursements. *Id.* at 825. Wide Awake was formed by a group of students to, among other things, "publish a magazine of philosophical and religious expression." *Id.* Although Wide Awake was given CIO status, the university denied Wide Awake's request to be reimbursed for the cost of printing its publication "for the sole reason that their student paper 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.'" *Id.* at 822-23, 827. The Court concluded that the university had engaged in viewpoint discrimination because it excluded student journalistic efforts with a religious editorial viewpoint. *Id.* at 831. In fact, the university expressly justified denying funds for Wide Awake's publication on the ground that its contents revealed an "avowed religious perspective." *Id.* at 832.

The factual situations presented by *Widmar v. Vincent*, 454 U.S. 263 (1981), *Lambs Chapel v. Center Moriches Union Free School*, 508 U.S. 384 (1993), and *Good News Club v. Milford Center*

School, 533 U.S. 98 (2001), provide other clear examples of viewpoint discrimination. In *Widmar*, the university excluded student groups and speakers "*based* on their desire to use a generally open forum to engage in religious worship and discussion." *Widmar*, 454 U.S. at 269 (emphasis added). In *Lambs Chapel*, the evidence in the record demonstrated that the school district excluded a particular film series *because* the presentation would have been from a religious perspective. *Lambs Chapel*, 508 U.S. at 393-94. In *Good News Club*, the school district excluded a club "based on its religious nature." *Good News Club*, 533 U.S. at 107.

In contrast here, Hastings has not excluded CLS *because* it is a religious group but rather because it refuses to comply with the prerequisites imposed on all student organizations. To become a registered student group, Hastings requires all student groups to comply with Hastings' Policies and Regulations Applying to College Activities, including the Nondiscrimination Policy. (*See* Stip. Facts, ¶¶ 12, 14, 17.) Pursuant to the Nondiscrimination Policy, a student organization cannot exclude interested students from participating on the basis of, among other things, religion or sexual orientation. The student groups must remain open to all students who want to join or participate. (*Id.*, ¶¶ 15, 17.)

Courts have found nondiscrimination statutes akin to Hastings' Nondiscrimination Policy to be viewpoint neutral. *See Roberts*, 468 U.S. at 615 (holding that a state law prohibiting discrimination on the basis of "race, color, creed, religion, disability,

national origin or sex" did "not distinguish between prohibited and permitted activity on the basis of viewpoint"); *see also Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 94 (2d Cir. 2003). Notably, in *Roberts*, the Court found that the state statute had not been applied "for the purpose of hampering the organization's ability to express its view." *Roberts*, 468 U.S. at 615. Rather, the statute "reflect[ed] the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services." *Id.*

In *Rotary Club of Duarte*, similar to *Roberts*, a local chapter of a national organization admitted women as members in violation of the national organization's requirements. As a result, the national organization revoked the local chapter's charter. *Duarte*, 481 U.S. at 541. In evaluating whether enforcing a statute against the national organization which barred discrimination in public accommodations violated the First Amendment rights of the organization's members, the Court held that the state statute made "no distinctions on the basis of the organization's viewpoint." *Id.* at 549.

In *Wyman*, the Connecticut State Employee Campaign Committee denied the application of a local chapter of the Boy Scouts of America to participate in the state's workplace charitable contribution campaign. *Wyman*, 335 F.3d at 83. The decision to exclude the Boy Scout chapter was based on a ruling by a state commission that the Boy

Scout's policy of excluding homosexuals from membership and employment opportunities violated Connecticut's Gay Rights Law. *Id.* at 83. The Second Circuit concluded that the state anti-discrimination statute "prohibits discriminatory membership and employment policies not because of the viewpoints such policies express, but because of the immediate harms – like denial of concrete economic and social benefits – such discrimination causes homosexuals." *Id.* at 94.

CLS's arguments regarding viewpoint discrimination are unavailing. CLS contends that Hastings engages in viewpoint discrimination because it prohibits CLS from using religion as a criteria for selecting members and officers. (CLS Mot. at 16.) CLS is confusing the appropriate analysis by focusing on the reasons CLS is acting, as opposed to the reasons underlying Hastings' Nondiscrimination Policy. CLS also asserts that, as a religious group, it is unfairly disadvantaged. It argues that while other organizations, such as sports teams or political groups, may exclude students based on their athletic ability or political beliefs, CLS may not exclude the students of its choice. (*Id.*) Again, CLS is confusing the analysis by focusing on the effect and the reason *CLS* is acting, as opposed to the reasons underlying *Hastings*' conduct. Moreover, the fact that a neutral policy may affect a group with a certain perspective or belief system does not render the policy viewpoint based. *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 763 (1994). In *Madsen*, a group of anti-abortion protestors challenged an injunction which prohibited them from

demonstrating in certain places and in particular ways outside of a health clinic that performed abortions. The Court rejected the protesters' argument that the injunction was viewpoint-based:

> That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group *whose conduct* violated the court's order happen to share the same opinion regarding abortions being performed at the clinic. In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based.

Id. (emphasis in original). Rather, the focus of the Court's inquiry for determining neutrality is government's purpose. *Id.*; *see also Menotti v. City of Seattle*, 409 F.3d 1113, 1129 (9th Cir. 2005) (holding that the fact that an injunction barring access near the World Trade Organization conference "predominantly affected protestors with anti-WTO views did not render it content based").

Finally, in its reply brief, CLS argues that Hastings "refuses to recognize the CLS chapter because it takes a decidedly Christian point of view ... on issues of human sexuality and gender identity." (CLS Reply at 17.) However, there is no evidence in the record to support CLS's argument that Hastings will not allow CLS to become a recognized student

organization because of CLS's religious perspective. In fact, the evidence in the record demonstrates otherwise. For the ten years preceding this lawsuit, a predecessor of CLS existed as a registered student organization at Hastings. (Joint Stip, ¶ 22.) The predecessor organization used the name of "Hastings Christian Legal Society" and "Hastings Christian Fellowship." (*Id.*) From the 1994-1995 academic year through the 2001-2002 academic year, the predecessor organization used the same set of bylaws, which appear to be an old version of the bylaws sent to student chapters by the National Christian Legal Society. (*Id.*, ¶ 23.) It was not until the 2004-2005 academic year, when it became clear that CLS would not comply with the Nondiscrimination Policy and Hastings' requirement that registered student organizations be open to all interested students that Hastings' withdrew CLS's recognition. (*Id.*, ¶¶ 33-35, 39-41.)

Thus, the Court concludes that the Nondiscrimination Policy, and Hastings' enforcement of this policy, is viewpoint neutral.

ii. Reasonableness.

In addition to being viewpoint neutral, restrictions on access to a limited public forum must be reasonable. "The reasonableness of a governmental restriction limiting access to a nonpublic forum must be assessed 'in light of the purpose of the forum and all of the surrounding circumstances.'" *Cogswell v. City of Seattle*, 347 F.3d 809, 817 (9th Cir. 2003) (quoting *Cornelius v.*

NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 809 (1985)). "The reasonableness analysis emphasizes the consistency of the limitation in the context of the forum's intended purpose." *Id.* (citing *DiLoreto*, 196 F.3d at 967).

In evaluating the reasonableness of Hastings' restrictions, the Court notes that "a university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of [the Supreme Court] have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Widmar*, 454 U.S. at 268 n.5. Universities have a "right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education." *Id.* at 277.

Hastings' purpose in recognizing and funding student organizations is to further students' education and participation in the law school environment and to foster students' interests and connections with their fellow students. Moreover, as a public institution, Hastings is subject to federal and state laws prohibiting discrimination. To promote the purpose of this forum and to comply with the spirit of the laws prohibiting discrimination, Hastings requires that student groups be open to all interested students, without discrimination on the basis of any protected status. (Stip. Facts, ¶¶ 12, 14, 15, 17.) The Court concludes

that Hastings' requirement of compliance with its Nondiscrimination Policy is a reasonable regulation that is consistent with and furthers its educational purpose. Accordingly, even if Hastings' Nondiscrimination Policy is considered a regulation of speech, Hastings' enforcement of this policy did not infringe upon CLS's First Amendment rights of free speech.

2. First Amendment: Expressive Association.

Although not expressly included in the First Amendment, the Supreme Court has recognized the freedom of expressive association as an right implicit in this amendment. As the Supreme Court explained in *Roberts*:

> [a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. ... Consequently, [the Supreme Court has] long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Roberts, 468 U.S. at 622; *see also Boy Scouts v. Dale*, 530 U.S. 640, 647-48 (2000). The freedom of

association may be unconstitutionally burdened in several different ways. For example, the "government may seek to impose penalties or withhold benefits from individuals because of their membership in a disfavored group, ... it may attempt to require disclosure of the fact of membership in a group seeking anonymity, ... and it may try to interfere with the internal organization or affairs of the group." *Roberts*, 468 U.S. at 622-23 (internal citations omitted).

CLS argues that its right to expressive association has been infringed. It is undisputed that CLS is being denied the right to official recognition by Hastings and that it is being denied access to particular areas of the campus and some avenues of communicating with its members and other students. What is disputed is the legal and practical effect of these limitations.

First, it is important to note what this case is not about. Although CLS relies heavily on *Dale*[4] and

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[4] In *Dale*, the Boy Scouts, a private organization, that "engage[s] in instilling a system of values in young people," revoked the adult membership of James Dale when it learned that he was "an avowed homosexual and gay rights activist." *Dale*, 530 U.S. at 643. The Supreme Court held that applying New Jersey's public accommodations law to require the Boy Scouts to readmit Dale as a scout in a leadership position violated the Boy Scout's right of expressive association. *Id.* The Court found that Dale's presence in a leadership position in the Boy Scouts would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653.

Roberts, these cases are inapplicable. *Dale* stands for the proposition that "forced inclusion of an unwanted person in a group infringes on the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 649. Similarly, the Court in *Roberts* addressed the validity of forcing a group to accept members it did not desire. *Roberts*, 468 U.S. at 623. Here, CLS is not being forced, as a private entity, to include certain members or officers. *See Wyman*, 335 F.3d at 91 (finding *Dale* inapplicable because the conditioned exclusion of organization from a particular forum did not rise to the level of compulsive membership); *see also Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 445-46 (3d Cir. 2000) (upholding university's withdrawal of recognition of a fraternity that violated campus rules on drug use and distinguishing *Dale* and *Roberts* because those cases involved state laws mandating that groups accept members with whom the groups did not want to associate).

In *Wyman*, a state committee refused to allow a local chapter of the Boy Scouts to participate in the state's charitable contribution campaign because the Boy Scouts excluded gays and lesbians from employment and membership positions in violation of a state law prohibiting discrimination on the basis of sexual orientation. The Boy Scouts argued that "by conditioning its participation in the Campaign on a change in its membership policies, the defendants violated the [Boy Scout's] constitutional right to

expressive association." *Wyman*, 335 F.3d at 88. The court rejected the Boy Scouts' argument that *Dale* determined the resolution of its claims, reasoning that "*Dale* considered [the state's] attempt to *require* the Boy Scouts to admit a person who, the Supreme Court found, would compromise the Boy Scout's message. Not surprisingly, the Supreme Court held that such state compulsion 'directly and immediately affects ... associational rights that enjoy *First Amendment* protection' and imposes a 'serious burden' on them." *Id.* (quoting *Dale*, 530 U.S. at 658-59) (emphasis in original). In contrast to *Dale*, the court found the effect of state's refusal to allow the Boy Scouts to participate in the campaign was "neither direct nor immediate, since its conditioned exclusion does not rise to the level of compulsion." *Id.*

In a case recently decided by the California Supreme Court, the Court rejected an organization's contention that its speech or associational rights were infringed by a requirement that it agree not to discriminate on the basis of religion and sexual orientation as a condition to receiving a city subsidy for a berth at the marina. *Evans*, 40 Cal. Rptr. 3d at 211. The Court reasoned that in adopting a nondiscrimination resolution and applying it to an organization, the city

> did not purport to prohibit the [organization] from operating in a discriminatory manner; it simply "refused to fund such activities out of the public fisc." ... To the extent the [organization] objected to compliance with the

> [nondiscrimination resolution], the organization ... was free to terminate its participation in the free berth program and thus avoid the requirement of the nondiscrimination provision; "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."

Id. at 213 (quoting *Rust v. Sullivant*, 500 U.S. 173, 198 (1991) and *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983)).

Similar to *Wyman* and *Evans*, Hastings is not directly ordering CLS to admit certain students. Rather, Hastings has merely placed conditions on using aspects of its campus as a forum and providing subsidies to organizations. If CLS wishes to participate in the forum and be eligible to receive funds, it must comply with Hastings' Nondiscrimination Policy. If not, CLS is "free to terminate its participation ... and thus avoid the requirement of the nondiscrimination provision." *See Evans*, 40 Cal. Rptr. 3d at 213. CLS may continue to meet as the group of its choice on campus, excluding any students they wish, and may continue to communicate its beliefs as it did all through the 2004-2005 academic year. Therefore, *Dale* and *Roberts* are inapplicable here.

a. Analysis Pursuant to *Healy v. James*.

The Supreme Court's analysis in *Healy v. James*, 408 U.S. 169 (1972), is the most instructive case with respect to CLS's claim of expressive association. In

Healy, the president of a state college refused to grant a student organization official recognition because "he found the organization's philosophy was antithetical to the school's policies." *Id.* at 174. The Court held that denying official recognition to student organizations, *without justification*, burdens or abridges students' right to associate to further their personal beliefs. *Id.* at 181. However, the Court noted that the college could restrict students' associational rights if it imposed the restrictions for a reason "directed at the organization's activities, rather than its philosophy" and such reason was factually supported by the record. *Id.* at 188; *see also Pi Lambda Phi Fraternity*, 229 F.3d at 445 (commenting that *Healy* specifically contemplated a situation in which a university acts out of non-ideological reasons to restrict a group's non-expressive activity, even when those actions would have an effect on expressive activity); *Tacynec v. City of Philadelphia*, 687 F.2d 793, 799 (3d Cir. 1982) (citing *Healy* for the proposition that an individual's right of association may be limited by valid, content-neutral time, place and manner restrictions).

i. Under *Healy*, Hastings May Impose Campus Restrictions if Reasons for Regulating Student Organizations Passes the *O'Brien* Test.

The Court in *Healy* indicated that the appropriate measure for evaluating whether justifications for a restriction on student organizations would be sufficient to pass constitutional muster is the *O'Brien* test – the test

for determining when government regulation of conduct violates First Amendment speech protections. *Healy*, 408 U.S. at 189 n.20. Moreover, the Court specifically noted that schools may impose a requirement "that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights." *Id.* at 193. The Court concluded "that the benefits of participation in the internal life of the college community may be denied to any group that reserves the right to violate any valid campus rules with which it disagrees." *Id.* at 193-94; *see also Evans*, 40 Cal. Rptr. 3d at 217-19 (applying *Healy* to find an organization's refusal to confirm it would comply with a nondiscrimination resolution justified city's withdrawal of a subsidy to the organization).

As discussed above, Hastings has denied CLS official recognition based on CLS's conduct – its refusal to comply with Hastings' Nondiscrimination Policy – not because of CLS's philosophies or beliefs. Thus, in accordance with the Supreme Court's analysis in *Healy*, this Court must evaluate whether Hastings' enforcement of its Nondiscrimination Policy against CLS unconstitutionally infringes CLS's right of expressive association pursuant to the test set forth in *O'Brien*, *i.e.*, whether the Nondiscrimination Policy is within the state's constitutional power, the policy furthers an important or substantial government interest that is unrelated to the suppression of expression, and the incidental restriction on the alleged First

Amendment freedoms is no greater than is essential to the furtherance of that interest. *See O'Brien*, 391 U.S. at 377. This Court has already found that Hastings' enforcement of its Nondiscrimination Policy passes constitutional muster under the *O'Brien* test.

In the context of CLS's claim of infringement of its associational rights, it is also significant that while CLS was denied the use of the Hastings logo, eligibility for funds, the use of certain bulletin boards, eligibility for a Hastings organization email address, and eligibility to send out mass emails through the Associated Students of the University of California at Hastings, the ability to place announcements in a weekly newsletter, and the ability to participate in the annual student organizations faire, CLS was not prohibited from meeting on campus. (Joint Stip, ¶¶ 9, 10, 62.) In fact, CLS was permitted to use campus facilities to meet and its members were permitted to communicate amongst themselves and with other students. (*Id.*, ¶¶ 10, 58.) As a non-registered group, CLS still had access to bulletin boards and chalk boards on campus to make announcements. (Joint Stip, ¶ 11.) Such evidence further demonstrates that Hastings' incidental restriction on CLS's alleged First Amendment freedoms was no greater than necessary. *See O'Brien*, 391 U.S. at 377 (holding that incidental restriction on alleged First Amendment freedoms must be no greater than necessary to the furtherance of an important governmental interest unrelated to the suppression of expression). Therefore, according to the analysis required by

Healy and *O'Brien*, Hastings does not unconstitutionally infringe on CLS's associational rights.

ii. Under *Healy*, Denying Recognition to Student Organizations Must be Justified Sufficiently.

Alternatively, even assuming *arguendo O'Brien* is not the appropriate test, it is important to note that *Healy* merely held that denying official recognition to student organizations, *without justification*, burdens or abridges students' right to associate to further their personal beliefs. *See Healy*, 408 U.S. at 181. In determining whether a school's reason for denying recognition provides sufficient justification, the Court examined both whether the reason was directed at the organization's activities or philosophies and the practical impact nonrecognition had on the students' ability to meet as a group and communicate. *Id.* at 184, 188 ("We are not free to disregard the practical realities."); *see also Gay Students Org. of Univ. of New Hampshire v. Bonner*, 509 F.2d 652, 658-59 (1st Cir. 1974) (noting that "the Court's analysis in *Healy* focused not on the technical point of recognition or nonrecognition, but on the practical realities of human interaction. ... The ultimate issue at which inquiry must be directed is the effect which a regulation has on organizational and associational activity, not the isolated and for the most part irrelevant issue of recognition per se.").

The Court in *Healy* found that the "primary impediment to free association flowing from nonrecognition [was] the denial of use of campus facilities for meetings and other appropriate purposes." *Healy*, 408 U.S. at 181. Most importantly, the organization was barred from using *any* campus facilities to hold meetings. *Id.* at 176. When the students attempted to meet a coffee shop on campus, they were disbanded and informed that they could not meet anywhere on college property as a group. *Id.* Students in the group were not allowed to place announcements regarding meetings, rallies or other activities in the student newspaper or on the campus bulletin boards. The students were not provided any opportunity to communicate with each other or other students on campus. *Id.* at 182-83. Unremarkably, the Court found that "[i]f an organization is to remain a viable entity in a campus community..., it must possess the means of communicating with [other] students." *Id.* at 181. In light of these circumstances, the Court found that "[d]enial of official recognition posed serious problems for the organization's existence and growth" and that these impediments were not insubstantial. *Id.* at 177, 182. Nevertheless, despite these substantial impediments, the Court remanded the matter for consideration of whether the students were willing to abide by reasonable campus rules and regulations, which, if they were not, would justify the denial of recognition. *Id.* at 194.

Here, in contrast to *Healy*, it is undisputed that despite Hastings' refusal to grant CLS recognized status, the group continued to meet and hold

activities throughout the 2004-2005 academic year. (Joint Stip., ¶¶ 44, 48.) The record demonstrates that CLS's efforts at recruiting members and attendees were not hampered by the denial of recognition. Throughout the 2004-2005 academic year, nine to fifteen students regularly attended CLS meetings and activities. (*Id.*, ¶ 48.) There is no evidence that CLS considered this a small group or that it was smaller than when the group met during the previous ten years as a recognized student group. In fact, during the prior academic year, when the predecessor to CLS met as a recognized student group, fewer students regularly attended the meetings and events. (*Id.*, ¶ 26: "During the 2003-2004 academic year .... [a]pproximately five (5) to seven (7) students attended ... meetings and events.") Moreover, there is no evidence that the restrictions to certain forms of communication at Hastings, such as through the Law School newsletter, hindered CLS's ability to communicate with other students. The president of CLS maintained a Yahoo! group for all members and attendees and communicated information relating to CLS's activities to them on this group. (Declaration of Stephen Aden ("Aden Decl."), Ex. B at 44.) Furthermore, even though CLS was not a recognized student organization at Hastings, Hastings still provided access to bulletin and chalk boards to make announcements, allowed CLS to meet on campus as an organization, and offered CLS use of Hastings' rooms and audio-visual equipment for such meetings and activities. (Joint Stip., ¶¶ 10, 11, 58, 61, Ex. H.)[5]

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[5] CLS argues that its access to such space and forms of

Thus, the Court finds that Hastings' denial of official recognition was not a substantial impediment to CLS's ability to meet and communicate as a group. In light of the fact that Hastings' reason for denying recognition was not directed at CLS's philosophies, the Court concludes that Hastings' denial of recognition was justified and thus does not unconstitutionally infringe CLS's members' right of expressive association. *See Healy*, 408 U.S. at 181.

iii. Denial of Recognition is Not Per Se Unconstitutional.

CLS's reliance on the cases cited in its reply brief to demonstrate the denial of recognition is a per se unconstitutional infringement of its members' associational rights under *Healy* is misplaced. (CLS's Reply at 7.) The courts in *Gay and Lesbian Students Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988), *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976), *Gay Students Org.*, 509 F.2d 652, and *American Civil Liberties Union of Virginia, Inc. v. Radford College*, 315 F. Supp. 893 (W.D. Va. 1970), each made explicit findings that the that the colleges

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communication are at Hastings' discretion and thus that Hastings could decide at any point to withdraw such access. (CLS Mot. at 13.) On the record before the Court, CLS is allowed access to facilities and certain forms of communication at Hastings. Even if CLS has not taken full advantage of the access, it is undisputed that it was made available to the group. CLS's claim regarding what Hastings may do in the future is not yet ripe. If circumstances change, and CLS believes that under the new circumstances, CLS's constitutional rights are being infringed, CLS may challenge the new conduct and conditions at that time.

or universities refused to grant recognition to these student organizations *because* of the organizations' beliefs or views.

In *Gay and Lesbian Students*, the university refused to provide the student group funds, which the group sought to support showing two films and holding a panel discussion. *Gay and Lesbian Students*, 850 F.2d at 363. The court found that the record was "replete" with evidence that the university's decision to deny funds was based on viewpoint discrimination. *Id.* at 366. The evidence included the following statement from one of the student senators voting to deny funding: "This is a group that supports gay and lesbian homosexuality. We cannot use state money to support a homosexual group." *Id.* at 363. Moreover, the court noted the pressure university officials received from state legislators not to fund the group or "to allow in any way the dissemination of opinions tolerant toward homosexuals." *Id.* at 367. Thus, the court concluded that the group was improperly denied funds "because of the views it espoused." *Id.* Accordingly, the court found the denial unconstitutionally infringed the students' First Amendment rights.

In *Gay Alliance of Students*, the university refused to grant the group's application to become a recognized student group because the university feared granting recognition would increase the number of students who might join, would harm students affiliated with a "homosexual activist organization," and would increase the opportunity for "homosexual contacts." *Gay Alliance of Students*,

544 F.2d at 165-66. Thus, the court found that the university targeted the group because of the content of the message it sought to convey. Accordingly, the court held that the university had to demonstrate its refusal to recognize the group was "tailored to serve a substantial governmental interest," and that it failed to do so. *Id.*

In *Gay Students Organization*, the student group was not allowed to sponsor any social functions. *Gay Students Org.*, 509 F.2d at 654. The university's prohibition on any social functions was triggered by the distribution of what the university characterized as "'extremist' homosexual publications" at an event sponsored by the group. *Id.* Thus, the court found that the university's prohibition was unconstitutional under the *O'Brien* test because it was content-related. *Id.* at 662 ("[T]he curtailing of expression which they find abhorrent or offensive cannot provide the important governmental interest upon which impairment of First Amendment freedoms must be predicated.").

Finally, in *American Civil Liberties Union*, the college did not grant the organization recognition because it felt the "role and purpose of the American Civil Liberties Union" lay outside of the school's scope and objectives. *American Civil Liberties Union*, 315 F. Supp. at 895. The court noted that the school did not define what the objectives of the school were and expressed doubt that the administration and faculty could reach agreement as to what specific objectives the institution was dedicated. *Id.* at 898. Notably, the college recognized the Young

Republican Club and Young Democratic Club. The court found it inconsistent to claim these political clubs were within the school's objectives, but not the ACLU. *Id.* at 898-99. Thus, the court held the denial of recognition violated the First Amendment. *Id.*

In contrast here, as noted above, Hastings did not withhold recognition of CLS because of CLS's views, but because CLS refused to comply with the Nondiscrimination Policy. Thus, *Gay and Lesbian Students*, *Gay Alliance of Students*, *Gay Students Organization*, and *American Civil Liberties Union of Virginia* do not support a finding that CLS's right to expressive association has been unconstitutionally fringed.

b. Analysis Pursuant to *Dale* and *Roberts*.

Even assuming *arguendo* that *Roberts* and *Dale* were applicable to CLS's expressive association claim, and this Court finds they are not, the holding of these cases do not support a finding that Hastings' denial of recognition was unconstitutional. Pursuant to *Dale*, courts apply a three-part test to determine whether the right of expressive association has been violated. *Dale*, 530 U.S. at 648-49. First, an organization must engage in expressive association. Second, the state action must significantly affect the group's ability to advocate its viewpoints. Third, the Court must determine if the state's interest justifies the infringement on the right to expressive association. *Id.* Although not as explicit, the Court in

Roberts follows a similar analysis. *Roberts*, 468 U.S. at 622-28.

i. First Prong: Organization Engages in Expressive Association.

To bring an expressive association claim, CLS "must engage in some form of expression, whether it be public or private." *Dale*, 530 U.S. at 549. Hastings does not dispute that CLS engages in expressive association. (Hastings Mot. at 16.) Therefore, the Court will assume for purposes of these motions that CLS engages in expressive association.

ii. Second Prong: Ability to Advocate Viewpoints Significantly Affected.

Next, the Court must determine whether Hastings' denial of recognition significantly affect CLS's ability to advocate its viewpoints. *Dale*, 530 U.S. at 650; *Roberts*, 468 U.S. at 626-28. In *Roberts*, the Court held that a regulation that forces a group to accept members it does not desire is a clear intrusion into the internal structure or affairs of the organization. *Roberts*, 468 U.S. at 623 ("Such a regulation may impair the ability of the original members to express only those views that brought them together. ... Freedom of association plainly presupposes a freedom not to associate."); *see also Dale*, 530 U.S. at 648 ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.").

However, here, Hastings is not ordering CLS to admit certain members, regardless of where it meets. Rather, Hastings is merely imposing a condition of participation in certain aspects of the forum on campus. *See Evans*, 40 Cal. Rptr. 3d at 213 (noting that to the extent an organization objected to compliance with a nondiscrimination policy as a condition of receiving a city subsidy, the organization was free to terminate its participation in the program and thus avoid the requirements of the nondiscrimination provision). Moreover, even assuming *arguendo* that Hastings' condition for participation could be viewed as requiring CLS to admit gay, lesbian, and non-Christian students, CLS has not demonstrated that its ability to express its views would be significantly impaired by complying with such a requirement.

In *Dale*, the Court found that the Boy Scouts's general mission was to instill values in young people, including being "morally straight." *Dale*, 530 U.S. at 649-50. The Boy Scouts sought to instill these values by having its adult leaders spend time with the youth members. During the time spent together, scoutmasters and assistant scoutmasters were tasked with inculcating the youth members with the Boy Scouts' values, both expressly and by example. *Id.* at 649-50. The Court further found that the Boy Scouts sincerely believed that "homosexual conduct [was] not morally straight" and did "not want to promote homosexual conduct as a legitimate form of behavior." *Id.* at 651. Although the Court stated that an association's assertions regarding the nature of its expression and its view of what would impair its

expression is owed deference, the Court examined the evidence on these points and did not blindly accept the Boy Scouts' arguments. *Id.* at 651-56. Moreover, the Court expressly noted that the group engaged in expressive association could not "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." *Id.* at 653; *see also Rumsfeld*, 126 S.Ct. at 1312-13 (rejecting the groups' argument that providing access to military recruiters would impair their own expression merely because they *said* it would and citing *Dale* for the proposition that "a speaker cannot erect a shield against laws requiring access simply by asserting that mere association would impair its message") (internal quotations omitted).

In determining whether admitting Dale would significantly impair the Boy Scouts' message, the Court reasoned that Dale was "one of a group of gay Scouts who have become leaders in their community and are open and honest about their sexual orientation. ... Dale was copresident of a gay and lesbian organization at college and remains a gay rights activist." *Dale*, 530 U.S. at 653. In light of these facts, the Court found that Dale's presence in a leadership position in the Boy Scouts would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* Significantly, the Court found *Hurley* illustrative of this point and noted that in *Hurley* "the parade organizers did not wish to exclude the GLIB members because of their sexual orientation,

but because they wanted to march behind a GLIB banner[]" and thus would force the parade organizers to send a message they did not want to propound. *Id.* at 653-54 (citing *Hurley*, 515 U.S. at 574-75.)

The broad class of students CLS seeks to exclude significantly differs from the Boy Scouts' conduct in *Dale*. CLS does not confine its desired discrimination to students who are open and honest about being gay, lesbian, or non-orthodox Christian, let alone leaders on campus advocating for gay rights or non-Christian faiths. Rather, CLS seeks to exclude *all* lesbian, gay, bisexual or non-orthodox Christian students. *See Dale*, 530 U.S. at 653 (finding that because Dale was open and honest about his sexual orientation and was a gay rights activist, his presence would force the Boy Scouts to send a message to its youth members and the world regarding homosexuality); *see also Hurley*, 515 U.S. at 572 (noting that the parade organizers disclaimed any intent to exclude gay, lesbian or bisexual individuals from participating generally, but rather, sought to a group from marching behind a particular banner).

Moreover, CLS does not demonstrate how admitting lesbian, gay, bisexual or non-orthodox Christian students would impair its mission. Significantly, unlike the Boy Scouts in *Dale*, CLS has not submitted any evidence demonstrating that teaching certain values to other students is part of the organization's mission or purpose, or that it seeks to do so by example, such that the mere

presence of someone who does not fully comply with the prescribed code of conduct would force CLS to send a message contrary to its mission. According to CLS, its mission is "to maintain a vibrant Christian Law Fellowship on the School's campus which enables its members, individually and as a group, to love the Lord with their whole beings–hearts, souls, and minds–and to love their neighbors as themselves." (Joint Stip., Ex. E.)

CLS now argues that it "seeks to affirm and encourage certain values in its members" and that its officers "serve as role models to the voting members and attendees," but the evidence it cites does not support these assertions. (CLS Mot. at 10, *citing* Joint Stip., ¶ 33; CLS Reply at 2, 8, *citing* Joint Stip., Ex. E at 2.) Paragraph 33 of the Joint Stipulation merely states that CLS's bylaws require all members and officers to sign the Statement of Faith and sets forth the substance of the Statement of Faith. (Joint Stip., ¶ 33.) Exhibit E to the Joint Stipulation is CLS's Constitution. The Constitution pronounces a "code of conduct" for officers which provides that officers "must exemplify the highest standards of morality as set forth in Scripture." (*Id.*, Ex. E at 2.) While CLS's members and officers may be instructed to abide by a code of conduct, CLS does not demonstrate how it portrays what the conduct is or who follows this code to the greater community at Hastings. In other words, it is not clear how anyone at Hastings, other than the individual members and officers, would even be aware that CLS's members and officers are living their private lives in accordance with a certain code of conduct.

CLS also argues that if it complied with the Nondiscrimination Policy, it would be stripped of its Christian beliefs and cease to exist. (CLS Mot. at 11.) Because officers and members have the authority to elect officers, and to amend the group's bylaws and constitution, and officers lead bible studies, CLS argues that opening up these functions to all students would lead CLS to cease being a vibrant Christian organization. (CLS Mot. at 12.) However, the evidence in the record does not support CLS's argument. For the previous ten years, a predecessor organization to CLS was on campus as a recognized student organization. (Joint Stip., ¶ 22.) The predecessor organization did not exclude openly gay and lesbian students or non-Orthodox Christians. (*Id.*, ¶¶ 25, 27, 28, Exs. C, D.) In fact, during the 2003-2004 academic year, one student who was openly lesbian and at least two students who held beliefs inconsistent with what CLS considers to be orthodox Christianity participated in the group's meetings. (*Id.*, ¶¶ 27, 28.) Yet, there is no indication that the participation of such students made the organization any less Christian or hampered the organization's ability to express any particular message or belief. Nor is there any evidence that during those ten years students hostile to CLS's beliefs tried to overtake the organization or alter its views.

Even now, when CLS insists on having members sign the Statement of Faith, CLS allows non-members to attend and participate in all meetings and events, including leading prayers. Again, there is no evidence that allowing such participation has

made CLS less Christian, or less able to express its views on what it means to be a Christian. Moreover, there is also no indication that any student who is open and honest about being a non-orthodox Christian, gay, lesbian, or bisexual, and a leader in the community on these issues, is seeking to join CLS. In fact, during the 2004-2005 academic year, CLS stipulated that no known gay, lesbian, bisexual or non-Christian student sought to join CLS as a member or officer, or even attended any of its meetings. (Joint Stip. at ¶¶ 50, 54.)

Thus, there is no evidence that complying with the Nondiscrimination Policy, and taking the risk that a non-orthodox Christian, gay, lesbian, or bisexual student become a member or officer, and thus, by their presence alone, would impair CLS's ability to convey its beliefs. Accordingly, the Court concludes that requiring CLS to comply with the Nondiscrimination Policy does not significantly affect CLS's ability to advocate its viewpoints.

iii. Third Prong: Justification of Infringement.

Because the Court concludes that there is no significant impact on CLS's ability to express itself, the Court need not address the third prong of the *Dale* test. However, even if there was some infringement, Hastings' interest in protecting its students from discrimination provides sufficient justification. In *Roberts*, the Supreme Court found that the state had a compelling interest in eliminating discrimination and that the state public

accommodations laws at issue served that interest unrelated to the expression of ideas. *Roberts*, 468 U.S. at 624. The Court in *Roberts* reasoned that:

> [o]n its face, the [state public accommodations law] does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria. ... Instead, ... the Act reflects the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services. ... That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order.

Roberts, 468 U.S. at 623-24. Accordingly, the Court in *Roberts* found that requiring the organizations to admit women did not violate their members' right of expressive association. *Id.* at 628-29; *see also Duarte*, 481 U.S. at 549 (applying similar reasoning to uphold state public accommodations law banning discrimination and requiring the group to admit women).

In contrast, the Court in *Dale* found that the interests of the state in its public accommodations law did not justify a "severe intrusion" on the organization's associational rights. *Dale*, 530 U.S. at 659. However, in balancing of the State's interest against the organization's, the Court found the

State's claim of compelling interest attenuated because the State's public accommodations law extended its anti-discrimination requirements to private groups whose activities fell well beyond those usually involved in providing public accommodations. *Dale*, 530 U.S. at 657 n.3 (questioning the validity of applying a state public accommodations law to a private entity); *see also Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 946 (Ala. 2004) (commenting that *Dale* "did not broadly rule ... that First Amendment rights should generally be deemed more compelling than laws barring ... discrimination; instead, the Court expressly found [the State's] claim of compelling interest attenuated in the particular situation at issue."). Thus, the Court concluded that the State's interest did not justify the severe intrusion.

Here, CLS is not being forced to include certain members or officers, let alone individuals who are outspoken advocates for gay rights or non-Christian ideals. Moreover, Hastings has a compelling interest in prohibiting discrimination on its campus, and, in contrast to *Dale*, there is no reason to find such interest is attenuated. *See Jews for Jesus*, 968 F.2d at 297 (state has a compelling interest in prohibiting religious and racial discrimination in public accommodations); *see also Presbytery of New Jersey*, 902 F. Supp. at 521 (state interest in eliminating discrimination on the basis of, *inter alia*, sexual orientation was compelling); *Gay Rights Coal.*, 536 A.2d at 38 ("The eradication of sexual orientation discrimination is a compelling governmental interest."). In balancing Hastings' compelling

interest to protect its students from discrimination against any infringement on CLS's members' expressive association, the Court concludes that Hastings' conduct is justified and, thus, does not unconstitutionally infringe CLS members' right to expressive association.

3. First Amendment: Free Exercise.

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. 1. In *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1990), the Supreme Court made clear that a neutral law of general application could prohibit conduct that was prescribed by an individual's religion and such law did not have to be supported by a compelling interest. *Smith*, 494 U.S. at 885; *see also Church of Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 U.S. 520, 531 (1993) ("A law that is neutral and of general applicability need not be justified by a compelling government interest, even if the law has the incidental effect of burdening a particular religious practice."). The Supreme Court also made clear that the government need not demonstrate a compelling interest even when the burden on religion by a neutral law of general applicability was substantial. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1030 (9th Cir. 2004) (citing *Smith*, 494 U.S. at 883-84). "A law is one of neutrality and general applicability if it does not aim to 'infringe upon or restrict practices

because of their religious motivation,' and if it does not 'in a selective manner impose burdens only on conduct motivated by religious belief[.]'" *Id.* at 1031 (quoting *Lukumi Babalu Aye*, 508 U.S. at 533, 543).

CLS argues that strict scrutiny still applies to its free exercise claim because laws targeting or imposing special burdens on religious beliefs are presumptively invalid, and that here, prohibiting discrimination on the basis of religion improperly targets religious beliefs. (CLS Mot. at 17.) However, the Nondiscrimination Policy does not target or single out religious beliefs, but rather, is a policy that is neutral and of general applicability. The Policy prohibits discrimination on the basis of protected categories, including religion and sexual orientation, irrespective of the motivation for such discrimination. *Cf. Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 809 (N.D. Cal. 1992) (finding that Title VII of the Civil Rights Act, which prohibits, among other things, employment discrimination on the basis of religion, "neither regulates religious beliefs, nor burdens religious acts, because of their religious motivation. On the contrary, it is clear that Title VII is a secular, neutral statute which, in this case, incidentally has a profound impact on defendants' free exercise of their religion.") Contrary to CLS's contention, regulating the conduct of discrimination on the basis, *inter alia*, of religion is not equivalent to regulating religious beliefs. CLS may be motivated by its religious beliefs to exclude students based on their religion or sexual orientation, but that does not convert the reason for

Hastings' policy prohibiting the discrimination to be one that is religiously-based.

Next, CLS cites *Smith* for the proposition that "where the state has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reasons." (CLS Mot. at 18, citing *Smith*, 494 U.S. at 884.) In the portion of *Smith* to which CLS cites, the Court was explaining that the test set forth in *Sherbet v. Verner*, 374 U.S. 398 (1963), requiring governmental actions that substantially burden a religious practice to be justified by a compelling governmental interest, has only been applied in the unemployment compensation field. *Smith*, 494 U.S. at 883-84. The Court explained that "if [it] were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, [it] would not apply it to require exemptions from a generally applicable ... law." *Id.* at 884. Even if the test in *Sherbert* were applicable here, CLS has not demonstrated that Hastings has provided exemptions to the Nondiscrimination Policy to other student organizations while refusing to grant CLS an exemption. CLS submits the bylaws of two registered student organizations at Hastings, the Vietnamese American Law Society and La Raza. (Aden Decl., Exs. I, O.)

The Vietnamese American Law Society's bylaws provide that "any full-time student at Hastings may become a member ... so long as they do not exhibit a consistent disregard and lack of respect for the objective of the organization," but specifically

declares that its "[m]embership rules shall not violate the Nondiscrimination Compliance Code of Hastings." (Aden Decl., Ex. I.) Defendant Chapman, the Director of Student Services at the Law School, explains that:

> Simply because a student organization makes reference in its bylaws to interests or objectives of the organization does not violate the Nondiscrimination Policy. Student organizations' bylaws will sometimes make reference in their sections on membership to members' interests and state that any student who holds interests or goals similar to an organization are eligible to become members. [She does] not interpret such references to members' interests as an attempt to establish a test or criteria for membership in any way. Other than [CLS] during the 2004-2005 and 2005-2006 academic years, [she is] aware of no registered student organization at Hastings that has ever attempted to restrict its membership based on either students' beliefs or agreement with the group's objectives. If [she] were to become aware that any group was doing so, [she] would inform the group that they were in violation of Hastings' Nondiscrimination Policy.

(Declaration of Judy Hansen Chapman ("Chapman Decl."), ¶ 8.)

La Raza's bylaws provide that it is the organization's policy "not to discriminate on the

basis of race, sex, color, creed, national origin, ancestry, age, sexual orientation, or disability." (Aden Decl., Ex. O.) However, other portions of its bylaws could be read to restrict membership to students of "Raza" background. (*Id.*) During the course of the instant litigation, the bylaws of La Raza were brought to Chapman's attention, and she realized that its bylaws during the 2004-2005 academic year "could be interpreted as requiring voting members of the group to be of Hispanic descent." (Chapman Decl., ¶ 10.) If this were a requirement of La Raza's, it would violate Hastings' requirement that registered student organizations allow all Hastings student to become members. (*Id.*) Chapman had previously interpreted La Raza's bylaws as allowing all students to join the organization and become voting members. In the summer of 2005,Chapman raised this issue with La Raza's officers who confirmed that any Hastings student may become a voting member of La Raza. (*Id.*) Hastings allowed La Raza to register as a student organization during the 2005-2006 academic year only with the understanding that it is in the process of revising its bylaws to make clear that all Hastings students are welcome to become voting members. (*Id.*; ¶¶ 10-11, Ex. A.) Accordingly, the Court concludes that the evidence fails to demonstrate that Hastings exempted other organizations from complying with the Nondiscrimination Policy.

Finally, CLS contends that pursuant to the "hybrid rights" doctrine, the Court should apply strict scrutiny to its free exercise claim. *Smith* may

be read to impose strict scrutiny in "hybrid situation[s]" in which a law "involve[s] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." *Smith*, 494 U.S. at 881-82. However, regardless of whether the "hybrid rights" doctrine is even viable, the Ninth Circuit has made clear that "to assert a hybrid-rights claim, a free exercise plaintiff must make out a colorable claim that a companion right has been violated – that is, a fair probability or a likelihood, but not a certitude, of success on the merits." *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (citation and internal quotations omitted); *see also San Jose Christian College*, 360 F.3d at 1032. Because the Court finds that none of CLS's claims for violations of their constitutional rights have merit, there is no basis for their alleged "hybrid-rights" claim. Thus, strict scrutiny does not apply to CLS's free exercise claim. Pursuant to the applicable rational basis test, the Court concludes that CLS's right to free exercise of religion has not been unconstitutionally infringed.[6]

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[6] CLS also appears to argue that an exemption analogous to the "ministerial exception" to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, should apply here. (CLS Mot. at 19.) Courts apply a "ministerial exception" to Title VII because "the ministerial relationship lies so close to the heart of the church that it would offend the Free Exercise Clause simply to require the church to articulate a religious justification for its personnel decisions." *Bolland v. California Province of the Society of Jesus*, 196 F.3d 940, 946 (9th Cir. 1999). The "ministerial exception" is limited to clergy and does not apply to lay personnel. *Id.* at 947. The "ministerial exception" is clearly inapplicable here. This matter does not involve an employment

4. Equal Protection Clause.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *Serrano v. Francis*, 345 F.3d 1071, 1081 (9th Cir. 2003) (*quoting Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985)). To bring a successful equal protection claim, a plaintiff must demonstrate that he or she was treated differently from similarly situated persons. *Dillingham v. I.N.S.*, 267 F.3d 996, 1007 (9th Cir. 2001). Additionally, a plaintiff must allege that the defendant acted with the intent or purpose to discriminate against him or her based upon membership in a protected class. *Serrano*, 345 F.3d at 1082; *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 2001). "Where the challenged governmental policy is 'facially neutral,' proof of its disproportionate impact on an identifiable group can satisfy the intent requirement only if it tends to show that some invidious or discriminatory purpose underlies the policy." *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001).

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dispute. CLS is not a church, and its members and officers are not clergy. CLS has not provided any authority demonstrating the ministerial exception has been or should be extended beyond Title VII claims. Accordingly, the Court declines to require Hastings to apply an analogous exception to its requirement that registered student organizations comply with the Nondiscrimination Policy.

CLS's equal protection claim fails for two independent reasons. First, it has not presented any evidence that it has been treated differently from other student groups. Second, CLS has not submitted any evidence of discriminatory intent.

CLS argues that Hastings' application of the Nondiscrimination Policy to it is arbitrary because Hastings permits numerous other groups to choose members and/or officers dedicated to their organizations' cause. As set forth above, CLS has not presented any evidence demonstrating that Hastings exempts other registered student organizations from complying with the Nondiscrimination Policy.

CLS also argues that the treatment of CLS was intentional and argues that CLS may rely on evidence of the circumstances surrounding the passage of the policy to demonstrate intentional discrimination against it. (CLS Mot. at 20.) Yet, CLS docs not submit any evidence with respect to the passage of the Nondiscrimination Policy. Nor does CLS present any other evidence demonstrating any discriminatory intent by Hastings. Accordingly, CLS's equal protection claim fails as a matter of law.[7]

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[7] In its reply brief, CLS contends for the first time that Hastings' enforcement of its Nondiscrimination Policy violates the doctrine of unconstitutional conditions. (CLS Reply at 26.) Pursuant to the doctrine of unconstitutional conditions, "the government may not require a person to give up a constitutional right ... in exchange for a discretionary benefit conferred by the government." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). Because the Court finds that the enforcement

CONCLUSION

For the foregoing reasons, the Court DENIES CLS's motion for summary judgment and GRANTS Hastings and Outlaw's cross-motions for summary judgment on of all CLS's claims.

IT IS SO ORDERED.

Dated: May 19, 2006

s/
JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

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of the Nondiscrimination Policy does not unconstitutionally infringe any of CLS's asserted constitutional claims, the doctrine of unconstitutional conditions is inapplicable.

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Fourteenth Amendment

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1.

EXCERPTS OF POLICIES AND REGULATIONS APPLYING TO COLLEGE ACTIVITIES, ORGANIZATIONS AND STUDENTS* ADOPTED BY THE BOARD OF DIRECTORS 6/22/1990

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* NOTE: The complete document is available in the General Counsel's Office (Room M115, 19B Building).

35.16 **Procedures for the Approval of a Voluntary Activity Fee (3/6/98)**

UNIVERSITY OF CALIFORNIA, SYSTEM-WIDE POLICIES AND REGULATIONS, AS MODIFIED BY THE UNIVERSITY OF CAULIFORNIA, HASTINGS COLLEGE OF THE LAW, ARE SET FORTH IN ITALICS. UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, IMPLEMENTING REGULATIONS, WHERE USED, ARE SET FORTH IN REGULAR FONT.

10.0 INTRODUCTION

In order to carry on its work of teaching, research and public service, the College has an obligation to maintain conditions under which the work of the College can go forward freely, in accordance with the highest standards of quality, institutional integrity and freedom of expression, with full recognition by all concerned of the rights and privileges, as well as the responsibilities, of those who comprise the College community. Each member of the College shares the responsibility of maintaining conditions conducive to the achievement of the College's purposes.

11.0 GENERAL PROVISIONS

For the purposes of these policies and regulations adopted pursuant to them, College property is any College-owned, operated, or - maintained property, including all College grounds and structures.

The provisions of the Introduction and Sections 20.00, 30.00 and 80.00 of this document have general applicability to all individuals and activities on College properties.

AUTHORITIES AND DELEGATIONS

University of California, Hastings College of the Law, and the Board of Directors of Hastings College of the Law are established and derive authority from the Serranus C. Hastings Trust and the California Constitution and statutes (Const. Art. IX, § 9; Education Code §§ 92201 et seq.). By virtue of such authority, the College is affiliated with the University of California and is governed by its own Board of Directors. The property of the College is held in the name of the Board of Directors and the Board is empowered to conduct all business of the College. The Standing Orders and Bylaws of the Board delegate specific authority to the Dean of the College, including the full authority and responsibility over the administration of academic and student affairs and business and fiscal operations of the College. These policies and regulations are promulgated pursuant to the foregoing Constitutional and statutory authorities and delegations.

For the purposes of these policies and campus regulations made pursuant to them, a student is defined as one who is currently enrolled at Hastings College of the Law or, during the

recess period between semesters or the summer period, one who has completed the immediately preceding term and is eligible for re-enrollment.

12.0 CAMPUS REGULATIONS

The Dean shall adopt, publish and make available, free of charge, campus regulations consistent with these policies.

12.10 *The Dean may consult with students, including student governments where they exist, faculty and staff in the development and modification* of *campus regulations.*

30.00 POLICY ON USE OF COLLEGE PROPERTIES

31.00 GENERAL PROVISIONS

31.10 *College regulations shall provide procedures and criteria for use of College properties based upon benefit to the College. Non-College persons or organizations shall be eligible to use such properties only upon invitation of the student government other College units or registered student organizations.*

31.11 *College properties shall be used only in accordance with Federal, State and local laws and shall not be used for the purposes of organizing or carrying out unlawful activity.*

31.12 *All persons on College property are required to abide by College policies and campus regulations and shall identify themselves upon request to College officials acting in the performance of their duties. Violation of college policies or campus regulations may subject a person to possible legal penalties; if the person is a student faculty member or staff member of the College, that person may be subject to College discipline.*

31.13 *A request for use of college properties may be denied if the request is not in accordance with campus regulations implementing these policies and shall be denied if circumstances are such that the event will present a clear and present danger to the orderly operation of the College. The applicant shall be accorded a review of any denial of a request for use of College properties. If a request is denied on the basis of a clear and present danger to the orderly operation of the campus, the applicant shall be accorded a prompt appeal to the Dean, who shall recognize the College's heavy burden in justifying such a denial. The review process shall be set out in campus regulations.*

A. REVIEW OF DENIALS

The office of the Director of Student Relations and Services shall administer all permits and issue all denials except those based on a clear and present danger.

31.14 *On College grounds open to the public generally, as may be defined in the campus regulations, all persons may exercise the constitutionally protected rights of free expression, speech, assembly, worship and distribution and sale of noncommercial literature incidental to the exercise of these freedoms; such activities shall not interfere with the orderly operations of the campus and must be conducted in accordance with campus time, place and manner regulations.*

A. PUBLIC AREAS

Hastings' public areas are limited to the outdoor areas in front of 198 and 200 McAllister Street.

32.00 CAMPUS REGULATIONS

32.10 *Campus regulations and procedures shall be designed to protect and promote the rights of members of the campus, prevent interference with College functions or activities and comply with all pertinent laws and College policies.*

A. PRIORITIES FOR USE

1. Academic functions of the College have first priority in use of College facilities.

2. College-sponsored events have priority over non-College events.

3. Events sponsored by registered student organizations have priority over events sponsored by non-College groups.

4. Non-College groups (See §31.10) sponsoring events that are College related may rent Hastings facilities on a space-available, first-come, first-served basis.

32.110 *All use of College properties and services by campus organizations must conform to applicable time, place and manner regulations. Those using College properties and services must avoid any implication that they are sponsored, endorsed or favored by the College unless they are specifically authorized by the College in writing.*

32.111 As *a state instrumentality, the College must remain neutral on religious and political matters. The College cannot sponsor or fund religious activities and cannot sponsor or fund political activities. Registered religious and political campus organizations shall have access to College properties on the same basis as all other campus organizations according to guidelines set forth in campus regulations.*

32.112 The *name, insignia, seal or address of the College or any of its offices or units shall not be used for or in connection with religious or political purposes or activities except as*

consistent with College policies and campus regulations.

32.113 *In correspondence, statements or other material relating to religious or political activities or issues, the College title of a faculty or staff member shall be used only for identification; if such identification might reasonably be construed as implying the support, endorsement, or opposition of the College with regard to any religious or political activity or issue, the identification shall be accompanied by an explicit statement that the individual1s speaking for himself or herself and not as a representative of the College or any of its offices or units.*

32.120 Noncommercial *fund raising by student government and by registered campus organizations shall be permitted pursuant to college policies and campus regulations; noncommercial fund raising by individuals or by other groups also maybe permitted under regulations developed by the campus, consistent with College policy. Appropriate provisions may be made governing the collection of donations, sale of materials, admission charges and financial accountability.*

A. In recognition of the College's public service responsibility, the Dean may approve a limited number of fund raising

programs for charitable organizations and public service agencies.

B. A registered student organization using the College facilities to raise funds must keep adequate and accurate records showing the means by which funds were raised, the uses for which the funds have been or will be spent and the amounts thereof. These records must be kept current. They must be available for inspection and audit by the College. If an audit is required, it may be ordered at the organization's expense.

32.13 *Campus regulations shall permit College students, faculty, staff, registered campus organizations and College units to post and exhibit noncommercial materials at locations designated in campus regulations for that purpose; posting and exhibiting of noncommercial materials by others may be permitted by campus regulations. All such materials shall clearly indicate the name of the sponsoring campus organization, College unit, or other individuals or organizations permitted to post and exhibit pursuant to campus regulations.*

33.00 Speech and Advocacy

33.10 *The time, place and manner of exercising speech and advocacy on the campuses are subject to campus regulations that shall*

provide for non-interference with College functions and reasonable protection to persons against practices which would make them involuntary audiences.

33.11 *It is the responsibility of the Dean to ensure an ongoing opportunity for the expression of a variety of viewpoints.*

33.12 *These policies and campus regulations in no way constitute prohibitions on the right to express political views by any individual in the College community. The college recognizes, supports and shall not abridge the constitutional rights of faculty, students or staff to participate, either as individuals or as members of groups, in the political process of supporting candidates for public office or any other political activity.*

34.00 Registered Campus organizations

34.10 Registration

An organization whose membership is limited to students, faculty or staff of Hastings College of the Law may become a registered campus organization by complying with the requirements and procedures set forth in campus regulations, which shall include the furnishing of a statement of the name of the organization, its purposes, its officers or other authorized representatives and such other pertinent information as may be specified in

campus regulations. Membership in registered campus organizations may be extended to other individuals, under conditions specified in campus regulations. Registration is subject to the condition and provision that Hastings College of the Law and the University of California neither sponsor nor endorse any such organization.

A. Registration

A non-commercial organization whose membership is limited to Hastings students may become a registered student organization by complying with the following requirements and procedures:

1. At the time of registration, an organization shall file a copy of its constitution or an equivalent document (and if it has them, bylaws), which shall include the name of the organization, a statement of its purpose, its requirements for membership (including fees), the method of selecting officers and its organizational structure and procedural rules.

2. At the time of registration and at the beginning of each semester there after, the organization shall file the name of its College advisor, if any,

the names, addresses and telephone numbers of members to whom inquires about the organization are to be referred and the name of the member of the organization who is designated as responsible for reserving rooms on behalf of the organization.

3. Amendments to any of the above must be filed when they occur.

4. Said documents and a registration form must be filed with and approved by the Director of Student Relations and Services at the beginning of each academic year.

    a. Allocation of Student Fees to campus organizations shall be done only after written notice that the allocation is being considered and the organization is given a full opportunity to openly present its request to the Finance Committee and to the ASH Council.

B. Advisors to Organizations
Registered student organizations are encouraged to have a College advisor to provide continuity in programming and to advise the organization in its operations. The advisor, to be chosen by the

organization, should be a member of the faculty, a senior member of the administrative staff, a practicing attorney or other professional with expertise in the organizations field of interest.

C. Rights of Organizations
Subject to the policies and regulations set forth herein, registered student organizations are entitled to the following privileges:

1. To use available Hastings facilities for meetings and other group activities.

2. To use designated Hastings bulletin boards for announcement of interest to organization members and the student body.

3. To use the Student Information Center (SIC) for distribution of organization materials to the Hastings community.

4. To apply for funding to the Associated Students of Hastings (ASH) or other funding sources.

D. Liability of Organizations
Hastings does not sponsor student organizations and therefore does not accept liability for activities of student organizations. Organizations are responsible for their own contracts and for

damages to persons or property resulting from activities sponsored by the organizations.

1. Each organization must agree to comply with the requirement that it inform members and those doing business with the organization that it is not College-sponsored and that the College assumes no responsibility for its activities.

2. The responsibility of officers for the activities of their organizations includes the individual responsibility of each officer for payment in full of debts incurred by the organization.

3. The accounts of all organizations are subject to inspection and/or audit by the College.

34.11 Conduct and Discipline:

Registered campus organizations are required to comply with college policies and campus regulations or they will be subject to revocation of registration, loss of privileges, or other sanctions for violation of such policies or regulations. In denying or revoking registration or applying sanction, campus regulations shall provide an opportunity for a hearing, at the request of the registered campus organization, with basic standards of

procedural due process, before the Director of Student Relations and Services.

34.12 College Name:

A registered campus organization shall not use the name of the University of California, Hastings College of the Law or abbreviations thereof as a part of its own name except with the express written permission of the Director of Student Relations and Services, approved by the Dean and the Board.

On June 7, 2002, the Board of Directors amended the Policy on Nondiscrimination, Section 20 of the Policies and Regulations Applying to College Activities, Organizations and Students as follows.

20.0 POLICY ON NONDISCRIMINATION

The College is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, College-owned student residence facilities and programs sponsored by the College, are governed by this policy of nondiscrimination. The College's policy on nondiscrimination is to comply fully with applicable law.

The University of California, Hastings College of the Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admissions, access and treatment in Hastings-sponsored programs and activities.

On March 6, 1998, the Board of Directors adopted regulations relating to student activity fees. As a result, Sections 34.13 through 35.10 of the Policies and Regulations Applying to College Activities, Organizations and Students are repealed and the following substituted in lieu thereof. On March 10, 2000, the Board of Directors amended paragraph 35.12C, as set forth herein.

35.10 Student Sponsored Activity Fees

The authority to impose, adjust or eliminate mandatory activity fees is vested in the Board of Directors. The Dean is authorized to approve voluntary activity fees, using the registration process to collect the fees from students to support registered student organizations.

35.11 Mandatory Activity Fees

A. A mandatory activity fee is a fee which must be paid by all registered students. It must be germane to the educational mission of the College and it must benefit the student body as a whole by funding student-related services, events and programs, including, but not limited to, student organizations and student government, which make significant contributions to student life.

B. Mandatory activity fees are of two types: 1) a fee imposed for an indefinite term, or 2) a

fee imposed for no more than seven years after which period the fee must be resubmitted to a vote of the student body, as provided in Section 35.12, to be renewed. The first type involves fees which by their very nature benefit the student body as a whole and which provide services and programs which have a long-term horizon, such as the Fitness Center. The second type involves fees which support more focused services and programs which should be reevaluated by the students periodically.

The fee for the Associated Students of UC Hastings (ASUCH), University of California Student Association (UCSA), Fitness Center Equipment Fund, and Tower Gymnasium are indefinite term fees. The fees for the Child Development Center, Student Events and General Assistance Advocacy Program (GAAP) are for terms not to exceed seven years. All new fees (excluding increases to existing Type 1 fees) shall be classified as Type 2 fees.

C. Interim Rules: Beginning with the 1998-99 academic year, limited-term fees which have been in effect for more then seven years must be resubmitted to the student body for a vote to renew these fees. Only one fee per year needs to be reconsidered. The ASUCH Governing Council shall

determine in what order these fees shall be reconsidered by the students.

Fees which have been in effect for less than seven years must be scheduled for reconsideration at the expiration of seven years from the date of approval of the fee by the Board of Directors. If re-approved by the students in accordance with the requirements of Section 35.12 C and D, the fee must be submitted to the Board of Directors for its approval.

35.12 Procedures for Imposition, Adjustment or Elimination of Student Sponsored Mandatory Activity Fee

A. A petition to impose, adjust or eliminate a mandatory activity fee must identify the sponsoring organization and describe in detail the use(s) for which the fee is being sought. The petition shall be submitted to the Office of the General Counsel for a determination as to whether the proposed fee falls within the definition of a "mandatory activity fee", General Counsel's decision shall be reported in the Hastings Weekly and may be appealed to the Board of Directors.

B. The Office of Records will certify the number of registered students as of the date the petition is approved. A "registered" student is a student who has

paid or made arrangements to pay enrollment and related fees to Hastings. The petition must be signed by the lesser of 250 registered students or one-fourth of the registered students in order to place the fee on the ballot. The petition must be submitted to the Office of Records for verification of each of the signatories.

C. The Office of Records shall certify the number of registered students as of the first day of elections. Twenty-five percent (25%) of the registered students must vote on each proposed mandatory fee in order to constitute a valid election of any one fee. No student having any direct interest in the outcome of the election, including participating in the formulation of the ballot measure, may count ballots. No member or officer of the student organization sponsoring the fee may collect or count ballots. If ASUCH is the sponsoring organization, no member of the Governing Council may collect or count ballots. After having been counted, the ballots shall be deposited with the Office of Student Services where they shall be maintained together with the verified petition for four years.

D. Two-thirds (2/3) of those voting is required to impose, adjust or eliminate a fee. The Director of Student Services shall certify the results of the elections to the Dean and

General Counsel and publish them in the Hastings Weekly. General Counsel shall submit a fee which received a majority of those voting to the Board of Directors for its approval.

35.15 Voluntary Activity Fee – Pledge System

A. A voluntary student fee is a fee in support of a specific program or activity sponsored by a registered student organization which serves the mission of the College.

B. The pledge system requires the student to act affirmatively to contribute to a designated program or activity by signing a pledge form agreeing to pay a voluntary fee each academic semester for the duration of the student's attendance at Hastings. The pledge may be terminated by the student by the giving of a written notice of termination to the Office of Fiscal Services. The fee is collected using the College's general student fee billing procedures. A paid fee is non-refundable.

The Office of Fiscal Services shall institute procedures governing the implementation of the pledge program including but not limited to providing a sample of a pledge form and notice of termination.

35.16 Procedures for the Approval of a Voluntary Activity Fee

A. A petition for the approval of a voluntary fee must identify the sponsoring student organization and describe the uses for which the fee is sought. The petition shall be submitted to the Office of the General Counsel for a determination as to whether the proposed fee falls within the definition of "voluntary fee". An adverse decision may be appealed to the Dean.

B. The petition must be signed by no less than 250 registered students. The Office of Records will certify the number of registered students as of the date the petition is approved. The petition must be submitted to the Office of Records for verification of the signatories. The Director of Student Services shall certify the results to the Dean who will authorize the collection of the pledges.

C. No less than ten percent (10%) of the registered students must sign pledges on a form provided by the Office of Fiscal Services to pay the voluntary fee before the collection mechanism is implemented. All pledge forms shall be submitted to the Office of Records for verification of the signatories. The verified petition shall be maintained by the Office of Student Services for four years from the date of the Dean's authorization and the pledge forms for four years from the date they were

signed. The Director of Student Services shall certify to the Office of Fiscal Services the names of the students who submitted the pledges. The collection of the pledges shall be integrated in the general fee collection process.

D. In the event the number of pledges collected is less than ten percent (10%) of the student body, notice thereof shall be given to the student organization which shall have thirty (30) days to satisfy the ten percent (10%) requirement. Failure to meet and maintain the minimum participation requirement will result in the automatic termination of the program.

E. The collected pledges shall be remitted or credited by the Office of Fiscal Services to the sponsoring student organization together with the names of the students who have paid the fees and those of pledgors who have not.

POLICY AND PROCEDURE ON SEXUAL HARASSMENT

1. *Policy.* The University of California, Hastings College of the Law is committed to the creation and maintenance of a community in which students, faculty, and administrative and academic staff can work together in an atmosphere free of all forms of harassment, exploitation, and intimidation. Accordingly, all members of the College community should be aware that sexual harassment is prohibited both by law and by University of California policy and that the College will not tolerate sexual harassment, whether such conduct occurs on or off College property. It is the purpose of this Policy and Procedure on Sexual Harassment to establish standards for the prevention, correction and, where appropriate, discipline of behavior that constitutes sexual harassment

2. *Prohibited Conduct.* No member of the College Community shall engage in sexual harassment.

3. *Definitions.*

   a. *Sexual Harassment.* As used in this policy, the term "sexual harassment" shall mean unwelcome sexual advances or requests for sexual favors,

(1) submission to which is either explicitly or implicitly made a term or condition of the recipient's instruction, employment, or participation in other College-related activity;

(2) submission to or rejection of which is used as a basis for evaluation in making academic or personnel decisions affecting the recipient; or

(3) that have the purpose or effect of unreasonably interfering with the recipient's work or academic performance by creating an intimidating, hostile, or offensive working or academic environment

The term "sexual harassment" also shall mean other speech or conduct of a sexual nature that has the purpose or effect of unreasonably interfering with an individual's work or academic performance by creating an intimidating, hostile, or offensive working or academic environment.

Anything said or done in a classroom or as part of a course or other educational activity is not sexual harassment if the speech or conduct is said or done with a reasonable good faith belief that it is germane to the pedagogical purposes of the College. This exemption applies regardless

of anything to the contrary elsewhere in this policy.

b. *Member of the College Community.* As used in this policy, the term "member of the College community" shall include faculty, students, and administrative and academic staff employees of the University of California, Hastings College of the Law.

Approved by Faculty on December 4, 1996

CONSTITUTION
CHRISTIAN LEGAL SOCIETY STUDENT CHAPTER OF
UC Hastings College of the Law
An Affiliated Student Chapter of the Christian legal Society

Article I. Name

The name of this organization is the Christian Legal Society Student Chapter of UC Hastings College of the Law [insert name of educational institution] ("Chapter"), a group consisting of law students or pre-law students at the named law school or undergraduate institution ("School"). The Chapter is an affiliated student chapter of Christian Legal Society ("CLS"), an Illinois non-profit corporation with its principal offices in Annandale, Virginia.

Article II. Mission and Purposes

Mission. The mission of the Chapter is to maintain a vibrant Christian Law Fellowship on the School's campus which enables its members, individually and as a group, to love the lord with their whole beings–hearts, souls, and minds–and to love their neighbors as themselves. (Matthew 22:37-40).

Purposes. In striving to accomplish this mission, the Chapter shall be guided by the ten purposes set forth in Art I of the CLS bylaws (see appendix 1, Student Chapter Manual) and by the LSM Threefold

Ministry Model, which entails three interrelated activities to be carried out by the Chapter:

- Cultivating spiritual growth through communal prayer, fellowship, and worship; learning to share one's faith; and devotional study of the Bible and classic Christian works.

- Showing the love of Christ to the campus community and the community at large by proclaiming the gospel in word and in deed such as through a life of integrity and charitable good works; as Martin Luther put it, "to be as Christ to our neighbor."

- Addressing the question, "What does it mean to be a Christian in law?" that is, learning to submit every aspect of one's calling in the legal profession to the Lordship of Jesus Christ.

Article III. Statement of Faith

3.1 *Statement of Faith.* All members and officers of this Chapter must agree to and affirm the following Statement of Faith:

Trusting in Jesus Christ as my Savior, I believe in:

- One God, eternally existent in three persons, Father, Son and Holy Spirit.

- God, the Father Almighty, Maker of heaven and earth.

- The Deity of our Lord, Jesus Christ, God's only Son conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.

- The presence and power of the Holy Spirit in the work of regeneration.

- The Bible as the inspired Word of God.

3.2 *Adherence.* All members and officers must endeavor to live their lives in a manner consistent with the Statement of Faith.

Article IV. Membership

4.1 *Equal Opportunity and Equal Access.* In the conduct of all aspects of its activities, the Chapter shall not discriminate on the basis of age, disability, color, national origin, race, sex, or veteran status.

4.2 *Membership.* Membership in the Chapter shall be open to all students at the School who agree with the mission and purposes set forth in Art. II, who sign, affirm, and endeavor to live their lives in a manner consistent with the Statement of Faith set forth in Art. III, and who submit an appropriate application for membership to the CLS. Any Chapter member who, for any reason, ceases to be a student at the School or whose CLS membership expires shall immediately cease to be a member of the Chapter.

4.3 *Eligibility to Vote.* Chapter members are the only persons eligible to vote for Chapter officers and for amendments to this Constitution.

Article V. Officers

5.1 *General.* The Chapter shall adopt bylaws delineating the titles, duties, qualifications, and terms of service of at least three officer positions and shall implement a procedure to insure the election or selection of at least three new officers by April 30. At a minimum, the election of an officer requires a majority vote of the Chapter members. In addition to any local requirements consistent with this Constitution, officers must be enrolled as students at the School, agree with the mission and purposes set forth in Art. II, sign and affirm the Statement of Faith set forth in Art. III, submit an appropriate application for membership to CLS, and endeavor to live their lives in a manner consistent with the Code of Conduct set forth in Paragraph 5.2. Chapter officers shall encourage local participants to join CLS. Any Chapter officer who, for any reason, ceases to be a student at the School or whose CLS membership expires shall immediately cease to be an officer of the Chapter.

5.2 *Code of Conduct.* Officers must exemplify the highest standards of morality as set forth in Scripture, abstaining from "acts of the sinful nature," including those in Galatians 5:19-21; Exodus 20; Matthew 15:19; Romans 1:27; 1 Corinthians 6:9-10. This does not, however, bar all who have ever committed such sins from holding

office, so long as they have since repented of these sins (1 Corinthians 6:11, Ephesians 2:1-9, Titus 3:3-7) and so manifest "the fruit of the Spirit which is love, joy, peace, patience, kindness, goodness, faithfulness, gentleness and self control" (Galatians 5:22-23) that their profession of Christian faith is credible.

5.3 *Transition of Authority.* To insure the continual well-being of the Chapter, outgoing officers shall facilitate the orderly transition of authority by taking adequate time in the winter and spring to train new officers. No later than April 30, the outgoing officers shall mail the Law Student Ministries Annual Reporting form, included as appendix 3 of the Student Chapter Manual, to CLS Law Student Ministries, 4208 Evergreen Lane, Suite 222, Annandale, VA 22003-3264. A copy of this report shall also be provided to the Chapter advisor.

5.4 *Forcible Removal of an* Officer. The removal of a current officer prior to the end of term requires a 75% majority vote of Chapter members.

Article VI. Chapter Advisor

The Chapter officers shall assist the LSM staff to identify a CLS faculty member or local attorney to serve as an advisor to the Chapter. The Chapter advisor must exemplify the same high standards of Biblical morality as set forth in Paragraph 5.2 above: The officers shall meet with the advisor on a regular basis and shall keep him or her informed of chapter meetings, special events, financial matters, problems

within the Chapter or the School, and other relevant matters.

Article VII. Meetings

Chapter meetings shall be held with enough frequency to accomplish the mission and purposes enumerated in Art II; at a minimum at least four (4) general meetings shall be held during each school year. One of the principal goals of meetings shall be to carry out and to plan events and activities designed to carry out LSM's Threefold Ministry Model (see Art. II). The officers, in consultation with the chapter members and advisor, shall determine the frequency, time and place, and agenda of each meeting and shall insure that adequate notice is given of each meeting.

Article VIII. Finances

8.1 *General.* The Chapter may raise revenues through contributions; fundraising activities or by applying for school funds available to student groups. A chapter shall never charge for local dues. If the Chapter chooses to raise revenues, it shall insure that the highest standards of Christian morality and financial integrity are met. At a minimum, the Chapter shall: maintain its funds in a segregated checking or savings account managed according to School standards; require the signatures of two officers to write a check or withdraw funds; incur financial obligations only when there is sufficient funding to honor the obligations; pay all debts in a prompt manner; and

maintain accurate financial records showing all receipts and expenditures and all assets and liabilities of the Chapter. Upon request, the Chapter's financial records shall be made available to Law Student Ministries.

8.2 *Distribution of Assets Upon Chapter Dissolution.* Upon dissolution of the Chapter by the termination of this Constitution or otherwise, all funds and any other assets of the Chapter shall be distributed exclusively for charitable or educational purposes or to CLS or other organizations exempt from federal taxes under Section 501 (c)(3) of the Internal Revenue Code.

Article IX. Restrictions on Activities

The Chapter shall not carry on any activities prohibited by CLS under its bylaws or by Sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code. Without the prior written consent of the CLS Executive Director, the Chapter shall not: be a voluntary party in any litigation; lobby (including the publishing or distribution of statements) or otherwise attempt to influence legislation; or participate or intervene in any political or judicial campaign on behalf of any candidate for office. No part of the net income of the Chapter shall inure to the benefit of its officers or other private persons, except that the Chapter shall be authorized to pay reasonable compensation for services actually rendered and to make payments and distributions in furtherance of its purposes.

Article X. Affiliation Process

To become an affiliated student chapter of CLS, at least three officers who are members in good standing of CLS must sign this Constitution, complete the attached Application for Recognition as a Student Chapter of the Christian Legal Society (encl. 1, "Affiliation Agreement"), and submit the originals of the Constitution and Affiliation Agreement to CLS Law Student Ministries, 4208 Evergreen Lane, Suite 222, Annandale, VA 22003-3264.

The LSM Director shall forward copies of the Constitution and Affiliation Agreement to the CLS Executive Director. If the Executive Director accepts the application, he or she shall send a signed acceptance document (encl. 2, "Acceptance") to the LSM Director, who shall place the original Acceptance in the Chapter file and promptly forward a copy to the Chapter.

Once the affiliation process is successfully completed, the Chapter shall comply with all of the terms and provisions of the Affiliation Agreement, which is hereby incorporated into this Constitution. The affiliated status of the Chapter shall continue in perpetuity, subject to the condition your chapter membership at all times must include at least three student members of CLS. Either party may terminate this status at any time by written notice to the other party.

Article XI. Amendments and Interpretation

Amendments. The Chapter may amend this Constitution by a 75% member vote, provided, however, that no amendment shall have any force or effect unless it has been approved in writing by the CLS Executive Director. Such request for approval must be submitted in writing through CLS Law Student Ministries, 4208 Evergreen Lane, Suite 22, Annandale, VA 22003-3264.

Interpretation. Any conflict or disagreement among chapter officers or members as to the meaning or interpretation of this Constitution shall be submitted in writing to the CLS Executive Director, through the LSM Director. The decision of the CLS Executive Director resolving the conflict or disagreement shall be final. In the event of any conflict or inconsistency between this Constitution and the CLS bylaws, the terms and provisions of the latter shall control.

Article XII. Force and Effect of Constitution

This Constitution shall take effect when the CLS Executive Director executes the Acceptance referred to in Art. X and shall remain in effect until terminated in writing by either party or until the Chapter ceases to meet the qualifications of a CLS student chapter as enumerated in Art. XIII of the CLS bylaws set forth in appendix 1 of this manual. If the Chapter Constitution is terminated, the CLS affiliated student chapter ceases to exist.

CONSTITUTION ADOPTED ON: September 10, 2004

Signed: s/Isaac Fong
Chapter Officer and CLS Student Member
Print name: Isaac Fong

s/Dina Haddad
Chapter Officer and CLS Student Member
Print Name: Dina Haddad

s/Julie Chan
Chapter Officer and CLS Student Member
Print Name: Julie Chan

Constitution of the University of California-Hastings College of the Law Student Chapter of The Association of Trial Lawyers of America (ATLA)

Article 1 – Name

The name of the chapter shall be the Association of Trial Lawyers of America at Hastings (ATLAH).

Article 2 – Objectives

To encourage law students and future trial lawyers to become actively involved in promoting the civil justice system and championing the cause of those who deserve redress for injury to person or property. ATLAH will comply with the Policies and Regulations Applying to College Activities, Organizations and Students.

Article 3 - ATLA Affiliation

By the adoption of this Constitution, and compliance with any other requirement of ATLA, the Student Chapter shall be recognized as an affiliated Student Chapter of ATLA and shall enjoy rights and privileges of affiliation as determined by the ATLA Board of Governors. The Board of Governors, through the ATLA Law School Committee and ATLA staff or other designee of ATLA, shall be entitled to review the programs, activities, and policies of each Student Chapter and may, after appropriate notice to the Student Chapter, rescind affiliation status.

Article 4 – Membership

SECTION 1: The Student Chapter, through the Executive Committee, may establish annual ATLAH membership dues.

SECTION 2: Any law school student in good standing attending the School of Law is eligible for membership (Member) in ATLAH.

SECTION 3: To be a member in good standing in ATLAH, the Member must be a student member in good standing in ATLA and pay any periodic dues of the Student Chapter, provided, however, that the member also continues to adhere to the objectives of the Student Chapter as well as the mission of ATLA.

ARTICLE 5 – OFFICERS

SECTION 1: The Officers shall be the President, Vice President, Secretary, and Parliamentarian.

SECTION 2: The President shall be at least a 2nd year law student. The President shall be the Student Chapter's Chief Executive Officer and shall preside over all meetings of the Executive Committee and Student Chapter.

SECTION 3: The Vice President shall perform such duties as are delegated by the President.

The Vice President shall preside at meetings in the absence of the President.

SECTION 4: The Secretary shall keep the minutes of all Student Chapter and Executive Committee meetings, and shall be the official custodian of all Student Chapter records, direct all official student chapter mailings of notices, and keep an accurate census of membership. The Treasurer may collect all Student Chapter dues and monies, keeping records thereof. The Treasurer shall receive, disburse, and invest the funds of the Student Chapter in the manner directed by the Executive Committee. The Secretary shall also be responsible to submit to the ATLA Manager of Law Student Services or designee all reports on a timely basis as required by ATLA.

SECTION 5: The Parliamentarian shall advise the presiding officers on questions of parliamentarian procedure in accordance with Roberts Rules of Order Newly Revised. The Parliamentarian shall perform such other duties as may be delegated by the President, Executive Committee, and Student Chapter on Constitutional questions.

SECTION 6: The terms of office shall be one (1) year, which shall begin at the close of the last general Student Chapter meeting of each school year, and no officer may succeed himself or herself in the same office.

SECTION 7: In the event of a vacancy in the office of President, the duties, powers and responsibilities of President shall be assumed immediately by the next officer in the line of succession as follows: Vice President, Secretary, Treasurer, Parliamentarian.

In the event of a vacancy in the other offices, notice of the vacancy shall be given to the Members which shall elect to fill the vacancy by majority vote at a meeting to be held not sooner than thirty (30) days after such notice has been given.

For purposes of this Article, a vacancy arises upon the death or resignation of an officer, or upon certification by two-thirds vote of the Executive Committee that an officer is mentally or physically unable to fulfill the duties of office.

ARTICLE 6 - EXECUTIVE COMMITTEE

SECTION 1: The Executive Committee shall be the managing body of the Student Chapter, and shall direct its affairs.

SECTION 2: The Executive Committee shall total nine (9) Members, including all elected Officers as well as five (5) Student Chapter Members appointed by the President, with the approval of a majority of the elected Officers.

SECTION 3: The Executive Committee shall meet at least six times during the school year, with notification of such meetings going to all members of the Committee at least ten (10) days in advance of a regularly scheduled meeting.

SECTION 4: Emergency or special meetings of the Executive Committee may be called by the President, with notification to all Members at least two (2) days in advance of the meeting.

ARTICLE 7 - FACULTY ADVISORS

SECTION 1: The Student Chapter should have a Faculty Advisor who is a professor at the University of California-Hastings College of the Law.

SECTION 2: The Faculty Advisor shall provide guidance to the Executive Committee and the President as needed relating to the activities and programs of the Student Chapter.

ARTICLE 8 - ELECTIONS AND VOTING

SECTION 1: Only Members in good standing as provided hereinabove shall be entitled to vote in any election or hold office in the Student Chapter.

SECTION 2: The Executive Committee may promulgate election rules, which rules shall serve as permanent rules unless amended by

the Executive Committee. The rules may be amended by the Executive Committee at any regular meeting of the Committee; however, any amendment shall not affect any election held within thirty (30) days of the approval of such amendment.

ARTICLE 9 - GENERAL MEETINGS

SECTION 1: General Student Chapter meetings shall be held at least (4) times during the school year, with the final meeting held at the close of the school year for the purpose of electing officers for the following school year.

SECTION 2: Notification of a General Student Chapter meeting must be provided to all Members fourteen (14) days prior to the meetings.

ARTICLE 10 – COMMITTEES

SECTION 1: The Executive Committee may create Standing Committees deemed necessary to operate the Student Chapter on a continuous basis. The Executive Committee shall elect Members to fill positions on Standing Committees with staggered terms so that one-third (1/3) of the terms expire each year. At the beginning of each school year, the Executive Committee shall fill vacancies on each Standing Committee. The President shall appoint the Chair(s) from among the members of the Standing Committee.

SECTION 2: The President may appoint such other Committees at his/her discretion. The President shall appoint Members to fill these Committees and appoint the Chair of each Committee.

SECTION 3: The Executive Committee shall by two-thirds (2/3) vote of all members on the Committee have the power to remove any Committee member or Chair.

ARTICLE 11 – AMENDMENTS

SECTION 1: This Constitution may be amended at the General Membership meeting of the Student Chapter by three quarters (3/4) of the Members present, or two-thirds (2/3) of the membership, whichever is less.

SECTION 2: An amendment must be proposed to the President or Secretary/Treasurer in writing not less than two (2) months prior to the General meeting at which the amendment will be considered, and (1) be approved by the Executive Committee and (2) be circulated in writing to the Members fourteen (14) days prior to the meeting at which the amendment will be considered.

ARTICLE 12 – BYLAWS

SECTION 1: The Executive Committee may adopt a set of Bylaws subject to the approval of the majority of Members.

SECTION 2: Adopted Bylaws shall not be inconsistent with this Constitution.

Bylaws of the HASTINGS DEMOCRATIC CAUCUS ("HDC")

First Adopted August 15, 2002

ARTICLE 1 NAME OF ORGANIZATION

Section 1 The name of this organization shall be the Hastings Democratic Caucus (HDC)

ARTICLE 2 CALIFORNIA YOUNG DEMOCRATS; CHARTER MEMBERSHIP

Section 1 The Hastings Democratic Caucus shall be an official chapter of the California Young Democrats (CYD) and, as such, shall register and meet all charter requirements of the California Young Democrats

Section 2 Unless explicitly set forth herein, this organization shall operate under the constitution and bylaws of the statewide California Young Democrats.

ARTICLE 3 PURPOSE

Section 1 The Hastings Democratic Caucus shall endeavor to advance Democratic party principles with a sensitivity to the issues and demands particular to law students and the generation of citizens 35 years old and younger.

Section 2 The HDC shall execute this objective through the following purposes, in compliance with the Policies and Regulations Applying to College Activities, Organizations, and Students of the University of California, Hastings College of the Law:

Section 3 HDC shall endeavor to create a social and professional network for its members;

Section 4 HDC shall endeavor to create volunteer and professional opportunities for its members;

Section 5 HOC shall endeavor to create a forum in which members may explore current social, legal, and public policy issues.

ARTICLE 4 MEMBERSHIP

Section 1 Active members are those who have paid mandatory dues and shall be called "Caucus Members."

Section 2 Membership shall be restricted to full-time students at Hastings. Thus, any full-time student at Hastings may become a member of HDC so long as they do not exhibit a consistent disregard and lack of respect for the objective of the organization as stated in Article 3, Section 1.

Section 3 There shall be mandatory dues in the amount of $10US per member per academic year for membership in the HDC.

Section 4 Membership rules shall not violate the Nondiscrimination Compliance Code of Hastings.

ARTICLE 4 OFFICERS; GENERALLY

Section 1 The officers of this organization shall consist of at least Seven Executive Board Members, which shall include a Chair, an Executive Director, an Outreach Director, a Finance Director, a Communications Director, a 3L Representative, 2L Representative, and a IL Representative.

Section 2 The member holding the office of Finance Director shall not serve in any other office of the organization.

Section 3 The officers shall perform duties prescribed by these bylaws and by the parliamentary authority adopted by this organization.

Section 4 All active members are eligible for the Executive Board.

Section 5 Only ILs, who are active members, are eligible for IL Representative. Only 2Ls can be 2L Representatives and 3Ls 3L Representatives.

Section 6 The method of nomination shall be from an active member. Officers of the organization shall be elected by secret ballot to serve for one academic year. Elections shall be held at a regular meeting during the Spring Semester and all officers shall take office the following meeting after their election and shall remain in office until their successors are elected.

Section 7 Only active members may vote for officers or are eligible for office.

Section 8 If the office of Chair shall become vacant for any reason, the Executive Director shall either fill the vacancy for the remainder of the term or elect to assume the complete duties of that office. If any office other than Chair shall become vacant, that vacancy shall be filled by an appointment by the Chair and unanimous approval of the Executive Board.

Section 9 The Chair shall create Executive Board positions as she or he deems appropriate with the majority approval of the current Executive Board.

Section 10 No officer shall be eligible to serve for more than 1 term in the same office (one academic year).

ARTICLE 5 OFFICERS; DUTIES

Section 1 CHAIR: The Chair shall serve the following functions:

Section 2 Generally, the Chair shall be responsible for strategy and external functions of the organization, including serving as the organization's principal fundraiser.

Section 3 Ensure the club registers as a chapter with the CYD (as long as the members approve), and develops relationships with senior party members on the appropriate County and AD Committees, with CDP Executive Committee members living near the club, and with CYD clubs and CYD officers in the club's CYD region;

Section 4 Ensure that regular meetings occur of the club (recommended at least four times a year);

Section 5 Represent the club at CYD statewide and regional meetings (or send a representative);

Section 6 Ensure that the club develops and implements a plan for political action;

Section 7 Provide regular updates to the appropriate CYD Regional Director;

Section 8 Guide the club to recruit new members, and to involve all members in Democratic Party participation.

Section 9 If an Advisory Board is established, report to such Board every quarter on the status of the organization.

Section 10 At the end of the term, prepare a transition binder for the incoming HDC Chair which shall include all pertinent administrative and financial documents.

Section 10 EXEC JTIVE DIRECTOR:
The Executive Director shall serve the following functions:

Section 11 Generally, the Executive Director shall be responsible for day-to-day management and the internal functions of the organization.

Section 12 The Executive Director shall carry out duties assigned by the club, and shall serve as backup to the President for the above duties;

Section 13 The Executive Director shall focus on Member retention and services;

Section 14 The Executive Director shall keep organizational records, and shall comply with any applicable laws;

Section 15 OUTREACH DIRECTOR; The Director of Outreach shall serve the following functions:

Section 16 Generally, the Director of Outreach shall be responsible for membership recruitment and organization activities;

Section 17 The Director of Outreach shall also endeavor to seek cooperative relationships with other similar organizations and or base constituencies to fulfill organizational purposes;

Section 18 FINANCE DIRECTOR; the Director of Finance shall serve the following functions:

Section 19 Generally, the Director of Finance shall be responsible for managing the fiduciary obligations of the organization;

Section 20 The Director of Finance shall assist the Chair in her or his duties as principal fundraiser;

Section 21 The Director of Finance shall work with the Executive Director and Chair to ensure that all membership dues are paid and a current list of caucus members;

Section 22 The Director of Finance shall keep financial records, and shall comply with any applicable laws;

Section 23 COMMUNICATIONS DIRECTOR; the Director of Communications shall serve the following functions:

Section 25 Generally, the Director of Communications shall be responsible for communicating Democratic Party policy (message), HDC events, HDC-related information, and other activities or communications the Executive Board deems appropriate, to the Members, Student Body and other interested groups.

Section 26 1L REPRESENTATIVE; the IL Representative shall serve the following functions:

Section 27 Generally, the IL Rep shall be responsible for creating the IL Committee, which shall be composed of representatives from each Section, and

shall represent the views of the current 1L class.

Section 28 2L REPRESENTATIVE; the 2L Representative shall serve the following functions:

Section 29 Generally, the 2L Rep shall represent the views of the current 3L class.

Section 30 3L REPRESENTATIVE; the One-L Representative shall serve the following functions:

Section 31 Generally, the 3L Rep shall represent the views of the current 3L class.

ARTICLE 6 MEETINGS

Section 1 The regular meetings of the organization shall be held at least once every 30 days from September to April, unless otherwise ordered by the organization.

Section 2 A regular meeting shall consist of reports from officers.

Section 3 Special meetings can be called by either of the Chair or by the request of five active members. At least two days notice is required.

Section 4 Forty percent (40) of the entire active membership (rounded up) shall constitute a quorum for the transaction of business, but less than a quorum may adjourn any meeting.

Section 5 The Chair shall preside over all the regular meetings of the organization.

Section 6 Each member shall be allowed one vote at club meetings. Proxy voting shall not be allowed for elections or other purposes unless specifically allowed by the club prior to the meeting.

ARTICLE 6 PARLIAMENTARY AUTHORITY

Section 1 The rules contained in the current edition of Robert's Rules of Order Revised shall govern the organization in all cases to which they are applicable and in which they are not inconsistent with these bylaws and any special rules of order the organization may adopt.

ARTICLE 7 AMENDMENT of BYLAWS

Section 1 These bylaws can be amended at any regular meeting of the organization by a two-thirds (2/3) vote, provided that the amendment has been submitted in writing at the previous meeting.

BYLAWS
Of the
HASTINGS HEALTH LAW JOURNAL
DEVELOPMENT TEAM

These are the bylaws of the Hasting Health Law Journal Development Team, a Hastings College of the Law student organization created and maintained in accordance with The Handbook for Student Organizations.

Article 1. Name of the organization.

This organization shall be named the Hastings Health Law Journal Development Team, hereinafter referred to as HHLJDT.

Article 2. Purpose of the organization.

This organization seeks to provide an interdisciplinary forum for discussion amongst academics and professionals in the areas of law and medicine. We also seek to foster discussion and scholarship in published format in the areas of health law, policy, practice, etc. The above will include legal, medical, social and professional discussions of law, medicine, and practice effecting consumers, professionals and the law.

Article 3. Membership.

Section 1. Membership shall be open to all Hastings students who have demonstrated the commitment and ability conducive to HHLJDT's organization and

purpose. Members must meet all Hastings requirements for participation in student organizations. In lieu of fees, members will be expected to contribute to the development and creation of the Hastings Health Law Journal. Contributions may include, but are not limited to, fundraising activities.

Section 2. The Advisory Committee shall be comprised of Hastings faculty and those practitioners and academics who have demonstrated expertise in the areas of law, medicine, and/or the intersections thereof. The Advisory Committee is comprised of the following individuals, thus far:

A) Lawrence Gostin: Professor of Law and Public Health, John Hopkins University, Georgetown Center for Law and Public Health
B) Dr. Anthony Mascola, MD: Fellow, Stanford Medical Center, Department of Psychiatry and Behavioral Medicine
C) Laurence Kessenick: Adjunct Professor, UC Hastings College of Law; Partner Hanson Bridgett, LLP
D) Dr. Larry Crane, MD: Chief Resident Internal Medicine, Stanford University Medical Center
E) Dr. Ross Downey, MD: Chief Resident Internal Medicine, Stanford University Medical Center
F) Stewart Agras, MD: Emeritus Professor of Psychiatry and Behavioral, Medicine Stanford University Medical Center
G) Tom McCarthy: O'Brien Center for Scholarly Publications, UC Hastings College of Law
H) Prospective UC Hastings Faculty Members: Professor Ugo Mattei.

Professor Marsha Cohen
Professor Lois Weithorn
Professor Joseph Grodin
Professor Radhika Rao

Section 3. The University of California, Hastings College of the Law, in accordance with applicable state and federal laws and campus policies, does not discriminate on the basis of race, color, national origin, religion, sex, disability, age, ancestry, citizenship, sexual orientation, status as a veteran or special disabled veteran, or other legally protected class, and it prohibits sexual harassment in its programs and activities. Inquiries about Hastings student-related policies, or the College's compliance with sate and federal laws and campus regulations relating to nondiscrimination, may be directed to the Director of Student Services, Hastings College of the Law, 200 McAllister, San Francisco, CA 94102, or the Office of Civil Rights, U.S. Department of Education, United Nations Plaza, San Francisco, CA, 94102.

Article 4. Officers.

Section 1. Officers of this organization shall consist of a President, Vice President External Affairs, Vice President Internal Affairs, Treasurer, and Secretary.

Section 2. Only Hastings students who have held membership in this organization for a minimum of one semester shall be eligible to be an officer. For Fall 2004, this minimum semester requirement will be waived.

Section 3. Candidates shall be nominated and elected at a generally announced meeting at the beginning of each semester. Only those candidates who meet all membership requirements for this organization are eligible for nomination or election to an officer position.

Section 4. If a vacancy should occur, that office shall be filled by the subsequent officer listed on the following list: president, vice president external affairs, vice president internal affairs, treasurer, and secretary.

Section 5. No member shall hold more than one office at a time and no member shall be eligible to serve more than two consecutive terms in the same office. Terms shall be one semester long.

Section 6. The officers shall perform duties as prescribed by these bylaws and by parliamentary authority adopted by the organization.

Article 5. Meetings

Section 1. The dates of future meetings of this organization shall be determined at each meeting. Meetings may be as often as once a week or as infrequent as once a month.

Section 2. Adequate notice of meetings will be publicized through email, the list serve, postings, and other mediums which are deemed appropriate.

Section 3. Special meetings may be called by the president or by the request of five active members of the organization. At least 2-days notice shall be given to all members.

Section 4. Due to the difficulty of predicting an appropriate number for quorum, proposals shall require majority vote of members in attendance at that meeting.

Section 5. The president of the organization shall preside at all meetings of the organization.

Article 6. Parliamentary Authority

The rules contained in the current edition of Robert's Rules of Order Newly Revised shall govern the organization in all cases to which they are applicable and in which they are not inconsistent with these bylaws and any special rules of order the organization may adopt.

Article 7. Amendment of Bylaws.

These bylaws may be amended at any regular meeting of the organization by a two-thirds vote of those in attendance, provided that the amendment has been submitted in writing at the previous meeting and was publicized through email or the list serve.

These bylaws have been adopted by resolution on September 15, 2004 during general meeting.

Bylaws of the Hastings Motorcycle Riders Club
9/13/2003

Article I Name of Organization

Hastings Motorcycle Riders Club (HMRC)

Article II Purpose

HMRC is an organization whose purpose is to advance the interests of and form a community for motorcycle and scooter riders at UC Hastings College of the Law. We seek to promote socialization and better, safer riding among motorcycle riding students through activities including club rides, skills workshops, and group meetings. We also critically examine University and public policy where it affects motorcyclists. HMRC complies with the Policies and Regulations Applying to College Activities, Organizations and Students.

Article III Membership

Section 1: Any UC Hastings student who owns or rides a motorcycle or scooter, or has an interest in such activities, may join the HMRC. An active member is one who has attended fifty (50) or more of the club's meetings and activities during the current academic year.

Section 2: There are no membership fees or dues.

Article IV Officers

Section 1: The officers of HMRC shall consist of a President, Vice-President, Secretary, and Treasurer.

Section 2: Any member is eligible to run for any office.

Section 3: Officers shall be elected by a show of hands, at the first official meeting of the academic year. Term shall begin immediately after the election.

Section 4: If the office of the President should become vacant for any reason, the vice president shall fill in that vacancy for the remainder of the term. Other vacancies will be filled by a nomination of the president for the remainder of the term.

Section 5: The President is the club leader and the chairman of the meetings. The President is responsible for all activities of the club, its management, projects, and all other aspects of the HMRC and its existence.

Section 6: The Vice President is the executive officer of the club, replacing the president when the latter cannot attend or perform his necessary duties or functions. The Vice President functions at the will and direction to the President in carrying out such projects, activities, requirements, and other missions as the President may require.

Section 7: The Secretary shall be responsible for taking attendance and minutes of meetings and maintaining a current roster with members' names, phone numbers, and email addresses.

Section 8: The Treasurer has responsibility for all monies of the club. The Treasurer will keep financial records and disperse funds, and reimburse members for out of pocket expenses incurred performing club business. The signature of the Treasurer or the President is required for disbursement of HMRC funds.

Section 9: An officer may be removed before the expiration of his term only on his own resignation, or on the motion of another officer at a regular meeting with a quorum of active members in attendance that is passed by a 2/3 majority.

Section 10: Only an officer, or a member appointed by the President, may plan and lead club rides.

Article V Meetings

Section 1: The regular meetings of the HMRC shall be held on the third Friday of every month unless otherwise ordered by the organization.

Section 2: Special meetings can be called only by the President or by a majority of officers. At least two days notice shall be given to all members.

Section 3: Fifty (50) percent of the active members will constitute a quorum, but less than a quorum may adjourn the meeting.

Section 4: The president shall preside at all meetings of the organization.

Article VI Parliamentary Authority

Section 1: The rules contained the current edition of *Roberts Rules of Order Newly Revised* shall govern the organization in all cases to which they are applicable and in which they are not inconsistent with these bylaws and any special rules of order the organization may adopt.

Article VII Amendment of Bylaws

Section 1: These bylaws can be amended at any meeting of the organization by a two thirds vote, provided that the amendment has been submitted in writing at the previous meeting.

BYLAWS
Adopted September 22, 1989
Amended May 3, 1994
Revised September 4, 1996
Revised April 2, 2003
Revised September 16, 2004

ARTICLE I--NAME OF ORGANIZATION

The name of the organization is Outlaw.

ARTICLE II--PURPOSE AND OBJECTIVES

The purpose of the organization is to promote a positive atmosphere at Hastings for lesbians, gay men, bisexuals, transgendered, and queer students. The objective of the organization is to educate the community at large about the issues and concerns specific to lesbians, gay men, bisexuals, transgendered, and queer persons in order to alleviate and eradicate homophobia, transphobia, racism, sexism, and other affronts to the dignity of individual human beings. The group also seeks to promote strong ties between the organization and other student organizations through outreach and community building activities.

ARTICLE III--MEMBERSHIP

Section 1. In order to became a member, an individual must be a full-time student at Hastings and attend one full meeting; after attending that meeting and putting his/her name on the

membership roster, she/he becomes a full voting member at the next meeting.

Section 2. Part-time students, faculty, staff and others associated with Hastings may become honorary members upon attending a meeting and expressing a desire to do so.

ARTICLE IV--OFFICERS

Section 1. The organization shall be run by a Board whose members should reflect the demographic make-up of the general membership. At the start of a new year, the past year's members may elect to continue their Board membership. In the event that there are not enough members to fill the Board, then anyone may volunteer to serve on the Board. Board positions are not to exceed 11 in number. The existing Board decides who will fill open positions on the Board, by majority. In the event that there is a tie voter the vote will be tabled and will be raised at the next meeting. These positions will be ratified by the general membership at the next meeting. This requires at least 70% approval with a quorum of 25%. The ratification process must be reasonably advertised on campus. For members who express interest in the process but cannot attend the meeting, alternative methods of ratification, such as email, must be made available.

Section 2. The Board will elect from amongst its own members two Co-Chairs, one Secretary, and one Treasurer. These positions are 1-year terms. The Co-Chairs' main responsibilities will be to facilitate

Board meetings and to each coordinate at least one education/awareness event each semester. The Board will handle all administrative tasks as well as set the agenda for each meeting. Any full member may also set any issue before the membership, or attend any and all Board meetings.

Section 3. In order to facilitate the maintenance of institutional memory, the Board will maintain and update a binder with relevant information for the Co-Chairs, Secretary, and Treasurer. In addition, if the Secretary or Treasurer will not return to the Board the following year, he/she must take on a first-year liason for the position during the second semester, in order to pass on the necessary information. Lastly, the Co-Chairs, Secretary, and Treasurer must be first or second year students.

Section 4. To remove a Co-Chair, Treasurer, or Secretary from her/his respective position, there must be a supermajority and superquorum. In particular, the Board must have a 80% quorum with 80% approval. The general membership must have 80% quorum and 67% approval at a meeting that advertises its intentions for a removal. Removal shall only occur for just cause, i.e., working against the spirit of the organization's goals and objectives. If a Co-Chair, Treasurer, or Secretary has become inactive, i.e., that there has been a repetitive disregard of duties, then that may be considered cause for removal. When there is a vacancy on the Board, volunteers will fill the position, and they need not be ratified by the general membership. The

Board can re-allocate positions as it sees fit, by a majority vote.

ARTICLE V--SATELLITE GROUPS

Section 1. A satellite group is a group affiliated with Outlaw. It may be formed by two or more members who bring their group and its aims to the attention of the general membership. It must write out a purpose clause for its members. The purpose of the satellite group is to act within and further the objectives of Outlaw. As stated in Article II, the satellite group may be formed to identify and address concerns of specific members and give them a united and organized voice in Outlaw. The satellite group may be formed to educate, enlighten and call to action Outlaw and to help it fully realize its purpose. A satellite group may adopt its own internal decision-making process or adopt Outlaw's decision process. A satellite group must have at least one Board member serve as its sponsor, to both report to the satellite group the activities of the Board as well as report to the Board about the group's activities. At all times, the Board shall remain in charge of approving the financial needs of the group, and will assist with room reservations, day-to-day needs, and other such logistics.

Section 2. The Board has the sole power to sever ties with a satellite group if the Board, in its sole discretion, decides that the purpose(s) of the satellite group no longer serves the purposes and objectives as defined in Art. II. Severance shall only be "for cause," and only for violation of purposes and

objectives in Art. II. In such an event ties between a satellite group and Outlaw are severed, the satellite group must no longer use the name or implicate the support, sponsorship or affiliation of Outlaw.

Section 3. A satellite group may only be dissolved by a 67% vote of the general membership, with 80% quorum.

Section 4. A satellite group is always free to sever from Outlaw at any time, for any reason, in which event the satellite group must no longer use the name or implicate the support, sponsorship or affiliation of Outlaw, unless both the Board and the satellite group mutually agree that a relationship is desired.

ARTICLE VI--MEETINGS

Section 1. General membership meetings shall be held not less than twice a semester, and they may be called as often as the Board and the membership deem necessary.

ARTICLE VII--PARLIAMENTARY AUTHORITY

Section 1. The primary goal of the organization is to decide ALL issues by consensus.

Section 2. If, after a reasonable and concerted effort the members have not reached a consensus, a vote may be proposed by any member. A majority of the Board present must agree that a vote is appropriate before a vote may be taken to decide an issue. A tie

vote by Board members means that no general vote may yet be taken.

Section 3. After a vote has been agreed upon, a resolution will pass if voted for by 80% of the members present.

ARTICLE VII--AMENDMENTS TO BYLAWS

Bylaws may be amended by the same procedure as in a regular decision, with the exception that 90% of the members present must pass the amendment for it to become effective.

ARTICLE IX--GROUP POLICY PER HASTINGS COLLEGE

Outlaw will comply with the policies and regulations applying to college activities, organizations and students, and submit records as required by the college.

SILENCED RIGHT BYLAWS

Heading: Bylaws of Silenced Right
Date: 9-14-04

Article I – Name of Organization

Silenced Right - National Alliance Pro-Life Group of UC Hastings College of the Law.

Article II – Purpose

Silenced Right, a UC Hastings student organization and chapter of National Alliance of Law School Pro-Life Groups, is founded upon the undeniable truth that all human life, from the moment of conception until natural death, is sacred and has inherent dignity. This dignity is to be preserved and sustained through the promotion and defense of the culture of life. Our mission at UC Hastings is to spread the pro-life message on grounds in an attempt to educate the community on the issue of abortion and to save the lives of unborn children.

Article III – Membership

Section 1: Membership is open to all regardless of race, color, national origin, religion, sex, disability, age, ancestry, citizenship, sexual orientation, status as a veteran or special disabled veteran, or other legally protected class.

Section 2: So long as individuals are committed to the goals set out by the leadership, they are welcome to participate and vote in Silenced Right elections.

Section 3: There are no dues or fees for membership in the organization, other than the new membership fee prescribed in Article III, Section I, of these bylaws

Article IV – Officers

Section 1 - Numbers, Titles, and Duties of Officers: The officers of this organization shall consist of a president, vice president, secretary, treasurer, and program chair. These officers shall perform the duties prescribed by these bylaws and by the parliamentary authority adopted by the organization.

Section 2 - The Eligibility Requirements of the Officers: Any registered student is eligible to hold office or head special committees.

Section 3 - The Method of Nomination: The method of nomination shall be from the floor by an active member. Officers of the organization shall be elected by secret ballot to service for one academic year. Elections shall be held during the spring semester at the annual business meeting in April and all officers shall take office the following meeting after their election and shall remain in office until their successors are elected.

Section 4 - The Method of Filling Vacancies: If the office of president should become vacant for any reason, the vice president shall fill that vacancy for the remainder of the term. If any office other than the president shall become vacant, that vacancy shall be filled by appointment by the president for the remainder of the term.

Article V – Meetings

Section 1: The regular meetings of this organization shall be held the first Wednesday of each month from September to April unless otherwise ordered by the organization.

Section 2: The regular meeting on the first Wednesday in April shall be known as the annual meeting and shall be for the purpose of electing officers and receiving reports of officers and committees.

Section 3: Special meetings can be called by the president or by the request of five active members of the organization. At least two-days notice shall be given to all members.

Section 4: Fifty-one percent of the entire active membership shall constitute a quorum for the transaction of business, but less than a quorum may adjourn any meeting.

Section 5: The president of Silent Right shall preside at all meetings of the organization.

Article VI – Parliamentary Authority

Section 1: The rules contained in the current edition of Roberts Rules of Order Newly Revised shall govern the organization in all cases to which they are applicable and in which they are not inconsistent with these bylaws and any special rules of order the organization may adopt.

Article VII – Amendment of Bylaws

Section 1: These bylaws can be amended at any regular meeting of the organization by a two-thirds vote, provided that the amendment has been submitted in writing at the previous regular meeting.

Bylaws of the VIETNAMESE AMERICAN LAW SOCIETY ("VALS")

September 2002
Revised September ~~2003~~ 2004

ARTICLE 1 NAME OF ORGANIZATION

Section 1 The name of this organization shall be the Vietnamese American Law Society or "VALS." Correspondence shall be addressed to VALS, Hastings College of the Law, 200 McAllister Street, San Francisco, CA 94102, or email at valshastings@hotmail.com.

ARTICLE 2 PURPOSE

Section 1 VALS shall celebrate Vietnamese culture and provide a social network for whomever is interested.

Section 2 VALS shall execute this objective through the following purposes, in compliance with the Policies and Regulations Applying to College Activities, Organizations, and Students of the University of California, Hastings College of the Law:

Section 3 VALS shall endeavor to create a social and professional network for its members;

Section 4 VALS shall endeavor to create service opportunities for its members to the Vietnamese American community and other communities of need, and;

Section 5 VALS shall endeavor to create forums in which its members and their fellow students may learn about and be exposed to Vietnamese culture, how Vietnamese Americans and culture shape the contemporary state of American society, and relations between the United States and Vietnam.

ARTICLE 3 MEMBERSHIP

Section 1 Membership shall be restricted to full-time student at Hastings. Thus, any full-time student at Hastings may become a member of VALS so long as they do not exhibit a consistent disregard and lack of respect for the objective of the organization as stated in Article 2, Section 1.

Section 2 There shall be no mandatory dues or fees for membership in VALS.

Section 3 Membership rules shall not violate the Nondiscrimination Compliance Code of Hastings.

ARTICLE 4 OFFICERS

Section 1 The officers of this organization shall at least consist of a President/Co-presidents, Treasurer, and 1L Representative. The President/Co-Presidents and Treasurer will determine if it is necessary to have other officer positions.

Section 2 The member holding the office of Treasurer may also be Co-President.

Section 3 The officers shall perform duties prescribed by these bylaws and by the parliamentary authority adopted by this organization.

Section 4 All active members are eligible for an officer position.

Section 5 The method of nomination shall be from an active member. Officers of the organization shall be elected by secret ballot to serve for one academic year. Elections shall be held at a regular meeting during the Spring Semester and all officers shall take office the following meeting after their election and shall remain in office until their successors are elected. 1L representatives will be elected during the Fall Semester.

Section 7 Active members are those who have attended at least one regular meeting during the academic year.

Section 8 Only active members may vote for officers or are eligible for office.

Section 9 If the office of President shall become vacant, the Treasurer will become the new President. If there are Co-Presidents, and one Co-President's position becomes vacant, the other Co-President will be the new President.

Section 10 No officer shall be eligible to serve for more than 1 term in the same office (one academic year).

ARTICLE 5 OFFICERS; DUTIES GENERALLY

Section 1 The President/Co-Presidents shall be the chief executive officer(s) of VALS, and shall be the representative of the organization.

Section 2 The Treasurer shall assume any duty necessary to assist the President and other officers in fulfilling the organization's objectives.

Section 3 The Treasurer is the chief financial officer of VALS, and shall ensure the financial integrity of the organization.

Section 4 The 1l Representative shall represent the First Year Class.

ARTICLE 6 MEETINGS

Section 1 The regular meetings of the organization shall be held at least once every 30 days from September to April, unless otherwise ordered by the organization.

Section 2 A regular meeting shall consist of reports from officers.

Section 3 Special meetings can be called by either of the President or by the request of the Treasurer and 1L Representative. At least two days notice is required.

Section 4 Fifty-One percent (51) of the entire active membership shall constitute a quorum for the

transaction of business, but less than a quorum may adjourn any meeting.

Section 5 The President/Co-Presidents shall preside over all the regular meetings of the organization. When the President/both Co-Presidents cannot preside over a meeting, the Treasurer shall do so.

ARTICLE 7 PARLIAMENTARY AUTHORITY

Section 1 The rules contained in the current edition of Robert's Rules of Order Revised shall govern the organization in all cases to which they are applicable and in which they are not inconsistent with these bylaws and any special rules of order the organization may adopt.

ARTICLE 8 AMENDMENT of BYLAWS

Section 1 These bylaws can be amended at any regular meeting of the organization by a two-thirds (2/3) vote, provided that the amendment has been submitted in writing at the previous meeting.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
JUL 8 - 2009
OFFICE OF THE CLERK

No. 08-1371

IN THE

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR HASTINGS COLLEGE OF THE LAW RESPONDENTS

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QUESTION PRESENTED

Whether a public university law school may require student organizations, as a condition of granting such organizations access to school funding and other benefits, to comply with a viewpoint-neutral nondiscrimination policy.

LIST OF PARTIES

On July 1, 2009, Respondent Leo P. Martinez became the Acting Chancellor and Dean of the University of California, Hastings College of the Law; he is substituted for the former Chancellor and Dean, Nell Newton, pursuant to RULE 35.3. The remaining Respondents are Jacqueline Ortega, the Director of Student Services; and Donald Bradley, Tina Combs, Maureen Corcoran, Marci Dragun, Carin T. Fujisaki, Claes H. Lewenhaupt, James E. Mahoney, Brian D. Monaghan, and Bruce L. Simon, the members of the Board of Directors of the University of California, Hastings College of the Law, in their official capacities.

The University of California, Hastings College of the Law is a government entity.

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STATEMENT OF THE CASE

In its unpublished two-sentence memorandum disposition below, the court of appeals affirmed summary judgment for Respondents based on a factual record comprised principally of a lengthy joint stipulation of facts. Pet. App. 1a-3a; ER 335-425. The Petition contains an incomplete account of the pertinent undisputed facts.

A. Hastings' Registration of Student Groups And The Policy On Nondiscrimination.

Respondents are the Chancellor and Dean, Director of the Office of Student Services, and individual members of the Board of Directors of Hastings College of the Law ("Hastings" or the "College"), a public law school in San Francisco that is part of the University of California. Pet. App. 6a-7a. Like many public universities, Hastings permits students to "register" student organizations with its Office of Student Services. *Id.* at 7a. To be a registered student group, the group must be a "non-commercial organization whose membership is limited to Hastings students." *Id.* at 83a.

Student organizations must be registered to obtain various benefits provided by the law school, including use of the Hastings name and logos, the use of certain means of communicating with Hastings students, access to particular law school facilities, and eligibility to apply for limited funds. *Id.* at 7a, 85a.[1] Hastings maintains this

1. Non-registered student organizations have access to bulletin boards and other means of communication with students and are also eligible to apply for permission to use rooms at the law school for meetings. ER 339 ¶¶10, 11, 348 ¶61.

registration system to provide its law students with opportunities to pursue academic and social interests outside the classroom that further their education, contribute to developing leadership skills, and generally contribute to the Hastings community and experience. ER 518 ¶4.

Only student groups that agree to abide by the College's Policies and Regulations Applying to College Activities, Organizations and Students ("Policies and Regulations") are eligible for registration. Pet. App. 8a, 72a-98a. This includes the Policy on Nondiscrimination (the "Nondiscrimination Policy" or "Policy"). *Id.* at 8a, 88a. The Policy provides:

> The College is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, College-owned student residence facilities and programs sponsored by the College, are governed by this policy of nondiscrimination. . . .
>
> The University of California, Hastings College of the Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.

Id. at 8a-9a, 88a.

As Petitioner Christian Legal Society ("CLS") acknowledges (Pet. 2), during the 2004-2005 academic year, when the instant dispute arose, Hastings recognized approximately sixty registered student organizations, including groups devoted to various academic, political, religious, cultural and athletic topics or pursuits. Pet. App. 109a-150a (bylaws of selected organizations).[2]

The parties stipulated, and the district court found, that Hastings interprets the Policy as requiring registered groups to allow *any* interested student to participate, become a member or seek leadership positions in the group, regardless of the student's status or beliefs. *Id.* at 9a. As the Ninth Circuit observed,

> The parties stipulate that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group.

Id. at 2a. Hastings has concluded that this policy helps ensure that those groups to which it provides funding and other benefits are furthering the general purposes of Hastings' registration system and that the educational and social opportunities these groups offer are available to all students. ER 518 ¶5. The Policy thereby encourages tolerance, cooperation, and learning

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2. Those groups included three religious organizations: the Hastings Association of Muslim Law Students, the Hastings Jewish Law Students Association, and Hastings Koinonia. ER 355, 357.

among students of different backgrounds and viewpoints. *Id.*

CLS asserts that "Hastings has recognized many groups whose constitutions provide that their officers and voting members should agree with their organizations' missions and viewpoints." Pet. 5. However, the record establishes that in their constitutions or bylaws, every other registered student organization expressly adopted the Nondiscrimination Policy and opened its membership to "any" or "all" Hastings students.[3] While some of those bylaws refer to the groups' interests or objectives, Hastings has always interpreted those references as informational only, not as authorizing those organizations to deny membership to any Hastings student interested in joining. Pet. App. 65a. In fact, the district court found that none of these bylaw provisions was ever used as a basis for denying membership to any interested student. *Id.* at 64a-66a.

CLS correctly contends that it is "the only group from which Hastings has ever withheld recognition." Pet. 3. No other student organization had ever refused to comply with Hastings' Nondiscrimination Policy, and none has a membership policy like CLS's, which explicitly prevents Hastings students from joining on the basis of their religion, sexual orientation or any other protected

3. *See* Pet. App. 109a, 110a (Association of Trial Lawyers of America at Hastings); *id.* at 118a (Hastings Democratic Caucus); *id.* at 127a, 129a (Hastings Health Law Journal Development Team); *id.* at 132a (Hastings Motorcycle Riders Club); *id.* at 136a-137a, 141a (Outlaw); *id.* at 142a (Silenced Right – National Alliance Pro-Life Group); *id.* at 147a (Vietnamese American Law Society).

status. Hastings has never received a complaint that any registered student organization discriminates on the basis of religion or sexual orientation. ER 341 ¶19. Since the Nondiscrimination Policy was adopted, no student organization at Hastings other than CLS has ever sought to be exempted from complying with it. ER 340 ¶16.

B. For Ten Years Prior To 2004-2005, CLS Did Not Restrict Eligibility For Membership Or Leadership Positions.

CLS's Petition does not address the district court's findings, based on the parties' detailed stipulation of facts, regarding CLS's history at Hastings. For ten years, from 1994-1995 through 2003-2004, a student group known as Hastings Christian Legal Society or Hastings Christian Fellowship ("HCF") was a registered student organization at Hastings. *Id.* at 9a.[4] Through the 2001-2002 academic year, these groups used bylaws sent to student chapters throughout the years by the national Christian Legal Society ("CLS National"), an association of Christian lawyers, law students, law professors, and judges that maintains attorney and law student chapters across the country. Those bylaws provided that the group would comply with Hastings'

---

4. In pre-filing correspondence and verified pleadings, CLS alleged that it was identical to or affiliated with these predecessor student groups. Thus, CLS referred to itself in the complaint as "Plaintiff Hastings Christian Fellowship" and "a/k/a HCF." ER 72 ¶1.1, 73-74 ¶¶2.1, 3.3; *see also* ER 404 (CLS letter asserting that Hastings' chapter of CLS "has been affiliated with the national Christian Legal Society since at least 1989").

Policies and Regulations. *Id.* In the 2002-2003 and 2003-2004 academic years, the group used a different set of bylaws that stated that all students were welcome to become members. *Id.* at 10a ("HCF welcomes all students of the University of California, Hastings College of Law"). These groups did not bar gay and lesbian or non-Christian students from membership or leadership positions. *Id.*

During the 2003-2004 academic year—the year immediately before CLS filed this litigation—HCF welcomed an openly lesbian student as a regular participant in its meetings, which included group prayers and Bible studies, and at least two participants held beliefs inconsistent with what CLS considers to be "orthodox" Christianity. *Id.* at 10a. Dina Haddad, an HCF member who the following year became CLS's Vice President, did not regard the lesbian student's presence or participation as inconsistent in any way with the group's tenets and faith; to the contrary, she testified, "It was a joy to have her." ER 447:25-448:3. Likewise, at oral argument before the district court, CLS's counsel expressly conceded that the student's participation in HCF did not burden its message in any way:

> But the point is not that that student changed the contents of the organization's expression by her participation. She did not. She simply exchanged views. They learned from each other as students in any club should. They respect one another. But *the contents and expression of CLS at Hastings was not changed in any way nor could it have been.*

ER 663:24-664:4 (emphasis added).

C. In 2004-2005, CLS Changes Its Bylaws And Refuses To Comply With Hastings' Nondiscrimination Policy.

At the close of the 2003-2004 academic year, three students—Isaac Fong (President), Dina Haddad (Vice President), and Julie Chan (Treasurer)—assumed leadership of Hastings Christian Fellowship. Pet. App. 11a. During the summer of 2004, they decided to formally affiliate the group with CLS National. *Id.*

CLS-National required CLS to adopt a specific set of bylaws to become a formal student chapter. *Id.*; *id.* at 99a-108a (constitution of CLS chapter). The bylaws require any student who wants to become a member to sign a "Statement of Faith" which provides:

> Trusting in Jesus Christ as my Savior, I believe in:
>
> - One God, eternally existent in three persons, Father, Son and Holy Spirit.
> - God the Father Almighty, Maker of heaven and earth.
> - The Deity of our Lord, Jesus Christ, God's only Son conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
> - The presence and power of the Holy Spirit in the work of regeneration.
> - The Bible as the inspired Word of God.

Id. at 11a, 100a-101a.

CLS will not permit students who do not sign the Statement of Faith to become members or officers. *Id.* at 12a. In addition, CLS interprets the Statement of Faith as barring gay and lesbian students from becoming members or officers of the group. *Id.*; ER 75 ¶3.8, 344 ¶¶34-35, 404 ("A person who engages in homosexual conduct . . . would not be permitted to become a member or serve as [a CLS] officer").[5]

CLS's bylaws commit the chapter not to discriminate in all aspects of its activities, including membership, "on the basis of age, disability, color, national origin, race, sex, or veteran status" – but they do not bar discrimination on the basis of religion or sexual orientation. *Id.* at 101a. Accordingly, when CLS submitted its bylaws to Hastings at the beginning of the 2004-2005 academic year, Hastings requested that CLS change them to conform with the Nondiscrimination Policy, and specifically to affirm that CLS would not discriminate on the basis of religion or sexual orientation. *Id.* at 12a. Hastings informed CLS that to become a recognized student organization, CLS would

5. CLS admits that "[a] person who advocates or unrepentantly engages in sexual conduct outside of marriage between a man and a woman is not considered to be living consistently with the Statement of Faith and, therefore, is not eligible for leadership or voting membership." Pet. 8. However, it asserts that a person's "mere experience of same-sex or opposite-sex sexual attraction" is not determinative. *Id.* The district court found this to be "a distinction without a difference." Pet. App. 22a (citing *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) (rejecting attempt to distinguish statute discriminating against "homosexual conduct" from one discriminating on the basis of sexual orientation)).

have to open its membership to all students irrespective of their religion or sexual orientation. *Id.* When CLS refused, Hastings informed CLS that it could not become a registered student group, and withheld certain travel funds previously set aside for CLS's officers to attend CLS-National's annual conference. *Id.* at 6a, 12a-13a.[6] However, Hastings informed CLS that it nevertheless could use Hastings' facilities for its meetings and activities. *Id.* at 8a; *see also* ER 348 ¶61, 422. CLS never requested to use such facilities for its chapter meetings during the 2004-2005 academic year. *Id.*

D. CLS's Activities During The 2004-2005 Academic Year.

Although it was not a registered student organization, at the beginning of the 2004-2005 academic year CLS participated in the annual Student Organizations Faire on campus. ER 346 ¶45. During the year, it held weekly Bible-study meetings, and hosted a beach barbeque, a Thanksgiving dinner, a campus lecture on the Christian faith and legal practice, several fellowship dinners, an end-of-year banquet, and several informal social activities. Pet. App. 13a. CLS also invited Hastings students to attend Good Friday and Easter Sunday church services with the organization. *Id.* The Bible studies were led by one of CLS's officers, but any attendee or member was welcome to lead the group in prayer, share prayer requests, and otherwise participate in prayer. *Id.* CLS made no distinction in that regard between "members" of CLS who had signed the Statement of Faith and "attendees" who had not.

6. The withheld funds totaled $250.00. ER 344-46 ¶¶37, 42.

Between nine and fifteen Hastings students regularly attended CLS's meetings and activities during the 2004-2005 academic year. *Id.* Other than CLS's three officers, only one other student signed the Statement of Faith and thereby became a member of CLS. *Id.* No known non-Christian, gay, lesbian, or bisexual students sought to join CLS as a member or officer, or to attend any of its meetings during the 2004-2005 academic year. *Id.* Other than its officers, CLS did not identify to the public who was or was not a "member" or authorize any member or officer to speak for it. ER 478-79. Aside from requiring that members or officers sign the Statement of Faith, CLS did not have any procedure for ensuring that its members or officers are not gay or non-Christian or engaging in conduct it views as inconsistent with that Statement. ER 457:12-458:5.

E. Proceedings in the District Court.

Shortly after Hastings informed it that to become a registered student organization, CLS would have to open its membership to all students, CLS filed suit, alleging that "[b]y enacting and enforcing the Policy on Nondiscrimination forbidding [CLS] to discriminate on the basis of religion and sexual orientation," Hastings had violated its constitutional rights. ER 80 ¶¶5.2, 6.2, 7.2, 81 ¶9.2; *see also* ER 78 ¶4.2, 79 ¶4.9 (asserting that CLS "would still consider religion and sexual orientation in the selection of officers and members," and objecting to Policy's requirement that CLS open membership and leadership positions to all students). CLS asserted claims for violation of its rights to freedom of expressive association and free speech pursuant to the First Amendment, the Establishment and Free Exercise

Clauses of the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Pet. App. 14a. The district court dismissed CLS's establishment, due process, and equal protection claims, with leave to amend the equal protection claim. *Id.*

On cross-motions for summary judgment, the district court denied CLS's motion and granted the motions filed by Hastings and Hastings Outlaw, a lesbian and gay student group that had intervened in the action. *Id.* at 5a. The district court first rejected CLS's claim that Hastings' Nondiscrimination Policy violates its right to free speech, holding that both on its face and as applied to CLS, that Policy regulates conduct, not speech. *Id.* at 16a-24a. The court reasoned that like similar state nondiscrimination laws, "the Nondiscrimination Policy regulates conduct, not speech because it affects what CLS must *do* if it wants to become a registered student organization – not engage in discrimination – not what CLS may or may not *say* regarding its beliefs on non-orthodox Christianity or homosexuality." *Id.* at 21a. The court found further that the evidence, including the history of CLS's predecessor organizations at Hastings, "does not show that CLS has been precluded from expressing any particular idea or viewpoint," or that the Policy "targets speech as opposed to conduct." *Id.* at 23a.

The district court held that Hastings' enforcement of the Nondiscrimination Policy did not unconstitutionally infringe CLS's freedom of speech under the standard in *United States v. O'Brien*, 391 U.S. 367 (1968). *Id.* at 24a-27a. Alternatively, the court found that even if the Nondiscrimination Policy may be construed as regulating speech directly, it passes constitutional muster under this

Court's forum analysis. *Id.* at 27a-38a. In particular, the court held that by restricting registration to non-commercial student groups that comply with its policies and open their membership to all students, and by making funds available to such organizations, Hastings created a limited public forum. *Id.* at 30a. Restrictions on access to such a forum are permissible so long as they are viewpoint-neutral and reasonable. *Id.*

The district court found both factors satisfied. Hastings' Nondiscrimination Policy is viewpoint-neutral: "Hastings has not excluded CLS *because* it is a religious group but rather because it refuses to comply with the prerequisites imposed on all student organizations." *Id.* at 32a. The district court found "there is no evidence in the record to support CLS's argument that Hastings will not allow CLS to become a recognized student organization because of CLS's religious perspective. In fact, the evidence in the record demonstrates otherwise." *Id.* at 35a-36a. Hastings' requirement that registered student organizations comply with its Nondiscrimination Policy is consistent with and furthers Hastings' educational mission, and therefore is reasonable in light of the purpose of the forum, which is "to further students' education and participation in the law school environment and to foster students' interest and connections with their fellow students." *Id.* at 36a-38a.

Next, the district court rejected CLS's claim that the requirement that it comply with the Nondiscrimination Policy violated its First Amendment right of expressive association. *Id.* at 38a-62a. The court explained that "Hastings is not directly ordering CLS

to admit certain students. Rather, Hastings has merely placed conditions on using aspects of its campus as a forum and providing subsidies to organizations." *Id.* at 42a. "If CLS wishes to participate in the forum and be eligible to receive funds, it must comply with Hastings' Nondiscrimination Policy." *Id.* If not, it nonetheless "may continue to meet as the group of its choice on campus, excluding any students they wish, and may continue to communicate its beliefs as it did all through the 2004-2005 academic year." *Id.*

The court also found that "CLS has not demonstrated that its ability to express its views would be significantly impaired by complying" with the Policy. *Id.* at 54a. "CLS has not submitted any evidence demonstrating that teaching certain values to other students is part of the organization's mission or purpose, or that it seeks to do so by example, so that the mere presence of someone who does not fully comply with the prescribed code of conduct would force CLS to send a message contrary to its mission." *Id.* at 56a-57a. Likewise, the district court found that "the evidence in the record does not support CLS's argument" that if it complied with the Nondiscrimination Policy, "it would be stripped of its Christian beliefs and cease to exist." *Id.* at 58a. In short, "there is no evidence that complying with the Nondiscrimination Policy, and taking the risk that a non-orthodox Christian, gay, lesbian, or bisexual student become a member or officer, and thus, by their presence alone, would impair CLS's ability to convey its beliefs." *Id.* at 59a.

The court also found that even if compliance with the Policy infringed in some way on CLS's ability to express itself, such an effect would be justified by Hastings' compelling interest in prohibiting discrimination on its campus. Pet. App. 59a-62a.

Finally, the district court rejected CLS's claims that the Policy violated its rights to free exercise of religion or to equal protection. Pet. App. 62a-69a.

F. Proceedings in the Court of Appeals.

In its two-sentence unsigned memorandum disposition, the Ninth Circuit affirmed. Pet. App. 1a-3a. The court of appeals emphasized Hastings' open membership policy: "The parties stipulate that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group." *Id.* at 2a. On that basis, the court found that the conditions on recognition are viewpoint neutral and reasonable, citing its decision in *Truth v. Kent Sch. Dist.*, 542 F.3d 634, *reh'g en banc denied*, 551 F.3d 850 (9th Cir. 2008), *cert. denied*, No. 08-1130 (June 29, 2009).

REASONS FOR DENYING THE PETITION

This Court recently denied certiorari in *Truth*, the sole decision cited in the court of appeals' unreported memorandum disposition below. The Ninth Circuit's published decision in *Truth* contained an extensive discussion and analysis of the issues, including a separate concurring opinion by two judges. The unsigned decision below, in contrast, contains almost no reasoned discussion, is unreported, and does not constitute precedent even within the Ninth Circuit. Even if it were a proper vehicle to review the question presented, the decision below does not squarely conflict with any decision of another court of appeals or of this Court, and the court of appeals correctly decided the issue presented.

I.

THE BRIEF UNREPORTED MEMORANDUM ORDER BELOW DOES NOT MERIT CERTIORARI.

The Ninth Circuit issued a brief unreported memorandum disposition that consists in its entirety of two sentences of discussion, followed by a citation to the court's decision in *Truth v. Kent Sch. Dist.*, 542 F.3d 634, *re'hg en banc denied*, 551 F.3d 850 (9th Cir. 2008), in which this Court recently denied certiorari. No. 08-1130 (June 29, 2009). Contrary to amici's unsupported assertion, this case is not an appropriate vehicle to resolve the issue presented and does not merit certiorari.

In its order below, the court of appeals found controlling its decision in *Truth*, which presented an issue essentially indistinguishable from that raised here. The petitioner in *Truth*, like CLS, had contended that the Ninth Circuit's decision in that case presented a square conflict with the Seventh Circuit's decision in *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006). *Truth v. Kent Sch. Dist.*, No. 08-1130, Pet. for Writ of Certiorari 29-31. Indeed, the petition in this case acknowledges that "the court below based its ruling solely on the *Truth* decision" (Pet. 12), which it discusses at length, and CLS expressly urged the Court to grant review in both cases. *Id.* at 12-15, 17-18, 39-41. Having denied the petition for certiorari in *Truth*, this Court should deny certiorari in the instant case as well.

The brief unreported order below is an inappropriate vehicle to review the constitutional issue presented in the Petition. To the extent that the order extended the Ninth Circuit's holding in *Truth*, as CLS contends (Pet. 40), the order does not address the factual differences between the two cases or their effect on the legal analysis. Moreover, as CLS describes at some length (Pet. 32-39), the same issue is pending in a number of other lower courts, including courts in the Seventh, Ninth and Eleventh Circuits. One or more of those courts is likely to decide the issue by a fully reasoned opinion that provides this Court with a detailed exposition of the pertinent facts and law, which is lacking here. Indeed, such a decision may be forthcoming from the Ninth Circuit itself, in which at least two such cases are pending. The decision below does not constitute binding precedent even in that Circuit, as the court of appeals expressly directed that its memorandum

disposition "is not appropriate for publication and is not precedent," except for limited purposes not present here. Pet. App. 1a (citing 9TH CIR. R. 36-3).[7] This Court should not grant certiorari until and unless the issues have been fully aired in the lower courts and a square conflict has emerged.

II.

THERE IS NO CONFLICT AMONG THE LOWER COURTS WARRANTING CERTIORARI.

Petitioner's primary contention is that the court of appeals' decision below creates a circuit split with the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). However, that contention is belied by the important factual and procedural distinctions between the two cases. Petitioner's further assertion that the decision conflicts with the Second Circuit's decision in *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839 (2d Cir. 1996) is groundless.

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7. Under the Ninth Circuit's rules, a written disposition shall be designated as a published opinion only if it "establishes, alters, modifies or clarifies a rule of law"; "[c]alls attention to a rule of law which appears to have been generally overlooked"; "[c]riticizes existing law"; or "[i]nvolves a legal or factual issue of unique interest or substantial public importance," among other grounds. 9TH CIR. R. 36-2. Thus, in the judgment of the panel below, none of these standards was met.

A. The Seventh Circuit's Decision in *Christian Legal Society v. Walker*.

Petitioner asserts that although *Walker* involved "identical material facts and legal claims," the Seventh Circuit reached a "diametrically opposite result" from that reached by the court of appeals below. Pet. 18. As the Ninth Circuit correctly concluded in *Truth*,[8] that assertion cannot withstand scrutiny of the two opinions, which differ in numerous important respects, both factually and procedurally.

In *Walker*, the dean of the Southern Illinois University School of Law ("SIU") declined to recognize a local chapter of the Christian Legal Society as an official student organization because he concluded that CLS's membership policies, which preclude membership to students who engage in or affirm homosexual conduct, violated SIU's nondiscrimination policies. The district court denied CLS's motion for a preliminary injunction to compel SIU to restore its official status, and a divided Seventh Circuit reversed, holding that CLS had shown a likelihood of success on the merits.[9]

The *Walker* majority rested its decision principally on a threshold factual ground not present here or in

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8. *See* 542 F.3d at 652 n.1 (Fisher, J., concurring) (distinguishing *Walker*); 551 F.3d at 851 (Wardlaw & Fisher, JJ., concurring in denial of rehearing en banc) (rejecting claim of circuit split and concluding that holdings are "entirely consonant").

9. One judge dissented. 453 F.3d at 867-76 (Wood, J., dissenting).

Truth: that it was "doubtful" that CLS had even violated any applicable university policy, the stated basis for the university's refusal to recognize it. 453 F.3d at 860-61. SIU had cited a policy requiring student organizations to adhere to all federal and state laws concerning nondiscrimination and equal opportunity, but never identified which federal or state law it believed CLS violated. *Id.* at 860. Likewise, the *Walker* court was "skeptical" that CLS had violated SIU's Affirmative Action/EEO policy, which by its terms applies to the university, not to student organizations. *Id.* at 860-61. *Walker* found that factual ground, by itself, was "enough to carry CLS's burden." *Id.* at 859. Here, in contrast, it is uncontroverted that CLS refused to comply with Hastings' Nondiscrimination Policy which, unlike SIU's policy, explicitly applies to student organizations. *See* pp. 2-3, 8-10, *supra*.

While the Seventh Circuit did go on to say that CLS had shown a likelihood of success on its expressive association and free speech claims (453 F.3d at 861-67), its discussion of those issues represented only alternative grounds for its decision, the significance of which is further diminished by the court's inability on the limited record before it to resolve a number of key issues. For several reasons, the decision below does not present any square conflict with *Walker*.

First, *Walker* did not squarely reach CLS's constitutional claims, but held only that CLS was reasonably likely to succeed on the merits of those claims, and remanded the case to the district court with directions to enter a preliminary injunction against the university. It is therefore only an interlocutory ruling, not a final decision on the merits.

Second, the Seventh Circuit's narrow holding was reached on the basis of an extremely limited record that was silent as to many important facts. *See Walker*, 453 F.3d at 867 (characterizing the record as "spartan"); *see also id.* at 869 ("Because of the procedural posture of the case, including the fact that SIU has not yet submitted any evidence, many critical questions remain unexplored") (Wood, J., dissenting); *id.* ("When the time comes for permanent relief, solid answers to the following questions, among others, will be essential"). While the majority may have been persuaded that the answers to those questions ultimately would favor CLS, its opinion properly acknowledged that answering them "will require further factual development, and that is a task properly left for the district court." *Id.* at 866.

Third, despite the limited factual record, the Seventh Circuit found "strong evidence" that SIU's policy, although viewpoint neutral on its face, had not been applied in a viewpoint neutral fashion. *Id.* at 866. In particular, the court cited evidence that other recognized student organizations discriminated in their membership requirements on grounds prohibited by SIU's policy, including organizations that explicitly restricted membership on the basis of religion and gender. *Id.* Here, in contrast, there was no such evidence; to the contrary, Hastings has an open membership rule that requires all student groups to accept all interested students as members. Pet. App. 2a, 9a; ER 341 ¶18.[10]

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10. There are additional factual distinctions between the two cases. As a result of SIU's refusal to recognize it, CLS was

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Fourth, as a result of the procedural posture of the case and the sparse factual record, the Seventh Circuit did not reach or resolve key legal issues that are undisputed here. Thus, the *Walker* court was unable to determine the nature of the forum involved, which it said was "an inquiry that will require further factual development" on remand to the district court. 453 F.3d at 866. Further, the court could not address whether SIU's policy was reasonable in light of the purposes served by the forum, a subject on which SIU apparently had not presented any evidence. *Id.* at 867. Here, in contrast, the district court explicitly found on undisputed evidence both that Hastings had created a limited public forum and that the Nondiscrimination Policy was reasonable in light of the purposes of that forum.

In short, the decision below does not present a square conflict with *Walker*, which addressed the issues presented here only as alternative grounds for an interlocutory ruling on a limited record that nevertheless presented key factual distinctions between the two cases.

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no longer able to reserve law school rooms for private meetings. 453 F.3d at 858. In *Healy v. James*, 408 U.S. 169 (1972), similarly, the college not only refused to recognize the student group, but prevented it from meeting on campus. *Id.* at 176 & n.6. Here, in contrast, Hastings told CLS that it was welcome to continue to meet on campus and to use other law school facilities, but CLS chose not to do so. Pet. App. 48a. Thus, the burden on the group's speech and association rights from non-recognition was far greater in *Walker* than here.

B. The Second Circuit's Equal Access Act Decision.

CLS's further contention that the Ninth Circuit panel's decision conflicts with the Second Circuit's decision in *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839 (2d Cir. 1996) (Pet. 20-22) is readily answered: in that case, as CLS concedes, "the Second Circuit based its decision on the Equal Access Act rather than the First Amendment." Pet. 22. *Hsu* was decided under the Equal Access Act, 20 U.S.C. §§4071-4074, a federal statute that applies to certain federally-funded public secondary schools, and did not present or decide any constitutional issue. *See* 85 F.3d at 856 (*Hurley* "does not control this case because . . . it concerns free speech rights under the Constitution, not a federal statute"); *id.* at 858 (observing that Court's freedom of association cases "are analytically distinct from this case, because they involve constitutional rights, not statutory ones"); *see Truth*, 542 F.3d at 647 (concluding that holding is not inconsistent with *Hsu*, which focused on the term "speech" in the Act). Thus, that decision raises issues of federal statutory interpretation that are distinct from the constitutional issue presented here, and cannot give rise to a cognizable conflict warranting certiorari.

CLS contends that the Equal Access Act extended free speech rights recognized by this Court in the college setting to secondary school student groups. Pet. 22. However, while the Act "extended the reasoning of Widmar to public secondary schools," this Court has explicitly recognized that Congress did not intend to incorporate the Court's free speech jurisprudence verbatim, but rather that "it intended to establish a standard different from the one established by our free

speech cases." *Bd. of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 235, 242 (1990). The loose analogy between the two cannot transform *Hsu* into a constitutional rather than a statutory ruling.

In any event, *Hsu* is fundamentally consistent with the decision below. The *Hsu* court found that "a religious test for membership or attendance" in a Christian student group would be "plainly insupportable" under the Equal Access Act, observing that "[i]t is difficult to understand how allowing non-Christians to attend the meetings and sing (or listen to) Christian prayers would change the Club's speech." 85 F.3d at 858 & n.17. It also flatly rejected the club's contention – identical to CLS's here – that it could properly exclude non-Christians from all officer positions. *Id.* at 857-58. The court went on to rule that under the Act, the club could impose a religious test for certain leadership positions, but only "to the extent that there is an integral connection between the exclusionary leadership policy and the 'religious speech' at their meetings," narrowly limiting its holding to those specific positions whose duties "consist of leading Christian prayers and devotions and safeguarding the 'spiritual content' of the meetings." *Id.* at 858.[11]

Here, it is undisputed that CLS did not look solely to its officers to perform such duties, but in fact allowed

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11. The Second Circuit is the only Circuit to have so read the Act. In a later case, that court squarely held that the government may condition access to a nonpublic forum on compliance with a reasonable, viewpoint-neutral nondiscrimination policy, a holding that is entirely consistent with the Ninth Circuit's analysis in this case. *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 91-98 (2d Cir. 2003).

members and even "attendees" (non-members) to lead the group in prayer. Pet. App. 13a. As a result, there is no "integral connection" between CLS's exclusionary membership and leadership policies and the "religious speech" at its meetings, and its associational interest in enforcing those policies is far weaker. Likewise, there is no integral connection between CLS's exclusion of gay and lesbian students as members and officers and the speech at its meetings, particularly given its history of admitting such students as active participants. In view of those critical factual differences, there would be no conflict between the decision below and *Hsu* even if the latter had reached the constitutional issue.

III.

THE COURT OF APPEALS' REJECTION OF PETITIONER'S CHALLENGE TO THE COLLEGE'S NONDISCRIMINATION POLICY IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS.

CLS also contends that the court of appeals' memorandum disposition conflicts with this Court's expressive association decisions and undermines its decisions protecting the equal access rights of religious student groups. Pet. 23-27, 28-30. To the contrary, the Ninth Circuit's decision upholding Hastings' uniform application of its reasonable, viewpoint-neutral nondiscrimination policy is entirely consistent with this Court's decisions in both areas.

A. Expressive Association.

CLS argues that the Ninth Circuit's ruling conflicts with this Court's decisions regarding the First Amendment right of expressive association. Pet. 23-27. However, CLS is constrained to acknowledge that the court of appeals' brief memorandum disposition below did not actually address its expressive association claim. *Id.* at 25-26. Instead, CLS directs its argument entirely at the *district court's* analysis of the issue. *Id.* at 26-27. The Ninth Circuit did not adopt that analysis, but instead relied on its prior decision in *Truth*, which this Court has already determined does not warrant certiorari.

In any event, CLS fails to establish any conflict between the district court's expressive association analysis and this Court's decisions in that area. CLS relies primarily on the decisions in *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) and *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995). However, neither case addressed (much less resolved) the issue presented here: whether the government may condition access to a limited public forum or to government financial subsidies on compliance with a viewpoint-neutral nondiscrimination policy.

This case is entirely unlike *Dale*, which involved the direct application of state law to compel a private organization to admit a member whose presence would have interfered with its message. In *Dale*, New Jersey sought to apply its public accommodations law to compel the Boy Scouts, a private organization that "engaged in instilling its system of values in young people," to

reinstate Dale, "an avowed homosexual and gay rights activist," as an adult scout leader. 530 U.S. at 644. The Court found that "the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints" (*id.* at 650) and therefore violated the Boy Scouts' First Amendment right of expressive association. In particular, the Court found that the Boy Scouts viewed homosexual conduct as "not morally straight" (*id.* at 650-51), and that scoutmasters played an important role as role models and adult leaders who "inculcate [youth members] with the Boy Scouts' values—both expressly and by example." *Id.* at 649-50. Emphasizing Dale's background as "the copresident of a gay and lesbian organization at college [who] remains a gay rights activist," the Court concluded that his "presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653.

Dale recognized that government action may unconstitutionally burden associational freedom when it constitutes an "intrusion into the internal structure or affairs of an association," such as a "regulation that forces the group to accept members it does not desire." *Id.* at 648 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). This case, in contrast, does not involve any such direct legal compulsion. As the district court found, "CLS is not being forced, as a private entity, to include certain members or officers." Pet. App. 40a. "Rather, Hastings has merely placed conditions on using aspects of its campus as a forum

and providing subsidies to organizations." *Id.* at 42a.[12] Thus, CLS (like all other student organizations) had a choice: if it wished to participate in Hastings' forum, thereby gaining access to eligibility for funding and certain law school resources, it could agree to comply with the law school's nondiscrimination policy. If not, it could continue to meet on campus and to exclude whichever students it chose. *Id.* at 42a, 54a. *Cf. Rumsfeld v. FAIR*, 547 U.S. 47, 58 (2006) ("The Solomon Amendment gives universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds").

Nor does the district court's analysis present any conflict with the Court's compelled-speech holding in *Hurley*. There, the Court held that Massachusetts could not apply its public accommodations act to force the private organizers of a St. Patrick's Day Parade to include an organization of gay, lesbian and bisexual Irish Americans. 515 U.S. at 572. The basis for the Court's holding, however, was not the sexual orientation of the organization's members, but the fact that they wished to march behind a banner identifying them as such ("GLIB"), thereby requiring the parade organizers to "alter the expressive content of their parade." *Id.* at 572-73 ("Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member

12. Petitioner disputes the district court's finding on this point, asserting that *Dale* governs even where the effect on associational rights is only indirect. Pet. 26. However, by its terms, *Dale* applies only where the state law in question "*directly and immediately* affects . . . associational rights." 530 U.S. at 659 (emphasis added).

of any group that the Council has approved to march"); *see also Dale*, 530 U.S. at 653 ("We noted that the parade organizers *did not wish to exclude the GLIB members because of their sexual orientations*, but because they wanted to march behind a GLIB banner") (emphasis added). Here, again, the district court made an explicit factual finding that CLS had failed to present any evidence that complying with Hastings' Policy would alter its message or affect its ability to advocate its viewpoint in any way.

Neither *Dale* nor *Hurley* involved the validity of conditions on access to a public (or nonpublic) forum or to government financial subsidies, the issue presented here. Those cases are entirely distinct from this Court's public forum decisions, which hold that when a university creates a limited public forum for use by student groups, it is entitled to confine the forum to "the limited and legitimate purposes for which it was created," such as by "reserving it for certain groups or for the discussion of certain topics," so long as the restrictions are reasonable in light of the purpose served by the forum and viewpoint-neutral. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995); *see also, e.g., Bd. of Regents v. Southworth*, 529 U.S. 217, 229-30, 234 (2000). The decision below merely applies these well-accepted principles by allowing Hastings to enforce uniform and reasonable nondiscrimination and open membership policies that benefit all students and further its educational mission.

The decision below is entirely consistent with this Court's government subsidy precedents, which hold that it is permissible to condition public funding on compliance with neutral nondiscrimination policies.

See Grove City College v. Bell, 465 U.S. 555, 575-76 (1984) ("Requiring [college] to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the [tuition subsidy] program infringes no First Amendment rights of the College or its students"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 602-04 (1983) (government may condition a subsidy created by tax exempt status on a lack of illegal racial discrimination by fundamentalist Christian schools); *see also Evans v. City of Berkeley*, 38 Cal. 4th 1, 10, 129 P.3d 394, 400 (2006) ("a government entity may constitutionally require a recipient of funding or subsidy to provide written, unambiguous assurances of compliance with a generally applicable nondiscrimination policy"). *See* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN L. REV. 1919, 1926 (2006) ("the government may decide not to subsidize such [student] groups: it may limit funding to those groups that discriminate neither in their choice of officers nor in their choice of members or attendees").

Finally, even if *Dale* applied here, CLS failed to meet its factual burden under that case to establish that complying with the Policy would significantly affect its ability to advocate public or private viewpoints. The district court expressly found that after it elected not to comply with the Policy, CLS was able to meet during the academic year without any significant impediment to its activities or its ability to communicate as a group – indeed, its membership actually *increased* after the law school declined to officially recognize it. *Id.* at 47a-49a. Although it did not have recognized status, CLS was permitted to participate in the student organization

fair, to reserve Hastings' rooms for meetings and events, and to post announcements about the organization and its activities. *Id.* Indeed, the district court found that CLS had failed to present *any* evidence that complying with the Nondiscrimination Policy would impair (or had impaired) its ability to convey its beliefs. *Id.* at 56a-59a.

CLS objects to that finding, citing this Court's direction to lower courts in *Dale* to "give deference to" an association's view of what would impair its expression. Pet. 26-27. However, while *Dale* mandated deference to associations' views, it did not wholly relieve them of the factual burden of establishing that the challenged government action "affects in a significant way the group's ability to advocate public or private viewpoints." 530 U.S. at 648; *see id.* at 649-53 (summarizing evidence). To the contrary, the Court specifically cautioned that its holding "is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." *Id.* at 653. This case falls squarely within that warning.[13]

13. Petitioner also takes issue with the district court's finding that Hastings has a compelling interest in prohibiting discrimination on its campus. Pet. 27. However, that conclusion is not open to serious question. This Court has observed that state laws prohibiting discrimination in the provision of public accommodations "plainly serv[e] compelling state interests of the highest order." *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987) (quoting *Roberts*, 468 U.S. at 624). Indeed, a state's interest in eradicating discrimination is particularly critical in institutions of higher education. *Grutter v. Bollinger*, 539 U.S. 306, 331-32 (2003). Hastings' Nondiscrimination Policy is manifestly "unrelated to the (Cont'd)

B. Equal Access.

CLS contends that the court of appeals' decision "renders toothless" this Court's decisions in *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995) and *Widmar v. Vincent*, 454 U.S. 263 (1981). Pet. 28-30. That contention fundamentally misconceives the holdings and rationale of those decisions, which hold that religious groups are entitled to *equal* access to public forums, not that they are entitled to be *exempted* from uniform viewpoint-neutral rules that apply to all forum participants. *Cf. Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (Free Exercise Clause does not exempt individuals from complying with valid and neutral laws of general applicability).

This Court's decisions in *Widmar*, *Rosenberger* and their progeny stand for "the fundamental principle that a state regulation of speech should be content-neutral." *Widmar*, 454 U.S. at 277. Thus, in *Widmar*, the Court struck down a state university's regulation prohibiting the use of university buildings or grounds "for purposes of religious worship or religious teaching." The Court explained that the regulation constituted "discriminatory exclusion from a public forum based on

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(Cont'd)

suppression of ideas" and advancing those compelling interests "cannot be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648 (quotation omitted); *see, e.g.*, *Roberts*, 468 U.S. at 624 (state's objective of eliminating discrimination and assuring its citizens equal access to publicly available goods and services is "unrelated to the suppression of expression").

the religious content of a group's intended speech," and therefore could be justified only under the strict scrutiny standard applicable to such "content-based exclusion," which it found the university failed to satisfy. *Id.* at 269-70, 277.

Likewise, in *Rosenberger*, the Court held that the University of Virginia's denial of funding to a student newspaper because of its Christian editorial viewpoint when the school funded publications with other viewpoints was impermissible. 515 U.S. at 829, 832. The Court again grounded its decision on the "axiomatic" principle that "the government may not regulate speech based on its substantive content or the message it conveys." *Id.* at 828. By "select[ing] for disfavored treatment those student journalistic efforts with religious editorial viewpoints," the university ran afoul of this prohibition, thereby violating students' rights to free speech. *Id.* at 831.

This case stands in vivid contrast to *Widmar* and *Rosenberger*. Here, as the district court expressly found, Hastings did *not* decline to fund and officially recognize CLS based on either the religious content or viewpoint of its speech. Pet. App. 32a, 35a-36a. Rather, it did so because of CLS's explicit refusal to comply with Hastings' generally applicable, viewpoint-neutral Nondiscrimination Policy. *Id.* That Policy does not target or prohibit any particular viewpoint or draw any distinction between religious and non-religious speech, viewpoints or groups; instead, it applies equally to *all*

student groups, religious and non-religious alike, regardless of the content or viewpoint of their speech.[14]

Nothing in the Court's equal access decisions precludes a state university from adopting or enforcing such a policy, so long as it applies it even-handedly to all student organizations. This Court long has recognized that broad federal and state nondiscrimination laws closely similar to Hastings' Nondiscrimination Policy are both content and viewpoint neutral. *E.g.*, *Hurley*, 515 U.S. at 572 (state public accommodations law "does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds"); *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (Title VII, which prohibits discrimination against an employee "because of such individual's race, color, religion, sex, or national origin," is a "permissible content-neutral regulation of conduct"); *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 549 (state law barring discrimination in public accommodations "makes no distinctions on the basis of the organization's viewpoint"); *Roberts*, 468 U.S. at 615, 623 (state human rights act "does not distinguish between prohibited and permitted activity on the basis of viewpoint"); *see also Evans*, 38 Cal. 4th at 14, 129 P.3d at 402 (city nondiscrimination policy "did not

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14. That the Policy may disproportionately affect groups with a particular viewpoint, such as religious groups, "does not itself render the [Policy] content or viewpoint based." *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 763 (1994).

demand adherence to or renunciation of any idea or viewpoint"), *cert. denied*, 127 S. Ct. 434 (2006).[15]

As CLS acknowledges (Pet. 35), public universities across the nation long have maintained similar nondiscrimination policies.[16] The widespread adoption and enforcement of such policies by institutions of higher education falls comfortably within the Court's explicit recognition of "a university's authority to impose reasonable regulations compatible with that mission [of education] upon the use of its campus and facilities." *Widmar*, 454 U.S. at 268 n.5; *see also id.* at 276-77 ("we affirm the continuing validity of cases that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other

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15. As Professor Volokh has observed,

> By any traditional First Amendment definition of content neutrality, . . . antidiscrimination rules are content-neutral. They do not treat expressive associations differently based on what the associations say. They are not justified by the content of the expressive associations' speech but by whether the associations let prospective members participate without regard to their race, religion, sex, and the like. Associations are covered whether they express racist views or antiracist views, religious views or atheist views, pro-gay-rights views or anti-gay-rights views.

Volokh, 58 STAN. L. REV. at 1930 (footnotes omitted).

16. Indeed, the Court noted in *Rosenberger* that in order to be eligible to participate in the University of Virginia's limited public forum, a student group was required to "pledge not to discriminate in its membership." 515 U.S. at 823.

students to obtain an education" (citation omitted) (citing *Healy v. James*, 408 U.S. 169, 188-89 (1972)).

CLS's suggestion, relying on an article by counsel for amici, that a university's uniform enforcement of nondiscrimination policies has the same effect as content or viewpoint-based exclusions, thereby "circumvent[ing]" *Widmar*'s holding (Pet. 30), is flawed. *Widmar* and *Rosenberger* stand for the principle of "equal access": *i.e.*, that religious student groups are entitled to access on university campuses on the *same* terms and conditions as other student organizations. *See Rosenberger*, 454 U.S. at 270-71 (referring to policy requiring university to "offer its facilities to religious groups and speakers on the terms available to other groups" as "an 'equal access' policy"). But Petitioner contends that religious student groups are constitutionally entitled to be *exempted* from viewpoint-neutral nondiscrimination policies – that is, that religious groups are entitled not to *equal* access, but to *superior* access, without being required to conform to policies that apply to all other groups. The novel position that religious groups should be uniquely entitled to a special exemption, not the Ninth Circuit's decision below upholding the legitimate application of viewpoint-neutral policies to all groups, diverges from this Court's precedents.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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In the Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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In the Supreme Court of the United States

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Respondents.

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I. THE SPLIT WITH THE SEVENTH CIRCUIT'S DECISION IN *CHRISTIAN LEGAL SOCIETY v. WALKER* IS IRRECONCILABLE.

None of Respondents' alleged factual and procedural differences (Br. in Opp. 18-21) between the Ninth Circuit in the instant case and the Seventh Circuit in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), explain the stark difference between the two appellate courts' outcomes and their approaches to the same legal claim by local chapters of the same national

organization challenging public law schools' refusal to recognize the chapters because of the same faith-based leadership and voting membership policies. Pet. 18-20.

The conflict leaves Christian Legal Society and other nationwide campus religious groups in an untenable position, requiring them to set leadership criteria under directly opposed regimes of constitutional law. *See Brief* Amici Curiae *of National Association of Evangelicals, Campus Crusade for Christ, InterVarsity Christian Fellowship, and Beta Upsilon Chi in Support of Petitioner,* No. 08-1371 (U.S. June 8, 2009).

The Ninth and Seventh Circuits sharply diverge in their *approaches* to a CLS chapter's claim that a public law school violated its First Amendment right of expressive association. The Seventh Circuit actually undertook expressive association analysis, asking whether application of a university's policy to CLS would undermine its ability to propound public or private viewpoints. 453 F.3d at 861-63. The Seventh Circuit then analyzed whether such a burden survived strict scrutiny. *Id.* at 863-64. Obviously, the Ninth Circuit addressed none of these questions.

None of the various procedural and factual differences Respondents invoke are relevant. First, the procedural posture of *Walker* – an interlocutory appeal of the denial of a motion for a preliminary injunction – does not change the fact that the Seventh Circuit engaged in expressive association

analysis while the Ninth Circuit did not. Invoking the preliminary character of that analysis – whether the chapter was likely to succeed on the merits of its expressive association claim – is unresponsive to the point made in the petition: the Seventh Circuit applied *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), while the Ninth Circuit did not.

Second, contrary to Respondents' contention, the comparatively undeveloped nature of the record in *Walker* hardly explains the Ninth Circuit's refusal to apply this Court's expressive association precedents. The Seventh Circuit would still have applied *Dale* and *Hurley* had the appeal occurred at a later stage of the litigation with a more extensive record.

Third, the existence of evidence in *Walker* that the university unevenly applied its policy does not diminish the conflict between the Seventh and Ninth Circuits in their approaches to CLS's expressive association claim. Evidence of uneven application did not trigger the Seventh Circuit's expressive association analysis. Relatedly, questions about whether SIU's Affirmative Action/Equal Opportunity policy was intended to apply to student groups have nothing to do with the Seventh Circuit's correct decision to analyze the CLS chapter's expressive association claim. The existence of *additional* problems with the university's treatment of the CLS chapter does not mitigate the disagreement between the two circuits.

Fourth, the Seventh Circuit's decision that it need not resolve *other* legal questions (*e.g.*, the nature of the speech forum, the reasonableness of the policy in light of the forum's purposes) is irrelevant to the stark contrast between the two appellate courts' approaches to CLS's expressive association claims.

Respondents' illusory offer of minimal access to CLS does not distinguish *Walker*. Br. in Opp. 1 n.1, 9, 20 n.10, 27, 29. The facts make this a hollow offer, and this Court's holdings make it legally irrelevant.

Respondents' counsel explained their offer of meeting space to the district court as follows: "Hastings allows community groups to some degree to use its facilities, sometimes on a pay basis . . . if they're available after priority is given to registered organizations." ER 641. Respondents offer CLS use of facilities on a space-available basis *only* after priority is given to the 60 recognized groups; moreover, CLS could be charged a rental fee. App. 78a-79a (Reg. 32.10.A.4). Permission could be revoked at any time. ER 642. In addition, Respondents have frozen CLS out of all campus channels of communication, except bulletin boards that are available to off-campus persons. ER 348, 422. Travel funds were revoked. ER 345-46. The student fair that CLS attended occurred *before* denial of recognition. ER 345-46.

In any event, the offer is ultimately meaningless: CLS would still be subject to the nondiscrimination policy and openness requirement under Regulation

31.12, which requires "[a]ll persons on College property . . . to abide by College policies and campus regulations." App. 77a.

The offer is also legally irrelevant. In *Healy*, this Court required recognition for a political student group even though the college officials claimed that the group "still may meet informally on campus." *Healy v. James*, 408 U.S. 169, 182-83 (1972) (denial of recognition "by itself constitutes an unconstitutional burden on a student group's right of expressive association"). In *Board of Education v. Mergens*, 496 U.S. 226, 247 (1990), the Court rejected the school's protest that a Christian student group could meet informally on campus and required school officials to grant the group formal recognition, pursuant to the Equal Access Act, with all the attendant benefits of access to meeting space and channels of communication.

II. THE SPLIT WITH THE SECOND CIRCUIT'S DECISION IN *HSU v. ROSLYN UNION FREE SCHOOL DISTRICT* IS STARK.

The Ninth Circuit decision directly conflicts with the Second Circuit's pre-*Dale* ruling in *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir. 1996), holding that a religious student group's "Christian officer requirement, as applied to some of the club's officers, is essential to the expressive content of the meetings and to the group's preservation of its purpose and identity," and, thus, a school district's denial of recognition based on its nondiscrimination policy violated the group's rights

of expressive association and speech under the Equal Access Act. *Id.* at 848, 858-59, 862. Writing without the benefit of this Court's guidance in *Dale*, the Second Circuit found that three of the group's five officer positions affected the group's religious expression; therefore, the group could limit those positions to persons who shared its religious commitment. *Id.* at 857-59, 862.

Thus, the Second Circuit protected the right of a religious student group to require leaders who directly affect the content of its meetings to share its religious beliefs, while the Ninth Circuit ruled that a religious group could not require any leader to share its religious viewpoint. Nor did the Ninth Circuit attempt even a minimal analysis of the impact non-Christian leaders would have on a Christian group's expression of its religious message. App. 2a.

Respondents' effort to dismiss this conflict on the technical claim that *Hsu* was decided on statutory grounds (Br. in Opp. 22-24) ignores the essential fact that the Second Circuit's statutory holding was explicitly anchored in this Court's constitutional jurisprudence protecting expressive association. Ruling for the students under the Equal Access Act, as is proper when both statutory and constitutional rights are claimed, the Second Circuit held that "the Act contains an implicit right of expressive association" because "the right to associate for the purpose of holding such a meeting is a necessary corollary" of the equal access right to meet. 85 F.3d at 859. The Second Circuit conducted an extensive expressive association analysis focused on this

Court's constitutional analysis in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *Hurley*. 85 F.3d at 858-59. The Second Circuit concluded that this Court's constitutional jurisprudence required it to interpret the federal act as protecting the right of a religious group to require its key leaders to share its core religious beliefs. *Id.* at 859. The Ninth Circuit failed to perform any expressive association analysis whatsoever.

Additionally, *Hsu* conflicts with the Ninth Circuit's specific holding – and Respondents' primary argument – that neutral application of a nondiscrimination policy to all groups satisfies a school's duty to provide a religious group with equal access. App. 2a; Br. in Opp. 3-4, 12, 14, 20, 24-28, 31-35. Observing that a "focus on the even application of [a] nondiscrimination rule misses the point," the Second Circuit instead found that "exemptions from neutrally applicable rules that impede one or another club from expressing the beliefs that it was formed to express, may be required if a school is to provide 'equal access.'" 85 F.3d at 860. Rejecting the claim, echoed here by Respondents (Br. in Opp. 35), that this would give the religious group "special rights," the Second Circuit reproved school officials for "ignor[ing] one of the principal ways in which many extracurricular clubs typically define themselves: by requiring that their leaders show a firm commitment to the club's cause." *Id.* at 860.

The Second Circuit spurned Respondents' underlying premise that a religious group's "concern that the Club risked facing non-Christian leadership and might be taken over by students inimical to the Club's purpose was . . . speculation." *Id.* at 861 (quotation marks and brackets omitted). The Second Circuit noted that the religious group had not made "any showing that [non-Christians] would desire to communicate any particular message." 85 F.3d at 856. Nonetheless, the Second Circuit found that "it is also speculation . . . to conclude that there would be no hostility toward" the religious group, particularly given that "religious groups have historically been the object of hostility and persecution more often than, say, chess players or glee clubs." *Id.* at 861.

III. THERE IS A CONFLICT WITH *BOY SCOUTS OF AMERICA v. DALE* AND *HURLEY v. IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON.*

Respondents contend that the Ninth Circuit's judgment does not contradict *Dale* and *Hurley*, arguing that only police power rules can violate the right of expressive association. Br. in Opp. 25-30. To the contrary, in *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006), this Court tacitly but clearly rejected that contention. There, law schools claimed that the Solomon Amendment violated their right of expressive association. *Id.* at 68-70. The Solomon Amendment was a condition on access to federal funding, *id.* at

51; this Court nonetheless examined whether compliance would significantly undermine the ability of the law schools to express their message. *Id.* at 68-70. Citing *Healy*, 408 U.S. at 180-84, this Court explained that laws that "d[o] not directly interfere with an organization's composition" but instead "impose penalties or withhold benefits" can violate the right of expressive association.[1] 547 U.S. at 69. If the Ninth Circuit – and Respondents – were correct that expressive association analysis is relevant only when police power rules were involved, this Court would not have undertaken that analysis in *FAIR*.[2]

Respondents also claim that the Ninth Circuit's decision does not contradict *Dale* and *Hurley* because CLS allegedly presented inadequate evidence that compliance with Respondents' policy would undermine the chapter's ability to express its religious messages. Br. in Opp. 29-30. To the contrary, the CLS chapter in this case presented the same evidence as the chapter in *Walker*, showing that CLS chapters are organized around shared religious commitments, both doctrinal (*e.g.*, belief in the Trinity) and ethical (*e.g.*, the limitation of sexual

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[1] The Court's declaration belies Respondents' suggestion that the nature of the speech forum somehow determines whether speakers possess the right of expressive association.

[2] This Court rejected the law schools' expressive association claim because Congress did not condition the receipt of federal funding upon having military recruiters "become members" or "part of the law school." 547 U.S. at 69. Of course, in the instant case, Respondents will recognize CLS only if it agrees to allow *anyone* to become a leader or voting member, without regard to his or her viewpoint, conduct or expression.

activity to married couples). Pet. App. 99a-108a; ER 334. Following *Dale*, the Seventh Circuit asked "whether application of [the university's] antidiscrimination policy to force inclusion of those who engage in or affirm homosexual conduct would significantly affect CLS's ability to express its disapproval of homosexual activity." 453 F.3d at 862. Declaring "[t]o ask this question is very nearly to answer it," *id.*, the *Walker* court sensibly did not demand empirical studies predicting what the community would think of CLS were it to comply with the university's demands. Nor did the court require CLS to prove that there were individuals rejecting its religious beliefs and practices who were waiting to join. It was virtually self-evident to the Seventh Circuit that the inclusion of such individuals in leadership and voting membership positions would impair CLS's ability to communicate its message. In light of this, Respondents' assertion that CLS presented "no evidence" that compliance with school policy would undermine its message is untenable.

Respondents also suggest that CLS would not suffer a burden from complying with the policy because, during the 2004-2005 school year, it allowed non-member attendees to pray.[3] Br. in Opp. 9, 23-24. Participants' prayers do not affect the group's overall message, unlike the leaders and

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[3] The practices of groups that existed prior to the formation of CLS and its affiliation with the national organization are irrelevant. It is undisputed that none of these fellowships were CLS chapters. ER 237, 250. The first chapter approved by the national organization started at Hastings in September 2004.

voting members, who control the group's message, vote on its decisions, amend its constitution, and lead its Bible studies. Respondents seem to suggest that CLS has no expressive association rights unless it either categorically excludes non-members from attending meetings or muzzles those who attend.

Respondents' understanding of their unwritten "openness" policy as a broad "all comers" requirement magnifies their interference with associational freedom. Such a policy means that all student groups at Hastings have lost the right to choose their leaders and members. The Hastings Democratic Caucus cannot expel a member who tore down "Obama 2008" signs while shouting "Vote for McCain." The Hastings Association of Muslim Law Students cannot remove a group president who drew a picture of Muhammed. Like the airport policy in *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), that banned all "First Amendment activities," the "openness" policy is a classic example of an overbroad regulation of speech that is a *per se* violation of the First Amendment. Just as it was "obvious that . . . no conceivable governmental interest would justify [the airport's] absolute prohibition of speech," *id.* at 575, it is obvious that Respondents' ban on expressive association offends the First Amendment.

IV. THIS COURT SHOULD NOT WAIT FOR A DIFFERENT CASE TO RESOLVE THE QUESTION PRESENTED.

Respondents predictably urge this Court to wait for some other case to resolve the important question presented in the petition. Br. in Opp. 16-17. Yet, the costs of delay will be substantial.

First, the conflict among the circuits leaves educational officials – particularly those in states whose circuit courts have not addressed the issue – without necessary guidance. Given the Ninth Circuit's departure from *Dale*, and its conflict with *Walker* and *Hsu*, it is likely that even more extensive litigation will be necessary to resolve these controversies.

Second, there is no assurance that a similar case, with the issue so clearly presented, will soon come before this Court. Respondents propose that one of the cases discussed on pages 32-39 of the petition might be a better candidate for review. An examination of the listed cases reveals the emptiness of that suggestion. In *Beta Upsilon Chi v. Machen*, 559 F. Supp. 2d 1274 (N.D. Fla. 2008), *appeal docketed*, No. 08-13332 (11th Cir. Jul. 30, 2008), the University of Florida claimed to change its nondiscrimination policy and filed a motion to dismiss the appeal as moot, which is pending. Petitioners have been unable to ascertain any pending case in the Seventh Circuit on this issue, despite Respondents' cryptic claim that one exists. Br. in Opp. 16. If Respondents are referring to the

Walker case, it ended when, in response to the Seventh Circuit's 2006 ruling, the university changed its policy to respect associational freedom. The cases at the University of North Carolina, Washburn University, the University of Minnesota, the University of Toledo, the University of Illinois, Arizona State University, Ohio State University, the University of Georgia, and Penn State University have all been completed.

Third, this Court has expressly stated that "[t]he fact that the Court of Appeals' order under challenge [] is unpublished carries *no weight* in our decision to review the case." *Commr. v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam) (emphasis added). This Court has not hesitated to take up an important and unsettled issue even though the lower court's judgment is unreported. *See, e.g., Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 61 (2000). *See* Michael Hannon, *A Close Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. App. Prac. & Process 199, 227-28 (2001).

Fourth, there is no reason to believe that the Ninth Circuit and its district courts will do anything more than the Ninth Circuit did in the instant case: decline to apply expressive association analysis and summarily rule against religious groups. Already, in *Christian Legal Society v. Eck*, 2009 WL 1439709 at *2 & n. 8 (D. Mont. May 19, 2009), *appeal docketed*, No. 09-35581 (9th Cir. June 18, 2009), a district court cited and relied upon the district court and Ninth Circuit judgments in the instant case in ruling

against a CLS chapter challenging its derecognition by University of Montana officials. The 317 postsecondary educational institutions in the Ninth Circuit have been given a green light to deny recognition to religious groups who simply want to protect their religious identity by requiring that their officers and voting members share their religious viewpoints. Pet. 31.

CONCLUSION

For these reasons and those stated in the petition, this Court should issue a writ of certiorari to review the judgment of the Ninth Circuit.

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AMICUS CURIAE BRIEF

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Respondents.

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BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF EVANGELICALS, CAMPUS CRUSADE FOR CHRIST, INTERVARSITY CHRISTIAN FELLOWSHIP/USA, AND BETA UPSILON CHI IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[*]

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 50 member denominations and associations, representing 45,000 local churches and over 30 million Christians. NAE serves as the collective voice of evangelical churches and other religious ministries. NAE believes that religious freedom is a gift of God, and is vital to limiting the government which is our American constitutional republic.

Campus Crusade for Christ ("CCC") has student chapters meeting at 731 universities and colleges across the country, including student chapters at 417 public universities and colleges. CCC also operates Student Venture, a ministry geared towards high school students. The purpose of CCC is to fulfill the Great Commission, Jesus' command to His disciples to "go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you." Matthew 28:19-20.

---

[*] Counsel of record were notified on May 27, 2009 of *amici's* intent to file this brief. The parties consented to the filing of this brief, and copies of the consent letters are on file with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Specifically, the goal of its student chapters is to reach every student at their campuses every year with the Gospel. Its leaders are to be effective witnesses of the Gospel to other students. At numerous public universities, CCC student groups have been threatened with denial of equal access to meeting space, funding, and other benefits because they set religious criteria for their leadership.

InterVarsity Christian Fellowship/USA ("IVCF") has as its purpose to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord: growing in love for God, God's Word, God's people of every ethnicity and culture and God's purposes in the world. IVCF carries out its ministry through student chapters. Officers of those chapters are required to subscribe to the purpose and doctrinal basis of IVCF and must subscribe to certain basic biblical truths of Christianity. Currently, IVCF has approximately 855 chapters on 556 campuses in the United States, including chapters at 299 public universities and colleges. Many IVCF student chapters at public universities have been threatened with denial of equal access to meeting space because they set religious criteria for their leadership.

Beta Upsilon Chi ("BYX") is the largest Christian fraternity in the United States. It is headquartered in Fort Worth, Texas, with twenty-four chapters on college and university campuses in eleven states. BYX's purpose is to establish brotherhood and unity among college men based on

the common bond of Jesus Christ. Over the past several years, college and university administrators – in states such as Florida, Georgia, and Missouri – have refused to recognize chapters of BYX, because the chapters call upon their officers and members to share the fraternity's Christian beliefs and to strive to live true to those beliefs.

ARGUMENT

This is an important case about religious liberty affecting the First Amendment expressive association rights of thousands of religious student groups at university campuses throughout the nation. The question presented is highly significant: *May government universities condition access to a public forum or benefit on a student religious group's abandonment of religious membership requirements and its right of self-definition?* The court below held that officials at the University of California Hastings College of Law could exclude a chapter of the Christian Legal Society (CLS) from operating at their campus, because the officials believed that the CLS chapter's statement of faith requirements conflict with the school's nondiscrimination policies.

The issue is a recurring one; the decision of the Ninth Circuit is in direct conflict with the decision of the Seventh Circuit in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006); and the decision also conflicts in principle with a long line of this Court's decisions recognizing the First Amendment right of expressive association of groups to define their identity and membership – rights that clearly extend to religious student groups at state universities. *See, e.g., Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981).

Amici include organizations with student religious groups whose ability to meet on college campuses for religious discussion, fellowship,

evangelism, and mutual support are directly threatened by the decision below. *Amici* strongly urge this Court to grant the writ of certiorari in this case to resolve the conflict in the lower courts and to clarify the vital First Amendment rights at issue here. We cannot emphasize too strongly the importance of this issue, its regularly recurring nature, the likelihood that the decision below will encourage *more* such actions at other state universities, and the enormous implications this issue has for the life and vitality of campus religious groups.

In this brief, we offer two straightforward legal points for this Court's consideration: First, campus religious groups possess the freedom of expressive association in their doctrinal and membership decisions, a freedom well-recognized by this Court's decisions. Second, we submit that the logical implication of this Court's "equal access" decisions in *Rosenberger* and *Widmar* upholding the rights of student religious groups to meet and use state university facilities and resources is that state university officials may not condition a religious group's access to campus facilities on relinquishment of its religious identity, including such group's expressive association right to define its religious doctrinal and membership requirements. We submit that these points demonstrate that the judgment below is erroneous, and highlight the importance of the issue and the need for this Court's review.

We offer a third, practical point supporting review in this particular case: This case frames this essential issue in about as clean and square a

fashion as it is possible to imagine. The facts are plain and simple: a campus law student Christian group has a statement-of-faith membership requirement; the state law school construes its "nondiscrimination" requirements as prohibiting the use of such a statement of faith by a student religious group at the law school. The issue is uncluttered by factual concerns involving allegations of improper conduct by any person or group. Moreover, because the issue takes place at the university level – indeed, at a law school level – there is no conceivably legitimate issue of student immaturity or of deference to a mistaken perception of state endorsement. *Widmar*, 454 U.S at 274 n.14. *See also Bd. of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226, 250 (1990). Finally, there is no conceivable question of public school curriculum policy. In sum, this case makes an excellent vehicle for consideration of the important constitutional issue presented.

I. CAMPUS RELIGIOUS STUDENT GROUPS POSSESS THE FIRST AMENDMENT RIGHT OF EXPRESSIVE ASSOCIATION.

This case concerns religious liberty. Specifically, it concerns the right of religious groups to define and maintain their doctrinal identity through their decisions about membership – in particular, the beliefs and conduct that define the religious group. In terms of this Court's precedent, this case concerns the First Amendment freedom of "expressive association," as it applies to religious persons and groups.

The freedom of expressive association is recognized in a great many of this Court's cases. *See, e.g., Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group*, 515 U.S. 557 (1995); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Democratic Party v. Wisconsin*, 450 U.S. 107 (1981); *Healy v. James*, 408 U.S. 169 (1972).

This freedom is also specially recognized as an aspect of religious liberty under the Free Exercise Clause. As this Court noted in *Employment Division v. Smith*, 494 U.S. 872, 882 (1990),

> it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed").

See also Roberts, 468 U.S. at 622-623 (noting that the freedom, among others, of persons "to worship" would not be adequately "protected from interference by the State unless a correlative freedom to engage

in group effort toward those ends were not also guaranteed" and stating that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together.").

The right of expressive association is the right of a group to define its identity and its message, by defining the membership – and membership requirements – of the group. As this Court held in *Democratic Party v. Wisconsin*, "the freedom to associate for the common advancement of political beliefs . . . *necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only* . . . ". 450 U.S. at 122 (emphasis added) (quotation marks, citations, and footnote omitted). As Justice O'Connor expressed it in her concurrence in *Roberts*: "[A]n association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members. . . . Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring in part and concurring in the judgment).

A campus student religious group – clearly, an expressive association – enjoys these same rights. A religious group's identity is undeniably constituted

by the "content of its message and the choice of its members." *Id.* What the religious group *stands for* – its message and identity – is a function of the faith commitments shared by the group's membership. For a fairly traditional Christian group (like the Christian Legal Society), this naturally may involve a *Christian* "statement of faith" to which it expects its members to adhere, and other Christian doctrinal requirements and standards of conduct. To be sure, not all of society will agree with those beliefs; a Christian organization's beliefs and standards may conflict with secular society's values in meaningful ways. This may well be true with regard to matters of sexual conduct. (The doctrine, faith, and conduct requirements of many of the world's great religious faiths take religious and moral positions against homosexual conduct.) But that is simply part of what defines the religious identity of that particular student group.

As a practical matter, this *of course* "excludes" persons who do not adhere to the beliefs or standards of conduct of that particular community of faith. But only in the most strained sense of the terms do such requirements "discriminate" against such "excluded" persons. The religious groups in question are simply exercising their First Amendment freedom to define themselves and their collective expression. In a sense, the persons thereby "excluded" exclude themselves by virtue of the exercise of *their* First Amendment rights: they do not agree with the group, and so exercise their right to differ in their beliefs and conduct.

There is no doubt that campus student organizations are covered by this Court's cases protecting the freedom of expressive association. They possess all the characteristics of such groups generally; they simply are limited to their respective campus student bodies. Indeed, arguably the leading case in this line of decisions, *Healy v. James*, 408 U.S. 169, involved a campus group, the Students for a Democratic Society, and rejected the state university's claimed authority to deny that group recognition because its views conflicted with the university's stated values. *Healy* well states the controlling principles that apply here:

> Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. . . . There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. . . . The mere disagreement of the [university] President with the group's philosophy affords no reason to deny recognition. As repugnant as these views may have been, . . . the mere expression of them would not justify the denial of First Amendment rights. . . . The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.

408 U.S. at 184, 187-188.

II. A STATE UNIVERSITY MAY NOT CONDITION A STUDENT RELIGIOUS GROUP'S ACCESS TO CAMPUS FACILITIES OR RESOURCES ON RELINQUISHMENT OF THE GROUP'S RIGHT TO DEFINE ITS MESSAGE AND IDENTITY THROUGH ITS MEMBERSHIP STANDARDS.

The First Amendment rights of speech and association apply to campus student *religious* groups as well as political and other groups. That principle is firmly settled by this Court's decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981), and more recently in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). The clear, necessary implication of those decisions – upholding religious campus group's right of access to campus fora for expressive activity – is that state officials may not exclude such a group from such benefits *on the basis of the group's religious identity or message*.

If it is true, as this Court's expressive association cases affirm, then that the selection of membership is an integral part of a group's ability to maintain its message or identity, it follows that government officials at state universities may not condition access to campus fora on a group's relinquishment of that right of expressive association. *See generally* Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*,

29 U.C. Davis L. Rev. 653 (1996) (collecting cases and developing this argument at length). Thus, state officials may not impose – whether under the rubric of generic "nondiscrimination" requirements or in some other form – restrictions on a campus religious student group's message or membership requirements.

While there may be extreme, limiting cases involving expressive conduct (or mis-conduct) the state has a compelling interest in prohibiting, *see* Paulsen, *supra*, at 691-697, a religious group simply defining its membership in terms of its religious beliefs and standards of conduct does not remotely approach such circumstances. Specifically, any assertion that the state has a "compelling" interest in interfering with the expressive identity and message of a Christian religious group by requiring that it include persons engaged in sexual conduct or lifestyles contrary to the group's understanding of its religious tenets, would appear to be foreclosed by this Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995). In that case, the Court unanimously rejected the application of a state anti-discrimination requirement (forbidding discrimination on the basis of homosexuality) that would have the effect of requiring the inclusion in a group's parade of unwanted members who would alter the original group's message:

> Under [the state's] approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so

> that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message. . . . The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.

Hurley, 515 U.S. at 573, 579.

So too here: the use by state officials of nondiscrimination requirements essentially to transform the student Christian Legal Society into a public accommodation whose views would be shaped by persons *not* sharing their views – or else to forbid CLS's expression and association on campus entirely – violates the fundamental rule of the First Amendment that a speaker has the autonomy to control the content of its own message. So to condition a campus religious group's rights of expression on a relinquishment of its right to control its own expressive identity and to define its own principles grates on the First Amendment.

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR ADDRESSING THIS IMPORTANT AND RECURRING ISSUE.

The reasons why this case presents an appropriate opportunity for deciding the important issues presented are well set forth in the Petition for Certiorari: the decision below presents a square conflict with the decision of the Seventh Circuit in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006); the decision below conflicts in principle with this Court's expressive association decisions and with *Widmar* and *Rosenberger*; and the issue is important and recurring.

As noted, we believe that other factors make this case an especially apt vehicle for addressing the question presented. There are no factual complications. The issue is presented in a straightforward manner – state university officials take the position that they may exclude Christian Legal Society from Hastings Law School because they believe that CLS's statement of faith and membership practices conflict with the school's nondiscrimination requirements; CLS maintains that its membership decisions and faith requirements are protected features of its First Amendment rights of freedom of expressive association, and that it cannot be denied campus rights on such a ground. The situation takes place at a state university law school – presenting none of the complicating or potentially distracting issues that might be thought present in a public high school

context. And there is no question of misconduct, harm, disruption, or conflict with a curriculum choice in any fashion.

To be sure, the opinion of the Ninth Circuit was a summary disposition, relying on an earlier Ninth Circuit panel opinion and circuit practice generally requiring one panel to follow the precedents of another. One might have preferred to see substantive discussion of the issues by members of the panel below. But the issue remains squarely presented, addressed substantively by the district court, and well-briefed. In many ways, it presents a cleaner case than the decision on which the panel below relied, which is also the subject of a pending petition for certiorari. The facts in *Truth v. Kent School District*, 499 F.3d 999 (9th Cir. 2007), *withdrawn*, 524 F.3d 957 (9th Cir. 2008), *amended by* 542 F.3d 634 (9th Cir. 2008), *reh'g denied*, 551 F.3d 850 (9th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3531 (U.S. Mar. 10, 2009) (No. 08-1130), arise in a high school setting and involve an interpretation of the Equal Access Act, 20 U.S.C. §§ 4071-4074, thus making its applicability to the matter here less than apt. *Amici* would recommend granting both cases together, for the light that one may help shed on the other. Alternatively, this Court could grant the writ in the instant case and hold the other (or vice versa). But at all events, *amici* submit that the instant case makes an excellent vehicle for addressing and resolving an important issue that has divided the lower courts and that has enormous consequences for religious student groups throughout the nation.

CONCLUSION

Amici respectfully request that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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JOINT APPENDIX

(5)

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In The
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CHRISTIAN LEGAL SOCIETY CHAPTER
OF UNIVERSITY OF CALIFORNIA,
HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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VOLUME I

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United States District Court for the
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10/22/2004	1	COMPLAINT against Judy Chapman, Maureen E. Corcoran, Eugene L. Freeland, Carin T. Fujisaki, Mary Kay Kane, John T. Knox, Jan Lewenhaupt, James E. Mahoney, Brian D. Monaghan, Bruce L. Simon, John K. Smith, Tony West (Filing fee $ 150, receipt number 3365328.). Filed by Christian Legal Society Chapter of University of California, Hastings College of the Law. (hdj, COURT STAFF) (Filed on 10/22/2004) (Entered: 10/25/2004)
		* * *
12/20/2004	7	MOTION to Dismiss *Director Defendants and to Dismiss Counts III, IV, and VI of Verified Complaint* filed by Judy Chapman, Maureen E. Corcoran, Eugene L. Freeland, Carin T. Fujisaki, John T. Knox, Jan Lewenhaupt, James E. Mahoney, Brian D. Monaghan, Bruce L. Simon, John K. Smith, Tony West, Mary Kay Kane. Motion Hearing set for 4/1/2005 09:00 AM. (Schulman, Ethan) (Filed on 12/20/2004) (Entered: 12/20/2004)
		* * *

03/11/2005	17	MEMORANDUM in Opposition *to Motion to Dismiss* filed by Christian Legal Society Chapter of University of California. (Attachments: # 1 Signature Page (Declarations/ Stipulations) 2005-03-10 TJT First Declaration of SHA# 2 Signature Page (Declarations/Stipulations) Attachment to Declaration of SHA) (Smith, Timothy) (Filed on 3/11/2005) (Entered: 03/11/2005)

* * *

03/18/2005	19	RESPONSE in Support *of Motion to Dismiss Director Defendants and to Dismiss Counts III, IV, and VI of Verified Complaint* filed by All Defendants. (Schulman, Ethan) (Filed on 3/18/2005) (Entered: 03/18/2005)

* * *

03/31/2005	24	Notice of Tentative Ruling and Questions for Hearing. Signed by Judge Jeffrey S. White on March 31, 2005. (jswlc1, COURT STAFF) (Filed on 3/31/2005) (Entered: 03/31/2005)

* * *

04/01/2005	26	Minute Entry: Motion Hearing held on 4/1/2005 before Judge Jeffrey S. White (Date Filed: 4/1/2005), Initial Case Management Conference held on 4/1/2005 before Judge Jeffrey S. White (Date Filed: 4/1/2005).

(Court Reporter Joan Columbini.) (jjo, COURT STAFF) (Date Filed: 4/1/2005) (Entered: 04/01/2005)

* * *

04/12/2005 31 ORDER GRANTING IN PART and DENYING IN PART 7 Defendants' Motion to Dismiss. Signed by Judge Jeffrey S. White on April 12, 2005. (jswlc1, COURT STAFF) (Filed on 4/12/2005) (Entered: 04/12/2005)

* * *

05/03/2005 34 AMENDED COMPLAINT against all defendants. Filed by Christian Legal Society Chapter of University of California. (Aden, Steven) (Filed on 5/3/2005) (Entered: 05/03/2005)

* * *

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* * *

05/25/2005 40 MOTION to Intervene *as a Party Defendant; Memorandum of Points and Authorities* filed by Hastings Outlaw. Motion Hearing set for 7/15/2005 09:00 AM in Courtroom 2, 17th Floor, San Francisco. (Thompson, Carol) (Filed on 5/25/2005) (Entered: 05/25/2005)

* * *

06/03/2005	45	Memorandum in Opposition re 40 MOTION to Intervene *as a Party Defendant; Memorandum of Points and Authorities* filed by Christian Legal Society Chapter of University of California. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Proposed Order)(Aden, Steven) (Filed on 6/3/2005) (Entered: 06/03/2005)
		* * *
06/10/2005	47	Reply Memorandum re 40 MOTION to Intervene *as a Party Defendant; Memorandum of Points and Authorities* filed by Hastings Outlaw. (Stoll, Christopher) (Filed on 6/10/2005) (Entered: 06/10/2005)
		* * *
08/01/2005	54	ORDER GRANTING 40 Hastings Outlaw's MOTION to Intervene. Signed by Judge Jeffrey S. White on 7/29/05. (jjo, COURT STAFF) (Filed on 8/1/2005) (Entered: 08/01/2005)
		* * *
10/07/2005	70	MOTION for Summary Judgment *and Supporting Memorandum* filed by Christian Legal Society Chapter of University of California. Motion Hearing set for 12/2/2005 09:00 AM in Courtroom 2, 17th Floor, San Francisco. (Aden, Steven) (Filed on 10/7/2005) (Entered: 10/07/2005)
		* * *

10/07/2005 72 STIPULATION *of Facts for Cross Motions for Summary Judgment* by Christian Legal Society Chapter of University of California. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Exhibit E# 6 Exhibit F# 7 Exhibit G# 8 Exhibit H# 9 Exhibit I# 10 Exhibit J# 11 Exhibit K# 12 Exhibit L) (Aden, Steven) (Filed on 10/7/2005) (Entered: 10/07/2005)

* * *

10/21/2005 79 MOTION for Summary Judgment *Defendants' Notice of Motion and Motion for Summary Judgment; Supporting Memorandum of Points and Authorities* filed by All Defendants. Motion Hearing set for 12/2/2005 09:00 AM. (Schulman, Ethan) (Filed on 10/21/2005) (Entered: 10/21/2005)

* * *

10/21/2005 87 MOTION for Summary Judgment *(Cross) and Notice of Cross-Motion and Opposition to Plaintiff's Motion for Summary Judgment; Memorandum of Points and Authorities* filed by Hastings Outlaw. Motion Hearing set for 12/2/2005 09:00 AM. (Thompson, Carol) (Filed on 10/21/2005) (Entered: 10/21/2005)

* * *

11/07/2005	93	Memorandum in Opposition re 79 MOTION for Summary Judgment *Defendants' Notice of Motion and Motion for Summary Judgment; Supporting Memorandum of Points and Authorities*, 87 MOTION for Summary Judgment *(Cross) and Notice of Cross-Motion and Opposition to Plaintiff's Motion for Summary Judgment; Memorandum of Points and Authorities* filed by Christian Legal Society Chapter of University of California. (Tracey, Timothy) (Filed on 11/7/2005) (Entered: 11/07/2005)

* * *

11/18/2005	97	Reply Memorandum *In Support Of Motion For Summary Judgment* filed by All Defendants. (Schulman, Ethan) (Filed on 11/18/2005) (Entered: 11/18/2005)

* * *

11/18/2005	102	Reply Memorandum re 87 MOTION for Summary Judgment *(Cross) and Notice of Cross-Motion and Opposition to Plaintiff's Motion for Summary Judgment; Memorandum of Points and Authorities Reply Memorandum in Support of Defendants' Cross-Motions for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment* filed by

		Hastings Outlaw. (Stoll, Christopher) (Filed on 11/18/2005) (Entered: 11/18/2005)
		* * *
12/02/2005	107	Minute Entry: Motion Hearing held on 12/2/2005 before Judge Jeffrey S. White (Date Filed: 12/2/2005). (Court Reporter Juanita Gonzales.) (jjo, COURT STAFF) (Date Filed: 12/2/2005) (Entered: 12/02/2005)
		* * *
04/17/2006	124	ORDER by Judge Jeffrey S. White denying 70 Motion for Summary Judgment, granting 79 Motion for Summary Judgment, granting 87 Motion for Summary Judgment (jswlc1, COURT STAFF) (Filed on 4/17/2006) (Entered: 04/17/2006)
04/17/2006	125	Judgment. Signed by Judge Jeffrey S. White on April 17, 2006. (jswlc1, COURT STAFF) (Filed on 4/17/2006) (Entered: 04/17/2006)
04/20/2006	126	MOTION to Amend/Correct *or Alter Judgment* filed by Christian Legal Society Chapter of University of California. (Attachments: # 1 Proposed Order)(Aden, Steven) (Filed on 4/20/2006) (Entered: 04/20/2006)

04/21/2006	127	Memorandum in Opposition re 126 MOTION to Amend/Correct or *Alter Judgment Hastings Defendants' Opposition To Plaintiff's Motion to Alter or Amend Judgment* filed by All Defendants. (Schulman, Ethan) (Filed on 4/21/2006) (Entered: 04/21/2006)

* * *

04/24/2006	129	Reply to Opposition re 126 MOTION to Amend/Correct *or Alter Judgment* filed by Christian Legal Society Chapter of University of California. (Aden, Steven) (Filed on 4/24/2006) (Entered: 04/24/2006)

* * *

05/17/2006	133	NOTICE OF APPEAL as to 124 Order on Motion for Summary Judgment,, by Christian Legal Society Chapter of University of California, Hastings College of the Law. Filing fee $ 455, receipt number 3385734. (hdj, COURT STAFF) (Filed on 5/17/2006) (Entered: 05/17/2006)

* * *

05/19/2006	135	ORDER by Judge Jeffrey S. White denying 126 Motion to Amend/Correct Judgment. (jswlc1, COURT STAFF) (Filed on 5/19/2006) (Entered: 05/19/2006)

05/19/2006	136	Amended Order re Motions for Summary Judgment. Signed by Judge Jeffrey S. White on May 19, 2006. (jswlc1, COURT STAFF) (Filed on 5/19/2006) (Entered: 05/19/2006)
05/23/2006	137	Costs Taxed in amount of $ 423.25 against Plaintiffs. (cgd, COURT STAFF) (Filed on 5/23/2006) (Entered: 05/23/2006)

* * *

06/01/2006	140	(Amended) NOTICE OF APPEAL by Christian Legal Society Chapter of University of California. (hdj, COURT STAFF) (Filed on 6/1/2006) (Entered: 06/01/2006)

* * *

06/13/2006	142	ORDER STAYING THE ORDER TAXING COSTS AGAINST PLAINTIFF PENDING APPEAL. Signed by Judge Jeffrey S. White on 6/12/06. (jjo, COURT STAFF) (Filed on 6/13/2006) (Entered: 06/13/2006)

United States Court of Appeals for the Ninth Circuit
No. 06-15956

05/23/2006	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: appellant's designation of RT is due 5/30/06; appellee's designation of RT is due 6/6/06; appellant shall order transcript by 6/16/06; court reporter shall file transcript in DC by 7/17/06; certificate of record shall be filed by 7/24/06; appellant's opening brief is due 9/5/06; appellees' brief is due 10/2/06; appellants' reply brief is due 10/16/06; [06-15956] (GR
		* * *
06/06/2006	10	Received copy of amended notice of appeal from district court (Copy to CONFAT) (MF)
		* * *
09/28/2006	19	Filed original and 15 copies Appellant Christ. Legal Soc. opening brief (Informal: NO) 72 pages and five excerpts of record in 4 volumes; served on 1/27/06 [06-15956] (MF)
		* * *

10/10/2006	28	Filed original and 15 copies Wall-builders, Inc.'s brief iin [sic] favor of aplt of 13 pages; served on 10/6/06 [06-15956] (MF)
	*	* *
12/26/2006	43	Filed original and 15 copies appellee Hastings Outlaw's 49 pages brief, -0- Exc.; served on 12/26/06 [06-15956] (MF)
	*	* *
01/12/2007	51	Filed original and 15 copies appellee Mary Kay Kane's 64 pages (16,026 words) brief, -0- excs; served on 12/22/06 [06-15956] (MF)
	*	* *
01/22/2007	47	Filed original and 15 copies Amicus curiae Americans United for Separation of Church & State's brief in support of aples 29 pages; served on 1/19/07 (Consent ltr dated 1/19/07 rec'd) [06-15956] (MF)
01/22/2007	48	Filed original and 15 copies The Regents of UC's Amicus curie [sic] brief of 14 pages; served on 1/18/07 [06-15956] (MF)
	*	* *

02/28/2007	57	Filed original and 15 copies Christ. Legal Soc. reply brief, (Informal: NO) 53 (10,445 words) pages; served on 2/1/07 [06-15956] (MF)
		* * *
09/18/2007	59	Filed aplt Christian Legal Society's additional citations, served on 9/11/07 (RECORDS) [06-15956] (MF)
10/02/2007	60	Filed Mary Kay Kane additional citations, served on 10/2/07 RECORDS FOR MERITS PANEL [06-15956] (GR)
		* * *
11/05/2007	65	Filed Christ. Legal Soc. additional citations, served on 11/1/07 [06-15956] (KKW)
		* * *
12/07/2007	69	CALENDARED: San Francisco February 15, 2008 9:00 am Courtroom 2 [06-15956] (MW)
		* * *
01/02/2008	71	Filed order (Deputy Clerk: jf) amicus ACLU's motion to extend time to file amicus brief. The br recd 2/5/07 is deemed filed. [6036881-1], granting amicus motion to become amicus of Invervarsity Christian Fellowship. The br recd 10/4/06 is deemed filed. [5967770-1] [06-15956] (GR)
		* * *

01/28/2008	75	Filed order (Deputy Clerk: jf) This case is removed from the 2/15/08 SF calendar pndg issuance of the mandate in Truth v. Kent School. The clerk is directed to place this case before the next avail panel after the mandate issues in Truth. FAXED PARTIES [06-15956] (GR)
		* * *
02/08/2008	78	Filed Mary Kay Kane additional citations, served on 1/22/08 RECORDS FOR MERITS PANEL [06-15956] (GR)
		* * *
01/14/2009	85	Filed (ECF) Appellant Christian Legal Society Chapter of University of California, Hastings College of the Law citation of supplemental authorities. Date of service: 01/14/2009. [6769280] (TJT)
		* * *
02/11/2009	87	Filed (ECF) Appellees Judy Chapman, Maureen E. Corcoran, Eugene L. Freeland, Carin T. Fujisaki, Mary Kay Kane, John T. Knox, Jan Lewenhaupt, James E. Mahoney, Brian D. Monaghan and Bruce L. Simon Correspondence: Rule 28(j) Letter to Clerk of the Court of Appeals. Date of service: 02/11/2009 [6804955] (EPS)
		* * *

02/18/2009	89	Filed (ECF) Appellant Christian Legal Society Chapter of University of California, Hastings College of the Law Correspondence: Corrected Rule 28(j) Letter. Date of service: 02/18/2009 [6811491] (TJT)
		* * *
03/05/2009	91	Filed (ECF) Appellant Christian Legal Society Chapter of University of California, Hastings College of the Law citation of supplemental authorities. Date of service: 03/05/2009. [6834031] (TJT)
03/06/2009	92	Filed (ECF) Appellees Judy Chapman, Maureen E. Corcoran, Eugene L. Freeland, Carin T. Fujisaki, Mary Kay Kane, John T. Knox, Jan Lewenhaupt, James E. Mahoney, Brian D. Monaghan and Bruce L. Simon Correspondence: Appellee's Rule 28(j) Letter to the Court. Date of service: 03/06/2009 [6835383] (EPS)
		* * *
03/10/2009	94	ARGUED AND SUBMITTED TO ALEX KOZINSKI, PROCTER R. HUG and CARLOS T. BEA. (RY)
		* * *

03/17/2009	96	FILED MEMORANDUM DISPOSITION (ALEX KOZINSKI, PROCTER R. HUG and CARLOS T. BEA) AFFIRMED. FILED AND ENTERED JUDGMENT. (DD)
		* * *
04/10/2009	101	Filed order (ALEX KOZINSKI) Appellant's pointless motion to stay the mandate is granted, pending the timely filing of a petition for a writ of certiorari. Fed. R. App. P. 41(d)(2). (WL)
05/12/2009	102	Received notice from the Supreme Court: petition for certiorari filed on 05/07/2009. Supreme Court Number 08-1371. (GV)
		* * *
12/10/2009	104	Received notice from the Supreme Court. Petition for certiorari GRANTED on 12/07/2009. Supreme Court Number 08-1371. [7165000] (TB)

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Counsel for Plaintiff Christian Legal Society Chapter of University California, Hastings College of the Law, a/k/a Hastings Christian Fellowship

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law,

Plaintiff,

v.

MARY KAY KANE, in her official capacity as Chancellor and Dean of University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law; and MAUREEN E. CORCORAN, EUGENE L. FREELAND, CARIN T. FUJISAKI, JOHN T. KNOX, JAN LEWENHAUPT, JAMES E. MAHONEY, BRIAN D. MONAGHAN, BRUCE L. SIMON, JOHN K. SMITH, and TONY WEST, in their official capacities as the Board of Directors of University of California, Hastings College of the Law,

Defendants.

CASE NO.

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Filed Oct. 22, 2004)

* * *

[Pleading Omitted, Select Exhibits Attached]

To join the Christian Legal Society, complete this application form:

☐ *Sign me up! Enclosed is my New Member Application form and payment.*

To complete this application:
1. Determine your membership type below and fill in your address information
2. Sign the Statement of Faith
3. Enclose payment or credit card information

PLEASE ENTER YOUR NAME AND ADDRESS INFORMATION

Title: _____ *First Name:* _____ *Last Name:* _____ *MI:* ___

Address: _____

_____

City: _____ *State/Province:* _____

Country: _____ *Zip/Postal Code:* _____

Phone: _____ *Fax:* _____

Law School: _____ _____ *Graduation Year:* _____

Email: _____ *Employer/Firm:* _____

Christian Legal Society
Statement of Faith
All applicants/members must sign this Statement of Faith

Trusting in Jesus Christ as my Savior,
I believe in:

- *One God, eternally existent in three persons, Father, Son and Holy Spirit.*
- *God the Father Almighty, Maker of heaven and earth.*
- *The Deity of our Lord, Jesus Christ, God's only Son, conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.*
- *The presence and power of the Holy Spirit in the work of regeneration.*
- *The Bible as the inspired Word of God.*

Membership Type / Annual Dues

O	Attorney - 6 or more years since Graduation	$175.00
O	New Lawyer - 5 or less years since Graduation	$87.50
O	Public Ministry	$87.50
O	Professor	$175.00
O	Law Professor - CLS Campus Advisor	$87.50
O	Judge Member	$100.00
O	Judge Subscriber	$100.00
O	Law Student	$25.00
O	Law Student Group – 2 or more as a group	$10.00
O	Pre-Law Student	$25.00
O	Associate (paralegals, legal secretaries, others)	$50.00
O	Foreign Member	$50.00
O	Retired	$50.00

Payment Method

? Check ? VISA ? MasterCard ?? AMEX ? ? Discover

Name on Card: _____

Card Number: _____ Exp. Date: ____

Signature: _____

For questions concerning dues, please contact Law Student Ministries at
(703) 642-1070 ext. 3304

Christian Legal Society/Law Student Ministries • 4208 Evergreen Lane, Suite 222 • Annandale, Virginia 22003
(703) 642-1070 ext 3304/3300 • Fax (703) 642-1075 • www.clsnet.org • lsm@clsnet.org

EXHIBIT A

BEST AVAILABLE COPY

EXHIBIT B

APPLICATION FOR RECOGNITION AS A STUDENT CHAPTER OF THE CHRISTIAN LEGAL SOCIETY

(AFFILIATION AGREEMENT)

In consideration of the right to be recognized as an affiliated student chapter of the Christian Legal Society and to enjoy all the benefits and privileges arising from that status, applicant, the CLS Student Chapter of UC Hastings College of the Law [insert name of educational institution] agrees:

1. To abide by the CLS Constitution governing student chapters, as such may be amended from time to time (see Art. XIII, CLS bylaws, appendix 1, Student Chapter Manual).

2. To abide by the local Constitution and to maintain them without alteration, unless prior written approval for amendment is obtained from the CLS Executive Director (see Art. XI, Student Chapter Constitution).

3. To accept as binding the decision of the CLS Executive Director in response to any inquiry concerning the meaning or interpretation of the local Constitution (see Art. XI, Student Chapter Constitution).

4. To permit and facilitate the inspection of applicant's records and operations at any time by Law Student Ministries (LSM).

5. To recognize ownership by CLS of the trademarks and service marks CHRISTIAN LEGAL

SOCIETY, CLS and a symbol consisting of a cross and scales of justice, and the exclusive right of CLS to control the quality of services offered and materials produced by applicant under these marks. Upon request, to provide LSM with copies of any or all materials carrying the CLS marks.

6. To cease immediately to hold itself out as a CLS student chapter upon demand by CLS or upon termination of this agreement and thereupon to discontinue promptly the use of the CLS marks.

7. To advise LSM of any significant operational or policy conflicts or other problems within the Chapter or between the Chapter and the School.

8. To insure, early in the school year, that the chapter advisor and student chapter officers read the Student Chapter Manual and familiarize themselves with the contents of the LSM Cares Package.

9. To make every effort to insure that one or more student chapter officers or members attend the CLS National Conference each year and to assist LSM by raising funds at the local level for this purpose.

10. To respond promptly to all LSM inquiries and, by April 30th of each year, to complete and mail the LSM Annual Reporting Form, attached as appendix 3 of the Student Chapter Manual, to **CLS Law Student Ministries, 4208 Evergreen Lane, Suite 222,**

Annandale, VA 22003-3264. See Art. V, local Constitution. Among other things, this form asks you to provide the following vital information: (a) the names, addresses, telephone numbers and e-mail addresses of new officers, of the student leader or advisor who has been designated to receive the LSM Student Kick-Off Package in August, and of **all graduating members**; and (b) the nature and extent of the Chapter's events and activities during the last school year.

11. If applicant does not enjoy federal tax exempt status under its School's exemption and would like to be included under a group exemption for CLS and its affiliates, the chapter officers should contact the **Director, LSM, 4208 Evergreen Lane, Suite 222, Annandale, VA 22003-3264**

12. This agreement shall continue in effect until terminated by either party or until applicant ceases to exist, which ever occurs first. Either party may terminate this agreement at any time by written notice to the other party.

DATE: September 10, 2004.

CLS STUDENT CHAPTER of
UC Hastings College of the Law

BY: /s/ Isaac Fong
Chapter Officer and
CLS Student Member
Print Name: Isaac Fong

/s/ Dina Haddad
Chapter Officer and
CLS Student Member
Print Name: Dina Haddad

/s/ Julie Chan
Chapter Officer and
CLS Student Member
Print Name: Julie Chan

ACCEPTANCE OF
CLS STUDENT CHAPTER CONSTITUTION
AND AFFILIATION AGREEMENT

The CLS Student Chapter Constitution and the Application for Recognition as a Student Chapter of CLS (Affiliation Agreement), submitted by the Christian Law Fellowship of UC Hastings College of the Law [insert name of educational institution], are hereby accepted. Henceforth, the fellowship is recognized as an official student chapter of the Christian Legal Society, subject to the terms and conditions set forth in the above Constitution and Affiliation Agreement.

FOR THE CHRISTIAN LEGAL SOCIETY:

/s/ Samuel B. Casey
Samuel B. Casey, Esq.
Executive Director, CLS

DATE: 9/20, 2004

EXHIBIT D

[Exhibit A To Hastings Handbook For Student Organizations]

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW
STUDENT ORGANIZATION REGISTRATION
Academic Year 20___-20___

Formal Name of Organization:

_____

All registered student organizations will comply with the Policies and Regulations Applying to College Activities, Organizations and Students as stated in the Handbook for Student Organizations and submit financial records as required by the College. Failure to comply may result in loss of status as a registered student organization.

Purpose of organization:

_____

_____

_____

Membership Fees (if any): _____

Faculty Advisors (if any): _____

Officers and Executives: *Note: The responsibility of officers for the activities of their organizations includes the individual responsibility of each officer for payment in full of debts incurred by the organization.*

Name of Officers	Class	Position	Phone	Email

(if applicable) Organization's Phone # _____
Email _____

Primary contact person _____
and preferred method of contact (email, telephone, or SIC folder) _____
which can be released to the public.

Print Name: _____

_____
Signature of Representative

_____
Date Registration Form
Submitted to Student Services

APROVED [sic] IN ACCORDANCE
WITH COLLEGE POLICIES:

_____
Signature of Director
of Student Services

_____
Date of Registration

To complete the Registration package, please attach to this form:

(*A complete package must be submitted in order for an organization to be considered for registration.*)

1. One copy of organization's most recent by-laws.
2. License Agreement for Use of College Name, completed and signed.

3. If you have an outside bank account, Registered Student Organization Account Information form, completed and signed; copy of bank signature card.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JEFFREY S. WHITE

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW F/K/A HASTINGS CHRISTIAN FELLOWSHIP, A STUDENT ORGANIZATION AT UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, PLAINTIFF, VS. MARY KAY KANE, ET AL., DEFENDANTS.	NO. C 04-4488 JSW SAN FRANCISCO, CALIFORNIA FRIDAY, APRIL 1, 2005

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF MCKINLEY & SMITH
3445 AMERICAN RIVER DR., SUITE A
SACRAMENTO, CALIFORNIA 95864

BY: **TIMOTHY SMITH, ESQUIRE**

RELIGIOUS LIBERTY ADVOCATES OF THE CHRISTIAN LEGAL SOCIETY
8001 BRADDOCK ROAD, SUITE 300
SPRINGFIELD, VIRGINIA 22151
BY: STEVEN H. ADEN, ESQUIRE

(FURTHER APPEARANCES ON FOLLOWING PAGE)

REPORTED BY: JOAN MARIE COLUMBINI, CSR 5435, RPR OFFICIAL COURT REPORTER, U.S. DISTRICT COURT

APPEARANCES CONTINUED:

FOR DEFENDANT HOWARD, RICE, NEMEROVSKI, CANADY, FALK & RABKIN
THREE EMBARCADERO CENTER, 7TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111
BY: ETHAN P. SCHULMAN, ESQUIRE
LONG XUAN DO, ESQUIRE
MATTHEW RUTLEDGE SCHULTZ, ESQUIRE
ELISE TRAYNUM, ESQUIRE
HASTINGS GENERAL COUNSEL

* * *

[43] AND I THINK EVEN SOME OF THEM ARE ESTABLISHMENT CLAUSE CASES.

THAT SAID, OF COURSE, COURTS CAN AND DO CONSIDER HYPOTHETICAL CIRCUMSTANCES AS PART OF THEIR DISCUSSION OF THE ISSUES AND AS PART OF DECIDING WHETHER THAT KIND OF A HEAVY BURDEN HAS BEEN MET.

I THINK THE COURT HERE HAS QUITE PROPERLY CHARACTERIZED THE HYPOTHETICAL THAT WE ARE TALKING ABOUT HERE AS FANCIFUL. WE ARE TALKING ABOUT AN ORGANIZATION THAT PUBLICLY BROADCASTS ITS ANTIPATHY TO NON-ADHERENTS TO ITS RELIGIOUS FAITH AND TO GAY AND LESBIAN STUDENTS, AND THE HYPOTHETICAL WE ARE TALKING ABOUT SPECIFICALLY IS IF ONE OR MORE OF THOSE STUDENTS, NOTWITHSTANDING THAT PUBLICLY EXPRESSED ANTIPATHY, FOR SOME STRANGE REASON VOLUNTARILY JOIN THE ORGANIZATION AND THEN DECIDES TO RUN FOR AN OFFICER POSITION – SO WE ARE NOW TWO FANCIFUL STEPS INTO THE HYPOTHETICAL – AND IF THAT STUDENT, THIRD STEP, WERE TO WIN THE ELECTION AMONG ALL OF THESE HOSTILE MEMBERS – I'M HAVING TROUBLE FOLLOWING THIS, BUT LET'S FOLLOW IT THROUGH TO ITS CONCLUSION – COULD THE POLICY THEN BE APPLIED IN SUCH A FASHION AS TO CREATE EXCESSIVE ENTANGLEMENT BECAUSE THE SCHOOL WOULD BE SEEKING TO IMPOSE DISCIPLINE ON THE MEMBERS – I TAKE IT BACK.

THE THIRD STEP IS NOT IF THE STUDENT WINS. THE THIRD STEP IS IF THE STUDENT

LOSES THE OFFICER ELECTION AND THEN THERE'S A COMPLAINT, I WAS DISCRIMINATED AGAINST BECAUSE I'M A GAY STUDENT AND THAT'S WHY I WASN'T ELECTED PRESIDENT OF [44] THE ORGANIZATION, AND THE SCHOOL THEN SEEKS TO IMPOSE DISCIPLINE AND SEEKS TO INQUIRE INTO THE RELIGIOUS BELIEFS OF THE VOTING MEMBERS OF THE ORGANIZATION. WELL, WE ARE VERY FAR DOWN A VERY FANCIFUL PATH.

THAT SAID, I GUESS I WOULD MAKE THE FURTHER POINT THAT WE'VE MADE IN OUR PAPERS, WHICH IS THAT THE *VERNON* CASE IS ONE EXAMPLE, BUT THE – *BOLLARD* IS ANOTHER IN THE NINTH CIRCUIT. THE NINTH CIRCUIT HAS SAID, LOOK – AND THE UNITED STATES SUPREME COURT HAS SAID THE SAME THING – ENTANGLEMENT MEANS SOME KIND OF ONGOING SYSTEMATIC SURVEILLANCE OR INVOLVEMENT IN THE RELIGIOUS BELIEFS OF AN ORGANIZATION. IT DOESN'T MEAN AN INVESTIGATION, AS IN *VERNON*, INTO WHETHER THE RELIGIOUS BELIEFS IMPROPERLY AFFECTED SOME ACTION.

SO THERE WOULDN'T – EVEN IF WE WERE TO GO DOWN THAT LONG FANCIFUL ROAD, THERE WOULD BE NO EXCESSIVE ENTANGLEMENT AS A MATTER OF THE ESTABLISHMENT CLAUSE.

THE COURT: ALL RIGHT. WHAT I'M GOING TO DO NOW, COUNSEL, I WILL GO TO

QUESTION FIVE, WHICH IS THE ONE I ALWAYS HESITATE TO ASK BECAUSE I DON'T WANT TO HEAR REARGUMENT OF WHAT'S IN THE BRIEFS AND ALL AND WHAT YOU'VE SAID IN RESPONSE TO QUESTIONS, BUT I WILL GIVE YOU AN OPPORTUNITY TO TELL THE COURT IF THERE'S ANYTHING YOU WISH TO ADD BEFORE THE MATTER IS SUBMITTED.

MR. ADEN: I WILL TRY TO BE BRIEF, YOUR HONOR, BY ONCE AGAIN RESPONDING TO MR. SCHULMAN'S COMMENTS.

[45] I AM PUZZLED BY COUNSEL'S ASSERTION THAT OURS IS A FACIAL ESTABLISHMENT ATTACK. IT IS, IN FACT, A FACIAL AND DOES APPLY ESTABLISHMENT ATTACK. IT IS NOT APPROPRIATE TO DISMISS AN ESTABLISHMENT CLAUSE CLAIM IN TOTO BECAUSE THE COURT MAY FEEL THAT THE FACIAL CHALLENGE HAS NOT BEEN MET. THERE REMAINS THE AS-APPLIED CHALLENGE.

SECOND, YOUR HONOR, HYPOTHETICALS ASIDE, THESE ARE VERY REAL CIRCUMSTANCES. OUR CLS CHAPTER AT WASHBURN UNIVERSITY IN TOPEKA, KANSAS WAS STRIPPED OF ITS FUNDING BY THE STUDENT COUNCIL BECAUSE IT PRECLUDED A NON-ADHERENT, A MEMBER OF THE CHURCH OF JESUS CHRIS [sic] OF LATTER DAY SAINTS, WHO ADMITTED THAT HE COULD NOT SIGN OUR STATEMENT OF FAITH, FROM LEADING A BIBLE

STUDY AT A CLS MEETING. THE STUDENT BAR ASSOCIATION FELT THAT WAS DISCRIMINATION ON THE BASIS OF RELIGION. THEY LOOKED AT THE BELIEFS OF THE MORMON STUDENT AND THE BELIEFS OF A CLS STUDENT. I DON'T THINK THAT'S APPROPRIATE FOR A GOVERNMENT BODY TO DO.

OUR CLS CHAPTER AT OHIO STATE UNIVERSITY FACED A COMPLAINT FROM THE GAY AND LESBIAN ORGANIZATION THERE ASKING THE ORGANIZATION TO STRIP IT OF FUNDING AND RECOGNITION. A WEEK AGO THE SOUTHERN UNIVERSITY OF ILLINOIS SCHOOL OF LAW STRIPPED OUR CLS CHAPTER OF FUNDING AND RECOGNITION BECAUSE IT WILL NOT ALLOW A LESBIAN STUDENT TO STAND FOR OFFICER STATUS. THOSE ARE OUTSIDE THE RECORD, BUT THESE ARE NOT HYPOTHETICALS.

THE QUESTION IS WOULD THE UNIVERSITY'S POLICY AND [46] THE IMPLEMENTATION OF IT NECESSARILY LEAD TO TRAWLING THROUGH RELIGIOUS BELIEFS. I DO NOT SEE HOW IT COULD NOT, BECAUSE THE POLICY SAYS CLS AT HASTINGS MAY NOT ENGAGE IN DISCRIMINATION ON THE BASIS OF RELIGION OR SEXUAL ORIENTATION IN TREATMENT OF STUDENTS. SETTING ASIDE ADMISSIONS OR ACCESS FOR A MOMENT, IT CANNOT TREAT ANY STUDENT DIFFERENTLY BECAUSE OF

WHAT THEY BELIEVE ABOUT RELIGION OR HUMAN SEXUALITY.

IN MY VIEW, IT IS CLEAR ON THE FACE OF THIS POLICY THAT A PERSON COULD NOT BE PREVENTED FROM LEADING A BIBLE STUDY SIMPLY BECAUSE THEY HAD A DIFFERENT VIEW ABOUT THE BIBLE'S INTERPRETATION OF THE BIBLE ON SEXUALITY. THEY COULD NOT COUNSEL OR ENCOURAGE A STUDENT TO ADOPT A DIFFERENT VIEW WITH REGARD TO SEXUALITY, OR EVEN A DIFFERENT RELIGIOUS VIEW, BECAUSE THAT IS DISPARATE TREATMENT. THAT'S DISCRIMINATION.

I CAN'T – I ALMOST CANNOT CONCEIVE OF A CIRCUMSTANCE IN WHICH THIS POLICY WOULD NOT RESULT IN TRAWLING THROUGH RELIGIOUS BELIEFS OF THE CHRISTIAN LEGAL SOCIETY AND ITS MEMBERS. IT'S A VERY REAL HYPOTHETICAL, YOUR HONOR.

THE COURT: THE ONLY THING I WOULD SAY, ALTHOUGH IT IS THIS IS A VERY COMPLICATED ANALYSIS WITH MULTIPLE OVERLAPPING DOCTRINE, FREE ACCESS, ESTABLISHMENT CLAUSE AND ALL THAT, WHEN YOU STEP BACK FROM ALL OF IT, THOUGH, THE CONCERN THAT THE COURT HAS IS HERE WE HAVE A PUBLIC COLLEGE WHICH IS BEING ASKED TO BASICALLY IN SOME FASHION GIVE ITS, I THINK IRRESPECTIVE OF HOW YOU CHARACTERIZE IT, ITS

IMPRIMATUR, [47] POSSIBLY USING ITS LOGO AND STUDENT FEES TO FUND AN ORGANIZATION WHICH BY ITS VERY CHARTER ENGAGES IN INAPPROPRIATE ILLEGAL INVIDIOUS DISCRIMINATION.

MR. ADEN: NOT ILLEGAL. HOW IS IT ILLEGAL? HOW IS IT ILLEGAL, YOUR HONOR?

THE COURT: BECAUSE IT'S ILLEGAL TO DISCRIMINATE BASED UPON RELIGION OR SEXUAL ORGANIZATION.

MR. ADEN: BY A PRIVATE RELIGIOUS ASSOCIATION, YOUR HONOR.

THE COURT: NO. BY A UNIVERSITY GIVING ITS IMPRIMATUR TO ESSENTIALLY THAT PARTICULAR ORGANIZATION.

MR. ADEN: IT'S A TAUTOLOGICAL ARGUMENT, YOUR HONOR, WITH ALL DUE RESPECT. THE UNIVERSITY HAS A POLICY SAYING YOU DO NOT HAVE ACCESS IF YOU DON'T AGREE WITH THE UNIVERSITY'S POLICY ON – THE UNIVERSITY'S POLICY ON RELIGION AND SEXUALITY. THAT'S A UNIVERSITY LAW, IF YOU WILL. BUT THE SUPREME COURT SAID IN *HEALY VERSUS JAMES* THAT VIOLATED THE FIRST AMENDMENT. THEY COULD NOT FORCE SDS TO ADHERE TO THE UNIVERSITY'S POLICY ON NON-VIOLENCE.

THE COURT: I UNDERSTAND YOUR ARGUMENT. I UNDERSTAND IT'S A VERY, VERY

COMPLICATED ISSUE. YOU HAVE THE INTERSECTION OF ALL OF THESE DIFFERENT DOCTRINES AND THE ISSUE OF – YOU KNOW, THE ISSUE OF FREE ACCESS AND THE ISSUE OF ESTABLISHMENT.

THE COURT IS NOT INDICATING THE WAY IT WILL RULE ON [48] THIS. I'M SORT OF GIVING YOU MY OBSERVATIONS ON WHAT I THINK IS SOMEWHAT OF A CONUNDRUM.

MR. ADEN: THANK YOU. I'M SORRY. I HAD ONE MORE POINT ON THE ESTABLISHMENT, THAT IS JUST TO POINT OUT TO THE COURT THAT THE SUPREME COURT IN *WITMAR* [sic] *VERSUS VINCENT* IN AFFIRMING FIRST AMENDMENT RIGHTS OF ACCESS TO UNIVERSITY FACILITIES TO RELIGIOUS GROUPS SAID THAT GRANTING ACCESS TO RELIGIOUS FACILITIES ACTUALLY AVOIDS EXCESSIVE ENTANGLEMENT UNDER THE ESTABLISHMENT CLAUSE, AND THE LANGUAGE THAT THE COURT USED IS AT 450 U.S. 272, NOTE 11.

> "THE UNIVERSITY WOULD RISK GREATER ENTANGLEMENT BY ATTEMPTING TO ENFORCE ITS EXCLUSION OF RELIGIOUS WORSHIP AND RELIGIOUS SPEECH. IT WOULD NEED TO DETERMINE WHICH WORDS AND ACTIVITIES FALL WITHIN RELIGIOUS WORSHIP AND RELIGIOUS TEACHING. THIS WOULD PROVE AN IMPOSSIBLE TASK, AND THERE WOULD BE A

CONTINUING NEED TO MONITOR GROUP MEETINGS TO ASSURE COMPLIANCE WITH THE RULE."

THAT IS ALL WE'RE SAYING, YOUR HONOR. IT'S A SAFER THING UNDER THE ESTABLISHMENT CLAUSE TO GRANT AN EXEMPTION. THAT'S WHY TITLE VII GRANTS AN EXCEPTION FOR RELIGIOUS ORGANIZATIONS.

I WAS PUZZLED BY COUNSEL'S ASSERTION A FEW MOMENTS AGO THAT TITLE VII SOMEHOW DOESN'T PERMIT DISCRIMINATION. IN FACT, TITLE VII ON ITS FACE HAS AN EXCEPTION FOR RELIGIOUS

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, a/k/a HASTINGS CHRISTIAN FELLOWSHIP,

Plaintiff,

v.

MARY KAY KANE, et al.,

Defendants /

No. C 04-04484 JSW

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

Now before the Court is the motion of defendants Maureen E. Corcoran, Eugene L. Freeland, Carin T. Fujisaki, John T. Knox, Jan Lewenhaupt, James E. Mahoney, Brian D. Monaghan, Bruce L. Simon, John K. Smith, and Tony West ("Director Defendants"), Mary Kay Kane, and Judy Chapman (collectively "Defendants") to dismiss the third, fourth and sixth claims in the complaint of plaintiff Christian Legal Society Chapter of University of California, Hastings College of the Law, a/k/a Hastings Christian Fellowship ("HCF"). Having carefully considered the parties' arguments, the relevant legal authority, and having had the benefit of oral argument, the Court hereby GRANTS IN PART and DENIES IN PART the motion to dismiss.

FACTUAL BACKGROUND

HCF is an unincorporated student organization and a local chapter of the national organization of the Christian Legal Society. (Complaint, ¶ 2.1.) The Christian Legal Society is a nationwide association of Christian lawyers, law students, law professors, and judges. The Christian Legal Society's purposes include providing a means of society, fellowship, and nurture among Christian lawyers; promoting justice, religious liberty, and biblical conflict resolution; encouraging, disciplining, and aiding Christian law students; and encouraging lawyers to furnish legal services to the poor. (Complaint, ¶ 3.1.) HCF requires all of its members and officers to agree to and affirm a Statement of Faith that it interprets as requiring its officers and members to adhere to orthodox Christian beliefs, which HCF construes as prohibiting sexual conduct between persons of the same sex. (Complaint, ¶¶ 3.7-3.8.) In September 2004, HCF informed Defendants that it would consider religion and sexual orientation in the selection of its officers and members. (Complaint, ¶¶ 4.1-4.3.)

Student groups at the Hastings College of the Law of the University of California ("Hastings") must be recognized as a "registered student organization" to be eligible to receive the following benefits from Hastings: (a) use of designated Hastings' bulletin boards for announcements of interest to organization members and the student body; (b) use of the Student Information Center for distribution of materials to the Hastings community; (c) listing on the Office of

Student Services' website and any hard copy lists; (d) participation in the Student Organizations' Faire; (e) access to all services offered by the Office of Student Services, including organizational consultation, workshops, financial consulting and training, and publications; (f) access to Hastings' publications, including the "Hastings Weekly;" (g) placement of organizational materials in 1L orientation packets; (h) listing organizational announcements on classroom chalkboards; (i) placement of announcements in the Student Event Calendar, delivered weekly to Hastings' students via email; (j) eligibility to enter into a License Agreement with Hastings for use of the Hastings name; (k) use of Hastings facilities for meetings; and (l) funding. (Complaint, ¶ 3.15.) As a condition of becoming a "registered student organization," Hastings requires a student organization to agree to and abide by the "Policies and Regulations Applying to College Activities, Organizations and Students," which requires, *inter alia,* student organizations to comply with the Policy on Nondiscrimination. (Complaint, ¶¶ 3.16-3.17.) The Policy on Nondiscrimination provides:

> The College is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, College-owned student residence facilities and programs sponsored by the College, are governed by this policy of nondiscrimination. . . .

> The University of California, Hastings College of the Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This non-discrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities."

(Complaint, Ex. E at § 20.00.)

Defendants would not allow HCF to register as a student organization unless it "open[ed] its membership to all students irrespective of their religious beliefs or sexual orientation." (Complaint, ¶ 4.5.) HCF alleges that "[b]y enacting and enforcing the Policy on Nondiscrimination forbidding HCF to discriminate on the basis of religion or sexual orientation, refusing to recognize HCF's constitutional right to an exemption from said policy, and withholding from HCF the status and benefits of a registered student organization" Hastings discriminated against HCF. (Complaint ¶ 4.12.) HCF filed the instant complaint asserting that Defendants are violating (1) HCF's rights to Freedom of Expressive Association pursuant to the First Amendment of the United States Constitution (Count I); (2) HCF's Free Speech pursuant to the First Amendment (Count II); (3) the Establishment Clause of the First Amendment (Count III); (4) the Due Process Clause of the Fourteenth Amendment (Count IV); (5) the Free Exercise Clause of the First Amendment (Count V); and (6) the Equal Protection Clause of the Fourteenth Amendment

(Count IV). In thier [sic] motion to dismiss, Defendants challenge only the legal sufficiency of HCF's third claim (Establishment Clause), fourth claim (Due Process Clause), and sixth claim (Equal Protection Clause). Defendants also contend the Director Defendants are not proper defendants pursuant to the *Ex parte Young* doctrine.

ANALYSIS

I. Legal Standard

Rule 12(b)(6) motions challenge the legal sufficiency of the claims asserted in the complaint. A motion to dismiss should not be granted unless it appears beyond a doubt that a plaintiff can show no set of facts supporting his claim. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Under this liberal standard, motions to dismiss are viewed with disfavor, and are rarely granted. *Hall v. City of Santa Barbara,* 833 F.2d 1270, 1274 (9th Cir. 1986). The complaint is viewed in a light most favorable to the nonmoving party, and all factual allegations therein are taken as true. *Sanders v. Kennedy,* 794 F.2d 478, 481 (9th Cir. 1989).

As a general rule, "a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Branch v. Tunnell,* 14 F.3d 449, 453 (9th Cir. 1994), *overruled on other grounds, Galbraith v. County of Santa Clara,* 307 F.3d 1119 (9th Cir. 2002) (citation omitted). However, documents subject to judicial notice or those attached to

the complaint may be considered on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1555 (9th Cir. 1989); *Mullis v. U.S. Bankruptcy Court for Dist. of Nevada*, 828 F.2d 1385, 1388 (9th Cir. 1987). In doing so, the Court does not convert a motion to dismiss to one for summary judgment. *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

II. HCF's Claim Under the Establishment Clause

The Establishment Clause of the First Amendment to the United States Constitution prohibits any law "respecting an establishment of religion." United States Const. amend. I. "[A]lthough the federal Establishment Clause cases for the most part have addressed governmental efforts to *benefit* religion or particular religions, it is clear that the 'First Amendment forbids an official purpose to *disapprove* of a particular religion or religions in general.'" *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1386 (9th Cir. 1994) (emphasis in original) (*quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1992)). The Establishment Clause requires government neutrality, and this neutrality would be violated as much by government approval as it would by government disapproval of religion. *Vernon*, 27 F.3d at 1396.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court articulated the test for analyzing

governmental conduct under the under the [sic] Establishment Clause. To survive the test, the government conduct at issue must (1) have a secular purpose, (2) not advance or inhibit religion as its principal or primary effect, and (3) not foster an excessive government entanglement with religion. *Id.* at 612-13. The challenged conduct must survive all three prongs of the test to be constitutional. *Vernon,* 27 F.3d at 1396 (*citing Edwards v. Aguillard,* 482 U.S. 578, 583 (1987)).

a. The Policy Has a Secular Purpose

"The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion." *Kreisner v. City of San Diego,* 1 F.3d 775, 782 (9th Cir. 1993) (quoting *Lynch v. Donnelly,* 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)). The government conduct will fail this prong "only if it is motivated wholly by an impermissible purpose." *Kreisner,* 1 F.3d at 782 (quoting *Bowen v. Kendrick,* 487 U.S. 589, 602 (1988)); *but see Vernon,* 27 F.3d at 1397 (acknowledging Ninth Circuit precedent that any secular purpose suffices, but noting that panel believes Supreme Court test is really that the "actual" or "primary" purpose must be secular). In any event, the Ninth Circuit's "analysis under this prong focuses purely on *purpose;* [it does] not question the propriety of the means to achieve that purpose or whether the defendants were correct or even reasonable in the assumptions underlying their actions. . . . Moreover,

[a] reviewing court must be reluctant to attribute unconstitutional motives to government actors in the face of a plausible secular purpose." *American Family Ass'n, Inc. v. City and County of San Francisco,* 277 F.3d 1114, 1121 (9th Cir. 2002) (internal quotes and citations omitted).

In *American Family Association,* the San Francisco Board of Supervisors sent the plaintiffs a letter stating: "Supervisor Leslie Katz denounces your hateful rhetoric against gays, lesbians and transgendered people. . . . It is not an exaggeration to say that there is a direct correlation between these acts of discrimination, such as when gays and lesbians are called sinful and when major religious organizations say they can change if they tried, and the horrible crimes committed against gays and lesbians." San Francisco then adopted two resolutions condemning a hate crime and anti-gay television advertisements. The resolution on the hate crime "call[ed] for the Religious Right to take accountability for the impact of their long-standing rhetoric denouncing gays and lesbians, which leads to a climate of mistrust and discrimination that can open the door to horrible [hate] crimes. . . ." *Id.* at 1119-1120. The court held that "although the letter and resolutions may appear to contain attacks on the Plaintiffs' religious views, in particular that homosexuality is sinful, there is also a plausible secular purpose in the Defendants' actions – protecting gays and lesbians from violence – and that therefore the

Plaintiffs could not state a claim under the purpose prong." *Id.* at 1121.

Here, it is even more clear that Defendants had a plausible secular purpose for the nondiscrimination policy – protecting against and eliminating discrimination at Hastings. *Cf. Bollard v. California Province of the Society of Jesus,* 196 F.3d 940, 948 (9th Cir. 1999) (noting Ninth Circuit had already held that Title VII has an obvious secular legislative purpose of eliminating employment discrimination). The nondiscrimination policy therefore passes the first prong.

b. Principal or Primary Effect

"Under the second prong of the *Lemon* test, [courts] must consider whether the government action has the principal or primary effect of advancing or inhibiting religion." *American Family Ass'n,* 277 F.3d at 1122 (*citing Lemon,* 403 U.S. at 612). To make this determination, courts ask "whether it would be objectively reasonable for the government action to be construed as sending primarily a message of either endorsement or approval of religion." *Vernon,* 27 F.3d at 1398. This inquiry must be conducted "from the perspective of a 'reasonable observer' who is both informed and reasonable." *American Family Ass'n,* 277 F.3d at 1122 (*citing Kreisner,* 1 F.3d at 784). "Unlike the secular purpose prong, in which it appears that any secular purpose, no matter how minimal, will pass the test,

the focus of this prong is on the *primary* effect of the government's conduct." *Id.* (emphasis in original).

In *Vernon,* the city of Los Angeles conducted an investigation into whether an officer's religious beliefs were inappropriately affecting the operations of the police department. The court concluded that "[n]otwithstanding the fact that one may infer possible city disapproval of [the officer's] religious beliefs from the direction of the investigation, this cannot be objectively construed as the primary purpose of the government action. The primary purpose . . . was the investigation of any possible impermissible or illegal on-duty conduct of [the officer]." *Vernon,* 27 F.3d at 1398-1399.

Similarly, in *American Family Association,* the court found it was "fairly easy to conclude that the primary effect of [the] resolution [was] not inhibition of religion. Although the resolution contain[ed] a provision calling 'for the Religious Right to take accountability for the impact of their long-standing rhetoric denouncing gays and lesbians,' this provision appear[ed] to be more of an afterthought and any disparagement of the Religious Right [was] not the primary effect of the resolution. Read as a whole, the primary effect [was] a denouncement of hate crimes. . . ." *American Family Ass'n,* 277 F.3d at 1122.

As compared to the government conduct in *Vernon* and *American Family Association,* it is even easier to conclude that the nondiscrimination policy at issue here does not inhibit religion as its *primary*

effect. *Id.* at 1122. Although HCF argues that the "clear effect of the policy is to punish religious student organizations, such as HCF, by denying recognition and its attendant benefits if the organizations refuse to accept members or leaders who oppose their religious beliefs and message," (Opp. at p. 8.), this assertion is unsupported by authority. The fact that HCF's conduct *may be* affected by the application of the policy does not mean that a reasonable observer would perceive the *primary* message or effect of the policy is to inhibit religion. Rather, a reasonable observer would construe the primary message of the nondiscrimination policy to be one of promoting nondiscrimination.

HCF also argues that the nondiscrimination policy has the effect of preferring religious sects that condone homosexual conduct over more orthodox sects and singles out religious associations as disfavored forms of association. However, even if the policy may result in more tolerant religious groups obtaining recognized status, HCF has not shown a reasonable observer would perceive the primary purpose of the policy which bans discrimination to be a preference for certain types of religions. As the Supreme Court stated, "the Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenants of some or all religions. . . . Thus, for temporal purposes murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may

disagree with others does not invalidate the regulation." *McGowan v. State of Maryland,* 366 U.S. 420, 442 (1961). Thus, the fact that HCF believes its religion justifies discriminating on the basis of sexual orientation, does not mean a policy which prohibits discrimination on this basis violates the Establishment Clause.

Finally, HCF's own allegations defeat its argument that the policy singles out religious associations as disfavored forms of association. According to its complaint, prior to the 2004-2005 academic year, HCF was registered as a student organization at Hastings. (Complaint, ¶ 3.3.) It was not until HCF informed Defendants that it intended to exclude members and officers based on their religious beliefs and sexual orientation that HCF was denied the opportunity to register. (Complaint, ¶¶ 4.1-4.5.) Thus, HCF has not alleged facts which, if true, show that a reasonable observer would perceive that Hastings' facially neutral policy banning discrimination inhibits religion as its primary effect.

c. Excessive Entanglement

Under the third prong of the *Lemon* test, courts examine whether the government conduct results in "an excessive government entanglement with religion." *Lemon,* 403 U.S. at 613. "[T]he entanglement prong seeks to minimize the interference of religious authorities with secular affairs and secular authorities in religious affairs." *Cammack v. Waihee,*

932 F.2d 765, 780 (9th Cir. 1991). Under this prong, courts ask "whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 675 (1970); *see also Cammack*, 932 F.2d at 781 (finding no excessive entanglement where the government's involvement was not "comprehensive" or "enduring"); *Vernon*, 27 F.3d at 1399 ("entanglement typically involves comprehensive, discriminating, and continuing state surveillance of religion"). In *Vernon*, the court held that the investigation of the officer did not involve excessive entanglement because there was "no continuing or systematic investigation of religious beliefs. . . . Given the relatively short duration of the investigation, it [was] unlikely that the government action at issue created either the reality or the appearance of on-going government interference in church affairs ." *Id.* at 1400.

In arguing the nondiscrimination policy fosters excessive entanglement, HCF posits a hypothetical situation. HCF argues that anytime a Hastings student is denied membership or defeated in an officer election for a religious organization, the student can complain of discrimination under the policy. According to HCF, the law school would then be forced to "troll through" the operations, beliefs, and purposes of the religious organization, and even individual students, to determine whether discrimination occurred. (Opp. at 9). However, these are not

facts that are alleged in the complaint. Nor does HCF even argue that such events actually occurred. As alleged by HCF, HCF admitted to Defendants that it would not abide by the nondiscrimination policy and that it intended to exclude members and officers based on their religion and sexual orientation.

HCF relies on the Supreme Courts [sic] statement in *Widmar v. Vincent,* 454 U.S. 263 (1981) that: "Merely to draw the distinction would require the university – and ultimately the courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.* at 270 n. 6. HCF's reliance on *Widmar* is misplaced. The *Widmar* Court was not addressing Establishment Clause issues but was responding to a suggestion by the dissent that speech about religion or describing religious experiences could be distinguished from religious worship, and thus was not protected speech. *Bob Jones University v. United States,* 461 U.S. 574 (1983), cited by Defendants, is more on point. In that case, the Supreme Court upheld a policy by the Internal Revenue Service to deny tax exempt status to private schools which racially discriminate. Two school [sic] challenged the policy, arguing that their racially discriminatory practices were based on their religious beliefs. The Court rejected an Establishment Clause challenge to nondiscrimination policy, noting that "the uniform application of the rule to all religiously

operated schools *avoids* the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief." *Id.* at 604 n. 30 (emphasis in original).

The Court therefore finds that applying uniformly applying [sic] the nondiscrimination policy to all student groups does not result in excessive government entanglement with religion.[1] Thus, accepting all HCF's factual allegations as true, HCF has not stated a violation of the Establishment Clause. Accordingly, the Court GRANTS Defendants' motion to dismiss HCF's Establishment Clause claim.

III. HFC's Claim Under the Due Process Clause

HCF alleges that the nondiscrimination policy violates its due process rights because it "fails to provide HCF with fair notice as to whether or not its leadership and membership practices comply with the nondiscrimination requirement and tasking University officials with enforcing the Policy on

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[1] HCF also argues that it states a violation of the Establishment Clause because by enacting and enforcing the nondiscrimination policy, Defendants are infringing on HCF's "power . . . to decide for [itself], free from state interference, matters of church government as well as those of faith and government." However, the cases cited by HCF were based on the Free Exercise Clause, not the Establishment Clause. *See, e.g., Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952). Whether HCF has stated a claim under the Free Exercise Clause of the First Amendment is not before the Court.

Nondiscrimination without providing criteria or guidelines to govern its enforcement." (Complaint, ¶ 8.2.) To be void for vagueness, a statute must be impermissibly vague in all of its applications. *United States v. Makowski,* 120 F.3d 1078, 1080 (9th Cir. 1997). Moreover, a statute is void for vagueness only "when it does not sufficiently identify the conduct that is prohibited." *Makowski,* 120 F.3d at 1080. Due process does not require language that advises with "mathematical certainty." *Grayned v. City of Rockford,* 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Rather, due process requires that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and that "laws . . . provide explicit standards for those who apply them" so as to prevent arbitrary and discriminatory enforcement. *Grayned,* 408 U.S. at 108; *see also Makowski,* 120 F.3d at 1080 ("the Fifth Amendment due process clause requires a statute to be sufficiently clear so as not to cause persons of common intelligence . . . necessarily to guess at its meaning and to differ as to its application") (internal quotations omitted). Thus, the Court must evaluate whether the policy fails "to give adequate notice to people of ordinary intelligence of what conduct is prohibited, or if it invites arbitrary and discriminatory enforcement." *Makowski,* 120 F.3d at 1081.

HCF argues that because the policy covers only "admissions, access and treatment in Hastings-sponsored programs and activities" it is not clear that

the policy applies to student organizations, and in particular, to leadership and membership decisions made by student organizations. HCF points out that Defendants expressly disclaim any connection between Hastings and student organizations in the policy. (Complaint, Ex. E: "Registration is subject to the condition and provision that Hastings College of the Law and the University of California neither sponsor nor endorse any such organization.) In reviewing the language of the entire policy, as well as the other provisions of Hastings' Polices [sic] and Regulations attached as Exhibit E to the Complaint, the Court finds that a person of ordinary intelligence would have adequate notice that the policy applies to student organizations. The policy itself states that "*[a]ll groups,* including administration, faculty, student governments, College-owned student resident facilies and programs sponsored by the College, are governed by this policy of nondiscrimination." (Complaint, Ex. E at § 20.00) (emphasis added.) Moreover, Hastings' Policies and Regulations provide that "[r]egistered campus organizations are required to comply with college policies and campus regulations or they will be subject to revocation of registration. . . ." (Complaint, Ex. E at § 34.11.) The Court further concludes that a person of ordinary intelligence would be able to understand the conduct at which the policy is directed, and in particular, would be able to understand that denying someone the ability to join and participate a group, whether as a member or an officer, would be covered by "admissions, access and treatment." *See Dayton*

Christian Schools v. Ohio Civil Rights Comm'n, 578 F.Supp. 1004, 1026-27 (S.D. Ohio 1984) (holding that statute prohibiting discrimination relating to employment on basis of race, color, religion, sex, or national origin was not void for vagueness where, "[i]n view of the mass of publicity that various forms of discrimination have received over time, it seems clear that a person of ordinary intelligence would be able to understand the conduct at which the statute aims").

HCF also argues that the policy is vague because it provides that Hastings shall not discriminate "unlawfully." According to HCF, because no federal or state law forbids HCF from selecting its leaders and members on the basis of religion and sexual orientation, the meaning of "discriminate unlawfully" is unclear. However, the policy also prohibits "arbitrary and unreasonable discriminatory practices." (Complaint, Ex. E at § 20.00.) Again, the Court finds that the language of the policy is not so vague that a person of ordinary intelligence would have inadequate notice of what conduct is prohibited. Therefore, the Court finds that the policy is not void for vagueness and GRANTS Defendants' motion to dismiss HCF's Due Process claim.

IV. HFC's Claim Under the Equal Protection Clause

HCF alleges that Defendants are violating its rights under the Equal Protection Clause. "The Equal

Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *Serrano v. Francis,* 345 F.3d 1071, 1081 (9th Cir. 2003) (*quoting Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439 (1985)). To state a successful Equal Protection claim, a plaintiff must allege that he or she was treated differently than similarly situated persons. *Dillingham v. I.N.S.,* 267 F.3d 996, 1007 (9th Cir. 2001). Additionally, a plaintiff must allege that the defendant acted with the intent or purpose to discriminate against him or her based upon membership in a protected class. *Serrano,* 345 F.3d at 1082; *Barren v. Harrington,* 152 F.3d 1193, 1194 (9th Cir. 2001).[2] "Where the challenged governmental policy is 'facially neutral,' proof of its disproportionate

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[2] HCF argues that it need not show intentional discrimination to state an equal protection claim, but the cases it cites do not stand for this proposition. (Opp. at 15, citing *Romer v. Evans,* 517 U.S. 620 (1996); *Niemotko v. State of Md.,* 340 U.S. 268 (1951); *Fowler v. State of R.I.,* 345 U.S. 67 (1953).) In each of these cases, the Court found evidence of intentional discrimination. *See Romer,* 517 U.S. 632-34 (concluding that the reason for the ordinance was animosity towards gays and lesbians); *Niemtko,* 340 U.S. at 272 (stating the conclusion was "inescapable" that the Jehovah's Witnesses were denied access to the park because of the city's dislike for or disagreement with them or their views); *Fowler,* 345 U.S. at 69 (finding the city discriminated against the Jehovah's Witnesses "because of the dislike which the local officials had of these people and their views").

impact on an identifiable group can satisfy the intent requirement only if it tends to show that some invidious or discriminatory purpose underlies the policy." *Lee v. City of Los Angeles,* 250 F.3d 668, 686 (9th Cir. 2001) (finding fatal to plaintiffs' claim their failure to allege defendants' conduct was motivated by discriminatory animus).

In *Lee,* a mentally disabled person was arrested, incarcerated and extradited based on his mistaken identity. The plaintiffs alleged that the police failed to take proper steps to verify that the individual in their custody was the proper person. *Id.* at 677-78. In support of the equal protection claim, the plaintiffs pled that the city's failure to provide sufficient training regarding mentally disabled persons or to implement other procedures to safeguard the rights of the mentally disabled person amounted to deliberate indifference to these persons' rights and denied them equal protection. *Id.* at 687. The court concluded that the plaintiffs failed to allege the defendants failed to treat a protected class differently, but rather, that "the gravamen of plaintiffs' complaint [was] that defendants *failed* to treat disabled persons differently from others similarly situated." *Id.* (emphasis in original).

Here, HCF does not allege it has been treated differently than other similarly situated groups or persons. Rather, HCF alleges that Defendants' "refus[al] to recognize HCF's constitutional right to an exemption from [the nondiscrimination] policy" violates the Equal Protection Clause. As in *Lee,* the

gravamen of HCF's complaint is that Defendants *failed* to treat it differently from others similarly situated. *Lee,* 250 F.3d at 687. HCF argues that the application of the nondiscrimination policy to it violates the Equal Protection clause by distinguishing between religious and non-religious student organizations. (Opp. at 14-15.) However, Hastings' policy would similarly bar an atheist group from excluding those who are religious.

Even if HCF could allege that it was treated differently than other similarly situated student groups under the policy, HCF has not alleged any intent to discriminate. Where, as here, the policy is facially neutral, HCF would need to allege that some invidious or discriminatory purpose underlies the policy. *Lee,* 250 F.3d at 686. Because HCF has not alleged any intent to discriminate, it has not properly stated a claim under the Equal Protection Clause.[3] The Court therefore GRANTS Defendants' motion to dismiss HCF's Equal Protection claim, but will give HCF leave to amend.

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[3] HCF's reliance on *Alpha Iota Omega Christian Fraternity v. Moeser,* Civil No. 1:04CV00765 (M.D.N.C. March 2, 2005) (slip opinion) (attached as Exhibit A to Declaration of Seven [sic] H. Aden) for the proposition that it states an equal protection claim is misplaced. In addition to the fact that the case is unpublished and does not contain a comprehensive analysis of the legal issues, this case is inapposite because the court based its opinion upon the First Amendment, not the Equal Protection Clause.

V. The Director Defendants

Defendants argue that the Director Defendants are not properly named as defendants under the *Ex parte Young* doctrine. This doctrine requires "some connection between a named state officer and enforcement of the challenged state law. . . . This connection must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Planned Parenthood of Idaho, Inc. v. Wasden,* 376 F.3d 908, 919 (9th Cir. 2004) (internal quotes and citation omitted). For example, if "an attorney general cannot direct, in a binding fashion, the prosecutorial activities of the officers who actually enforce the law . . . , he may not be a proper defendant" in challenges to state criminal laws. *Id.* However, if the attorney general has the authority to enforce the law, concurrent with the county prosecutors, then he or she would be a proper defendant. *Id.*

Here, Defendants argue that the Director Defendants have delegated all their authority to enforce the nondiscrimination policy to the Dean of Hastings, and that therefore, the case against them should be dismissed. At the hearing, though, Defendants conceded that the Director Defendants would have the authority to amend the policy to allow for exceptions for groups such as HCF. Moreover, the exact scope of the Director Defendants' delegation of their authority and whether the Director Defendants retain concurrent authority to enforce the

nondiscrimination policy is unclear at this point. Hastings' Policies and Regulations Applying to College Activities, Organizations and Students, adopted by the Board of Directors, states: "the Board is empowered to conduct all business of the College. The Standing Orders and Bylaws of the Board delegate specific authority to the Dean of the College, including the full authority and responsibility over the administration of academic and student affairs and business and fiscal operations of the College." (Complaint, Ex. C at § 11.00.) The Defendants submitted a copy of the Standing Orders and By-Laws of the Board of Directors of the University of California Hastings College of the Law ("Standing Orders and By-Laws") which states that "[t]he Chancellor and Dean shall serve as the chief executive and academic officer of the College, with full authority for all its departments and activities."[4] Because the Standing Orders and By-Laws do not address whether the Director Defendants also retain concurrent authority to conduct the business of Hastings or under what circumstances the Director Defendants may revoke their delegation to the Dean, the Court cannot determine as a matter of law at this stage in the litigation that the Director Defendants do not have sufficient connection with the policy under the *Ex parte Young* doctrine. Therefore, the Court

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[4] HCF stipulated at the hearing that it would be proper for the Court to take judicial notice of the Standing Orders and By-Laws.

DENIES Defendants' motion to dismiss the Director Defendants without prejudice to Defendants' raising this issue in a motion for summary judgment.

CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART Defendants' motion to dismiss HCF's third claim (Establishment Clause), fourth claim (Due Process Clause), and sixth claim (Equal Protection Clause), and DENIES IN PART Defendants' motion on the grounds that the Director Defendants are not proper defendants. The Court GRANTS HCF leave to amend its Equal Protection claim. HCF shall file its amended pleading, if any, within twenty-one days from the date of this Order. If HCF files an amended pleading, it shall supercede and not incorporate the prior complaint by reference.

IT IS SO ORDERED.

Dated: April 12, 2005

/s/ Jeffrey S. White
JEFFREY S. WHITE
UNITED STATES
DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law, Plaintiff, *vs.* MARY KAY KANE, *et al.*, Defendants.	Civil Action No.: C 04 4484 JSW Action Filed: October 22, 2004 FIRST AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (Filed May 3, 2005) Judge: Hon. Jeffery S. White

COMES NOW Plaintiff, Christian Legal Society Chapter of University California, Hastings College of the Law, a/k/a Hastings Christian Fellowship, by and through its undersigned counsel, Timothy Smith, Esq. and Steven Burlingham, Esq. and Gregory S. Baylor, Esq., Steven H. Aden, Esq. and Timothy J. Tracey, Esq., Religious Liberty Advocates of the Christian Legal Society, and Benjamin W. Bull, Esq. and Gary S. McCaleb, Esq. of the Alliance Defense Fund, and hereby brings the following causes of action against Defendants Mary Kay Kane, in her official capacity as Chancellor and Dean of University

of California, Hastings College of the Law; Judy Chapman, in her official capacity as Director of Student Services for University of California, Hastings College of the Law; and Maureen E. Corcoran, Eugene L. Freeland, Carin T. Fujisaki, John T. Knox, Jan Lewenhaupt, James E. Mahoney, Brian D. Monaghan, Bruce L. Simon, John K. Smith, and Tony West, in their official capacities as the Board of Directors of University of California, Hastings College of the Law. In support of its claims for relief, Plaintiff alleges and avers as follows:

JURISDICTION AND VENUE

1.1 Plaintiff Hastings Christian Fellowship brings this civil rights action pursuant to 42 U.S.C. § 1983 and § 1988 for deprivations of Plaintiff's rights secured by the First and Fourteenth Amendments to the United States Constitution.

1.2 Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1343(a)(3) and 1343(a)(4), which provide for original jurisdiction in this Court of all suits brought pursuant to 42 U.S.C. § 1983. Jurisdiction is also conferred on this Court by 28 U.S.C. § 1331 because the cause of action arises under the Constitution and laws of the United States. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because, upon information and belief, the Defendants reside in the Northern District of California and may be found and served in the Northern District of California, and

because a substantial part of the events or omissions giving rise to these claims arose in this District.

1.3 Intradistrict Assignment: A substantial part of the events giving rise to this claim occurred within the City and County of San Francisco.

PARTIES

2.1 Plaintiff Christian Legal Society Chapter of University California, Hastings College of the Law, a/k/a Hastings Christian Fellowship is an unincorporated student organization of University of California, Hastings College of the Law in San Francisco, California. It is a local chapter of the national organization known as the Christian Legal Society, an IRC 501(c)(3) – qualified religious professional membership organization. HCF is capable of suing in its own name and has standing to bring this action in its own name and on behalf of its individual members.

2.2 Defendant Mary Kay Kane is the Chancellor and Dean of University of California, Hastings College of the Law, a public law school founded by the California State Assembly and operated by the State of California. Her duties include, among others, coordinating with the Board of Directors, implementing the policies of the Board, and representing the University of California, Hastings College of the Law ("UC Hastings") before the California State Assembly. The Office of the Chancellor and Dean is located at

200 McAllister Street, San Francisco, California 94102. Chancellor Kane issued in her official capacity.

2.3 Defendant Judy Chapman is the Director of Student Services for University of California, Hastings College of the Law. Her duties include, among others, oversight of the registration of student organizations at UC Hastings and review of student initiated grievances regarding discriminatory practices and violation of privacy rights. The Office of Student Services is located at 200 McAllister Street, San Francisco, California 94102. Ms. Chapman is sued in her official capacity.

2.4 Defendants Maureen E. Corcoran, Eugene L. Freeland, Carin T. Fujisaki, John T. Knox, Jan Lewenhaupt, James E. Mahoney, Brian D. Monaghan, Bruce L. Simon, John K. Smith, and Tony West are members of the Board of Directors of UC Hastings and are responsible for, among other things, governance of UC Hastings. Their offices are located at 200 McAllister Street, San Francisco, California 94102. They are sued in their official capacities.

FACTUAL BACKGROUND

3.1 Christian Legal Society is a nationwide association of Christian lawyers, law students, law professors, and judges. The organization's purposes include providing a means of society, fellowship, and nurture among Christian lawyers; promoting justice, religious liberty, and biblical conflict resolution; encouraging, discipling, and aiding Christian law

students; and encouraging lawyers to furnish legal services to the poor. In furtherance of its purposes, the national Christian Legal Society organization maintains both attorney and law student chapters across the country.

3.2 All members of the national Christian Legal Society, including student members, must sign a Statement of Faith indicating that the member holds certain Christian viewpoints commonly regarded in both the Roman Catholic and Protestant evangelical traditions as orthodox. A true and correct copy of the New Member Application which includes the Statement of Faith is attached as Exhibit A.

3.3 HCF is the local UC Hastings chapter of the national Christian Legal Society organization. HCF is a student organization at UC Hastings, and, until the 2004-2005 academic year, has been officially recognized by the College as a registered student organization.

3.4 HCF is governed by a chapter constitution. A true and correct copy of the HCF Constitution is attached as Exhibit B.

3.5 Any student is welcome to participate in HCF meetings and other activities, regardless of religion, sexual orientation, or membership or non-membership in any other protected class. However, pursuant to the constitution and rules for CLS student chapters of the national Christian Legal Society, HCF requires its members and officers to sign the national Christian Legal Society's Statement of Faith.

3.6 HCF incorporates these officer and membership requirements into its chapter constitution.

3.7 Specifically, HCF's Chapter Constitution provides:

> All members and officers of this Chapter must agree to and affirm the following Statement of Faith:
>
> Trusting in Jesus Christ as my Savior, I believe in:
>
> - One God, eternally existent in three persons, Father, Son and Holy Spirit.
> - God the Father Almighty, Maker of heaven and earth.
> - The Deity of our Lord, Jesus Christ, God's only Son conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
> - The presence and power of the Holy Spirit in the work of regeneration.
> - The Bible as the inspired Word of God.

Exhibit B, at p. 1.

3.8 HCF interprets its Statement of Faith to require that officers adhere to orthodox Christian beliefs, including the Bible's prohibition of sexual conduct between persons of the same sex. A person who engages in homosexual conduct or adheres to the

viewpoint that homosexual conduct is not sinful would not be permitted to become a member or serve as an HCF officer. A person who may have engaged in homosexual conduct in the past but has repented of that conduct, or who has homosexual inclinations but does not engage in or affirm homosexual conduct, would not be prevented from becoming a member or serving as an officer.

3.9 The mission of HCF is to maintain a vibrant Christian law fellowship on the UC Hastings campus which enables its members, individually and as a group, to fulfill the Christian mandate to love God and to love their neighbors as themselves. Exhibit B, at p. 1.

3.10 HCF believes that in order to achieve its mission, it must require its members and officers to sign, affirm, and endeavor to live their lives in a manner consistent with its Statement of Faith.

3.11 Individuals who refuse to adhere to HCF's Statement of Faith are not permitted to be members or officers.

3.12 UC Hastings is a public law school located in San Francisco, California and part of the University of California system of schools.

3.13 UC Hastings permits students to form and register "student organizations."

3.14 To date, UC Hastings has registered 54 student organizations ranging from the Clara Foltz Feminist Association to Hastings Republicans. *See*

UC Hastings College of the Law, 2004-2005 Registered Student Organizations. A true and correct copy of the UC Hastings College of the Law, 2004-2005 Registered Student Organizations is attached as Exhibit C. Of the 54 registered student organizations, only 3 are religious or spiritual student organizations. *See id.*

3.15 Student groups at UC Hastings must be recognized as a "registered student organization" in order to use College facilities for meetings or to receivè funding. Recognition as a UC Hastings student organization conveys numerous additional substantial benefits and privileges. Additional benefits of forming a registered student organization include, but are not limited to:

(a) Use of designated UC Hastings bulletin boards for announcements of interest to organization members and the student body;

(b) Use of the Student Information Center for distribution of organization materials to the UC Hastings community;

(c) Listing on the Office of Student Services' website and any hard copy lists;

(d) Participation in the Student Organizations' Faire;

(e) Access to all services offered by the Office of Student Services, including organization consultation, workshops, financial

consulting and training, and publications;

(f) Access to UC Hastings' publications, including the "Hastings Weekly;"

(g) Placement of organizational materials in 1L orientation packets;

(h) Listing organization announcements on classroom chalkboards;

(i) Placement of announcements in the Student Event Calendar, delivered weekly to UC Hastings students via email; and

(j) Eligibility to enter into a License Agreement with UC Hastings for use of the College name.

3.16 As a condition of becoming a "registered student organization" at UC Hastings and thereby gaining access to the benefits and privileges enumerated above, the University requires an organization to agree to and abide by the "Policies and Regulations Applying to College Activities, Organizations and Students." "All registered students organizations will comply with the Policies and Regulations Apply to College Activities, Organizations and Students as stated in the Handbook for Student Organizations." University of California, Hastings College of the Law, Student Organization Registration, p. 19. A true and correct copy of University of California, Hastings College of the Law, Student Organization Registration is attached as Exhibit D.

3.17 Among other things, the Policies and Regulations Applying to College Activities, Organizations and Students require student organizations to abide by the Policy On Nondiscrimination. A true and correct copy of the relevant Policies and Regulations Applying to College Activities, Organizations and Students is attached as Exhibit E.

3.18 The Policy on Nondiscrimination provides in pertinent part:

> The University of California, Hastings College of the Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.

Exhibit E, at p. 69.

3.19 "All groups, including administration, faculty, student governments, College-owned student residence facilities and programs sponsored by the College, are governed by" the Policy on Nondiscrimination. Exhibit E, at p. 69. The policy precludes student organizations from considering religion or sexual orientation in the selection of officers or members.

3.20 A student organization's registration "must be approved by the Director of Student Relations and Service at the beginning of each academic year" in order to affirm the group's compliance with UC Hastings' policies and to ensure the Office of Student

Services has up-to-date information concerning officers and members. Exhibit E, at p. 66.

3.21 If a student organization violates any law or policy of UC Hastings, including the Policy on Nondiscrimination, "they will be subject to revocation of registration, loss of privileges, or other sanctions for violation of such policies or regulations." Exhibit E, at p. 67.

RECENT DEVELOPMENTS

4.1 In early September 2004, HCF submitted its constitution and registration form to Defendant Judy Chapman for the annual renewal of its registered status with the UC Hastings' Office of Student Services.

4.2 HCF's constitution stated that the group would not discriminate on the basis of race, color, national origin, ancestry, disability, age, or sex. However, HCF maintained that it would still consider religion and sexual orientation in the selection of officers and members.

4.3 Defendant Chapman warned HCF co-leaders, Dina Haddad and Isaac Fong, that HCF's disagreement with UC Hastings' Policy on Nondiscrimination would likely bar the group from status as a registered student organization.

4.4 On or about September 23, 2004, HCF hand-delivered to Defendant Chapman a letter providing a brief overview of the membership and

leadership policies of the Christian Legal Society and a synopsis of the pertinent law which HCF believed favored Defendant Chapman approving HCF's registration form.

4.5 On or about October 1, 2004, UC Hastings informed HCF that "to be one of our student-recognized organizations, [HCF] must open its membership to all students irrespective of their religious beliefs or sexual orientation." Letter from UC Hastings to HCF dated October 1, 2004. A true and correct copy of the Letter from UC Hastings to HCF dated October 1, 2004 is attached Exhibit F.

4.6 On or about October 12, 2004, Ms. Haddad received an email from Defendant Chapman informing her that the $250.00 in student activities funds set aside for HCF officers to travel to the Christian Legal Society's National Conference had been withdrawn.

4.7 Since receiving the October 1, 2004 letter from UC Hastings, HCF has been denied access to classroom chalkboards, bulletin boards, and all other channels of communications in order to announce its meetings or recruit members from the UC Hastings community.

4.8 HCF desires the privileges and status of being recognized by UC Hastings as a registered student organization.

4.9 HCF objects to the Policy on Nondiscrimination that requires HCF to open its membership and

officer positions to all students regardless of religion or sexual orientation.

4.10 HCF's objections to the Policy on Nondiscrimination stem from its members' sincerely held religious beliefs.

4.11 HCF does not object to the University policies forbidding discrimination on the basis of race, color, national origin, ancestry, disability, age, or sex.

4.12 By enacting and enforcing the Policy on Nondiscrimination forbidding HCF to discriminate on the basis of religion or sexual orientation, refusing to recognize HCF's constitutional right to an exemption from said policy, and withholding from HCF the status and benefits of a registered student organization, UC Hastings has engaged in discrimination against HCF and its members based on the content and viewpoint of their speech and sent a message of exclusion and disfavor of HCF and its members by Defendants, resulting in a chilling impact on HCF's efforts at recruitment, association and dissemination of its message.

4.13 All alleged acts of the Defendants, their officers, agents, servants, employees, or persons acting at their behest or direction, were done and are continuing to be done under the color of state law, including the statutes, regulations, customs, policies and usages of the State of California, and pursuant to policies and/or customs established by UC Hastings through Defendants.

4.14 Unless and until enforcement of the Defendants' policies regarding the Policy on Nondiscrimination is enjoined, HCF and its members and similarly situated religious organizations will suffer and continue to suffer irreparable harm to their federal and state rights of free association, freedom of speech and free exercise of religion.

COUNT I

FREEDOM OF EXPRESSIVE ASSOCIATION

UNITED STATES CONST. AMEND. I

5.1 HCF restates and realleges each allegation set forth in paragraphs 1.1 through 4.13 as if set forth verbatim herein.

5.2 By enacting and enforcing the Policy on Nondiscrimination forbidding HCF to discriminate on the basis of religion or sexual orientation, refusing to recognize HCF's constitutional right to an exemption from said policy, withholding from HCF the status and benefits of a registered student organization, and engaging in direct and subtle forms of retaliation against HCF and its members, Defendants have violated and will continue to violate the right to freedom of expressive association guaranteed to HCF and its members by the First Amendment to the United States Constitution and made applicable to the states and their political subdivisions by the Fourteenth Amendment.

COUNT II

FREE SPEECH

UNITED STATES CONST. AMEND. I

6.1 HCF restates and realleges each allegation set forth in paragraphs 1.1 through 5.2 as if set forth verbatim herein.

6.2 By enacting and enforcing the Policy on Nondiscrimination forbidding HCF to discriminate on the basis of religion or sexual orientation, refusing to recognize HCF's constitutional right to an exemption from said policy, withholding from HCF the status and benefits of a registered student organization, and engaging in direct and subtle forms of retaliation against HCF and its members, Defendants have violated and will continue to violate the right to free speech guaranteed to HCF and its members by the First Amendment to the United States Constitution and made applicable to the states and their political subdivisions by the Fourteenth Amendment.

COUNT III

ESTABLISHMENT CLAUSE

UNITED STATES CONST. AMEND. I

7.1 HCF restates and realleges each allegation set forth in paragraphs 1.1 through 6.2 as if set forth verbatim herein.

7.2 By enacting and enforcing the Policy on Nondiscrimination forbidding HCF to discriminate on

the basis of religion or sexual orientation, refusing to recognize HCF's constitutional right to an exemption from said policy, withholding from HCF the status and benefits of a registered student organization, and engaging in direct and subtle forms of retaliation against HCF and its members, Defendants have violated and will continue to violate the Establishment Clause of the First Amendment to the United States Constitution and made applicable to the states and their political subdivisions by the Fourteenth Amendment.

COUNT IV

DUE PROCESS

UNITED STATES CONST. AMEND. XIV

8.1 HCF restates and realleges each allegation set forth in paragraphs 1.1 through 7.2 as if set forth verbatim herein.

8.2 By adopting the University Nondiscrimination Policy that fails to provide HCF with fair notice as to whether or not its leadership and membership practices comply with the nondiscrimination requirement and tasking University officials with enforcing the Policy on Nondiscrimination without providing criteria or guidelines to govern its enforcement, Defendants have violated and will continue to violate the right of due process guaranteed to HCF and its members by the Fourteenth Amendment to the United States Constitution.

COUNT V

FREE EXERCISE CLAUSE

UNITED STATE [sic] CONST. AMEND I

9.1 HCF restates and realleges each allegation set forth in paragraphs 1.1 through 8.2 as if set forth verbatim herein.

9.2 By enacting and enforcing the Policy on Nondiscrimination forbidding HCF to discriminate on the basis of religion or sexual orientation, refusing to recognize HCF's constitutional right to an exemption from said policy, withholding from HCF the status and benefits of a registered student organization, and engaging in direct and subtle forms of retaliation against HCF and its members, Defendants have violated and will continue to violate the right to free exercise of religion guaranteed to HCF and its members by the First Amendment to the United States Constitution and made applicable to the states and their political subdivisions by the Fourteenth Amendment.

COUNT VI

EQUAL PROTECTION CLAUSE

UNITED STATES CONST. AMEND. XIV

10.1 HCF restates and realleges each allegation set forth in paragraphs 1.1 through 9.2 as if set forth verbatim herein.

10.2 Religious student organizations, like HCF, are similarly situated to other UC Hastings's student organizations that associate around adherence to a particular set of ideals and/or beliefs, whether those be political, such as the Hastings Republicans, social, such as The Environmental Law Society, or cultural, such as the Asian/Pacific American Law Student Association.

10.3 Although HCF is similarly situated to these political, social, and cultural student organizations, Defendants treat religious student organizations, like HCF, differently from these groups. Defendants' Policy on Nondiscrimination permits political, social, and cultural student organizations to select officers and members dedicated to their organization's ideals and beliefs. The Policy on Nondiscrimination, however, prohibits religious student organizations, like HCF, from selecting officers and members dedicated to a particular set of religious ideals or beliefs.

10.4 Defendants intended to discriminate invidiously against religious student organizations, like HCF, and single out such groups for disparate treatment.

10.5 Accordingly, Defendants have denied and will continue to deny the equal protection of the laws guaranteed to HCF and its members as a religious association by the Fourteenth Amendment to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff HCF respectfully requests that this Court order the following relief:

(1) A declaration that Defendants' Policy on Nondiscrimination is unconstitutional facially and as applied against Plaintiff and similarly situated religious organizations who desire to select members and officers based upon their shared religious beliefs and/or viewpoint regarding homosexual conduct;

(2) A preliminary and permanent injunction enjoining Defendants from requiring Plaintiff and similarly situated religious organizations from adhering to the Policy on Nondiscrimination with respect to religion and sexual orientation; and prohibiting Defendants, their employees, officers, employees and agents, and all persons acting by and through them, from withholding the privileges, benefits, or incidents of registered status from Plaintiff and similarly situated organizations and from retaliating against Plaintiff and its members directly or indirectly for exercising their constitutional rights;

(3) An award of reasonable costs and attorneys' fees incurred by Plaintiff in prosecuting this action pursuant to 42 U.S.C. § 1988; and

(4) Such other and further relief as the Court deems just and proper under the circumstances.

Respectfully submitted this 3rd day of May, 2005

/s/ Steven H. Aden

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law, Plaintiff,	No. C 04 4484 JSW Action Filed: October 22, 2004 *ANSWER TO FIRST AMENDED COMPLAINT* (Filed May 20, 2005) Judge: Hon. Jeffrey S. White

v.

MARY KAY KANE, in her official capacity as Chancellor and Dean of the University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law; *et al.*,

Defendants.

For their answer to the Plaintiff Christian Legal Society Chapter of the University of California, Hastings College of the Law's (hereinafter, "Plaintiff") First Amended Verified Complaint For Declaratory And Injunctive Relief (hereinafter, "FAC"), Defendants Mary Kay Kane, in her official capacity as Chancellor and Dean of the University of California, University of California, Hastings College of the Law ("Hastings"); Judy Chapman, in her official capacity as Hastings' Director of Student Services; and Maureen E. Corcoran, Eugene L. Freeland, Carin T. Fujisaki, John T. Knox, Jan Lewenhaupt, James E. Mahoney, Brian D. Monaghan, Bruce L. Simon, John K. Smith, and Tony West, in their official capacities as Hastings' Board of Directors (collectively, "Defendants"), by and through their undersigned counsel, admit, deny, and allege as follows:

1.1. Answering paragraph 1.1 of the FAC, Defendants admit that Plaintiff purports to bring the action that it describes. Except as so admitted, Defendants deny each and every allegation contained in said paragraph, including, but not limited to, that the FAC contains allegations giving rise to a legally cognizable cause of action.

1.2. Answering paragraph 1.2, Defendants admit that the Court has jurisdiction over Defendants Hastings, Mary Kay Kane, and Judy Chapman and that venue is proper, but deny that (1) jurisdiction exists as to defendant Maureen E. Corcoran, Eugene L. Freeland, Carin T. Fujisaki, John T. Knox, Jan Lewenhaupt, James E. Mahoney, Brian D. Monaghan, Bruce L. Simon, John K. Smith, and Tony West and (2) any valid cause of action against any of the Defendants is stated in the FAC.

1.3. Answering paragraph 1.3, Defendants admit the allegations contained therein.

2.1. Answering paragraph 2.1, Defendants admit the allegations contained therein, except that Defendants deny that Plaintiff and Hastings Christian Fellowship are the same entity.

2.2. Answering paragraph 2.2, Defendants admit the allegations contained therein.

2.3. Answering paragraph 2.3, Defendants admit the allegations contained therein.

2.4. Answering paragraph 2.4, Defendants admit that under Hastings' Policies and Regulations

Applying to College Activities, Hastings is "governed" by defendants Maureen E. Corcoran, Eugene L. Freeland, Carin T. Fujisaki, John T. Knox, Jan Lewenhaupt, James E. Mahoney, Brian D. Monaghan, Bruce L. Simon, John K. Smith, and Tony West, but deny that this "governance" involves the enforcement of the Nondiscrimination Policy against student groups such as Plaintiff sufficient to render these Defendants proper defendants in this action.

3.1. Answering paragraph 3.1, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, on that basis, deny each and every allegation contained therein.

3.2. Answering paragraph 3.2, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, on that basis, deny each and every allegation contained therein.

3.3. Answering paragraph 3.3, Defendants admit that, in prior years, Hastings Christian Fellowship has applied for and received recognition from Hastings's Office of Student Services as a registered student organization. Defendants deny that Plaintiff and Hastings Christian Fellowship are the same entity. Defendants lack knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained therein and, on that basis, deny each and every remaining allegation.

3.4. Answering paragraph 3.4, Defendants lack knowledge and information sufficient to form a belief

as to the truth of these allegations and, on that basis, deny each and every allegation contained therein.

3.5. Answering paragraph 3.5, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, on that basis, deny each and every allegation contained therein.

3.6. Answering paragraph 3.6, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, on that basis, deny each and every allegation contained therein.

3.7. Answering paragraph 3.7, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, on that basis, deny each and every allegation contained therein.

3.8. Answering paragraph 3.8, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, on that basis, deny each and every allegation contained therein.

3.9. Answering paragraph 3.9, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, on that basis, deny each and every allegation contained therein.

3.10. Answering paragraph 3.10, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, on that basis, deny each and every allegation contained therein.

3.11. Answering paragraph 3.11, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, on that basis, deny each and every allegation contained therein.

3.12. Answering paragraph 3.12, Defendants admit the allegations contained therein.

3.13. Answering paragraph 3.13, Defendants admit that Hastings permits students to form and register organizations through the Office of Student Services subject to the policies governing student organizations.

3.14. Answering paragraph 3.14, Defendants deny that Hastings has 54 registered student organizations to date. Defendants lack knowledge and information sufficient to form a belief as to whether "only" 3 registered student organizations are "religious or spiritual," and so, on that basis, deny this allegation.

3.15. Answering paragraph 3.15, Defendants admit the allegations contained therein, except that Defendants deny that a student group must be recognized by the Office of Student Services in order to use College facilities for meetings.

3.16. Answering paragraph 3.16, Defendants admit the allegations contained therein, except that Defendants deny that a student group must be recognized by the Office of Student Services in order

to gain access to the benefits enumerated in paragraph 3.15.

3.17. Answering paragraph 3.17, Defendants admit the allegations contained therein.

3.18. Answering paragraph 3.18, Defendants admit the allegations contained therein.

3.19. Answering paragraph 3.19, Defendants admit that the Policy on Nondiscrimination applies to administration, faculty, student governments, College-owned student residence facilities, and programs sponsored by Hastings, and that the Policy prohibits student organizations from conditioning their membership or officer positions based on (among other things) religion or sexual orientation.

3.20. Answering paragraph 3.20, Defendants admit the allegations contained therein.

3.21. Answering paragraph 3.21, Defendants admit the allegations contained therein.

4.1. Answering paragraph 4.1, Defendants admit the allegations contained therein, except that Defendants deny that Hastings Christian Fellowship and Plaintiff are the same entity.

4.2. Answering paragraph 4.2, Defendants admit the allegations contained therein, except that Defendants deny that Hastings Christian Fellowship and Plaintiff are the same entity. Defendants further allege that Plaintiff maintained that it would not only "consider" the religion and sexual orientation in the

selection of officers and members, but that it would prohibit non-Christian and homosexual students from becoming members or officers based solely on their non-Christian or homosexual status.

4.3. Answering paragraph 4.3, Defendants admit the allegations contained therein, except that Defendants deny that Hastings Christian Fellowship and Plaintiff are the same entity.

4.4. Answering paragraph 4.4, Defendants admit the allegations contained therein, except that Defendants deny that Hastings Christian Fellowship and Plaintiff are the same entity.

4.5. Answering paragraph 4.5, Defendants admit the allegations contained therein, except that Defendants deny that Hastings Christian Fellowship and Plaintiff are the same entity.

4.6. Answering paragraph 4.6, Defendants admit that Defendant Judy Chapman sent Dina Haddad an email on October 11, 2004 informing Ms. Haddad that the $250.00 in student activities funds previously set aside for Plaintiff's officers to travel to the CLS national conference had been withdrawn. Defendants deny that Hastings Christian Fellowship and Plaintiff are the same entity. Defendants are without knowledge or information sufficient to form a belief as to when Ms. Haddad received the email, and so, on that basis, deny the allegation that Ms. Haddad received the email on October 12, 2004.

4.7. Answering paragraph 4.7, Defendants deny each and every allegation contained therein.

4.8. Answering paragraph 4.8, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, on that basis, deny each and every allegation contained therein.

4.9. Answering paragraph 4.9, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, on that basis, deny each and every allegation contained therein.

4.10. Answering paragraph 4.10, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, on that basis, deny each and every allegation contained therein.

4.11. Answering paragraph 4.11, Defendants lack knowledge and information sufficient to form a belief as to the truth of these allegations and, on that basis, deny each and every allegation contained therein.

4.12. Answering paragraph 4.12, Defendants deny each and every allegation contained therein.

4.13. Answering paragraph 4.13, Defendants admit the allegations contained therein.

4.14. Answering paragraph 4.14, Defendants deny each and every allegation contained therein.

5.1. Answering paragraph 5.1, Defendants incorporate by reference their previous answers.

5.2. Answering paragraph 5.2, Defendants deny each and every allegation contained therein.

6.1. Answering paragraph 6.1, Defendants incorporate by reference their previous answers.

6.2. Answering paragraph 6.2, Defendants deny each and every allegation contained therein.

7.1. Answering paragraph 7.1, Defendants incorporate by reference their previous answers.

7.2. Answering paragraph 7.2, Defendants deny each and every allegation contained therein.

8.1. Answering paragraph 8.1, Defendants incorporate by reference their previous answers.

8.2. Answering paragraph 8.2, Defendants deny each and every allegation contained therein.

9.1. Answering paragraph 9.1, Defendants incorporate by reference their previous answers.

9.2. Answering paragraph 9.2, Defendants deny each and every allegation contained therein.

10.1. Answering paragraph 10.1, Defendants incorporate by reference their previous answers.

10.2. Answering paragraph 10.2, Defendants deny each and every allegation contained therein.

10.3. Answering paragraph 10.3, Defendants deny each and every allegation contained therein.

10.4. Answering paragraph 10.4, Defendants admit that the Policy on Nondiscrimination permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs. Defendants deny that the Policy on Nondiscrimination prohibits religious student organizations such as Plaintiff from doing so as well, and deny each and every other allegation contained in paragraph 10.4.

10.5. Answering paragraph 10.5, Defendants deny each and every allegation contained therein.

11. Defendants deny all allegations not expressly admitted above.

AFFIRMATIVE DEFENSES

12. The FAC fails to state a claim upon which relief can be granted.

13. Plaintiff's claims for equitable relief may be barred by the doctrines of waiver, estoppel, laches, and/or unclean hands, depending on the facts adduced in discovery.

14. Defendants reserve the right to assert such other affirmative defenses as may be developed during the course of the litigation.

WHEREFORE, Defendants pray as follows:

1. That Plaintiff take nothing by reason of the FAC, and that the judgment be rendered in favor of Defendants;

2. That Defendants be awarded their costs of suit incurred in defense of this action;

3. For such other relief as the Court deems proper.

ETHAN P. SCHULMAN
MATTHEW R. SCHULTZ
HOWARD RICE NEMEROVSKI
CANADY FALK & RABKIN
A Professional Corporation

ELISE K. TRAYNUM
General Counsel and
Secretary to the Board
HASTINGS COLLEGE OF THE LAW
UNIVERSITY OF CALIFORNIA

By: /s/ Matthew R. Schultz
MATTHEW R. SCHULTZ

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law,

Plaintiff,

v.

MARY KAY KANE, in her official capacity as Chancellor and Dean of the University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law; and MAUREEN E. CORCORAN, EUGENE L. FREELAND, CARIN T. FUJISAKI, JOHN T. KNOX, JAN LEWENHAUPT, JAMES E. MAHONEY, BRIAN D. MONAGHAN, BRUCE J. SIMON, JOHN K. SMITH, and TONY WEST, in their official capacities as the Board of Directors of University of California, Hastings College of the Law,

Defendants /

No. C 04-04484 JSW

ORDER GRANTING HASTINGS OUTLAW'S MOTION TO INTERVENE

(Filed Aug. 1, 2005)

Hastings OUTLAW ("Outlaw") has filed a motion to intervene in this action brought by the plaintiff Christian Legal Society Chapter of University of California, Hastings College of the Law, a/k/a Hastings Christian Fellowship ("HCF"), against defendants Maureen E. Corcoran, Eugene L. Freeland, Carin T. Fujisaki, John T. Knox, Jan Lewenhaupt, James E. Mahoney, Brian D. Monaghan, Bruce J. Simon, John K. Smith, Tony West, Mary Kay Kane, and Judy Chapman ("Defendants"), pursuant to Federal Rule of Civil Procedure 24(a) & (b). Defendants do not oppose Outlaw's request to intervene. Having carefully considered the parties' arguments and relevant legal authority, the Court hereby GRANTS the motion to intervene.

BACKGROUND

HCF, a religious student organization at the Hastings College of the Law of the University of California ("Hastings"), filed an action against Defendants on October 22, 2004 after Hastings refused to recognize HCF as a registered student organization because its constitution violates the school's Policy on Nondiscrimination ("Policy"). (First Amended Verified Complaint for Declaratory and Injunctive Relief ("FAC"), at ¶ 4.5.) HCF is challenging Hastings' Policy on constitutional grounds, as well as seeking a permanent injunction to enjoin Hastings from enforcing its Policy with respect to religion and sexual orientation. (FAC at 12-13, ¶ 4.4.)

Outlaw is a registered student organization at Hastings whose members include gay, lesbian, and bisexual [sic]. (Declaration of Michael W. Flynn in support of Hastings Outlaw's Motion to Intervene ("Flynn Decl."), at ¶ 2.) Its purposes include combating discrimination based on sexual orientation. *Id.* Outlaw now moves to intervene in this action as a defendant.

DISCUSSION

A. Outlaw is Entitled to Intervene as of Right

Pursuant to Federal Rule of Civil Procedure 24(a), an applicant seeking to intervene in a pending lawsuit "as of right" must demonstrate that: "(1) it has a significant protectable interest relating to the property or transaction that is the subject matter of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest." *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002) (internal citations omitted).

In evaluating these requirements, courts "are guided primarily by practical and equitable considerations." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). Courts generally construe conflicts in favor of intervention. *United States ex rel. McGough v. Covington Techs. Co.*, 967 P.2d 1391, 1394 (9th Cir. 1992). "By allowing parties with a practical interest in the outcome of a particular case to intervene, we

often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court." *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 n.8 (9th Cir. 1995) (citation omitted).

Outlaw has demonstrated to the Court's satisfaction that it meets the four requirements of Rule 24(a). Outlaw has a significant protectable interest in nondiscrimination based on sexual orientation. If HCF prevails and is permitted to violate the Policy, then Outlaw's ability to protect its interests will be potentially impaired and impacted. Outlaw's motion to intervene is timely: litigation on this matter is in the early stages, intervention will not delay the case or prejudice the parties, and Outlaw's reason for delay was adequate. Finally, because Outlaw's interests in the litigation are more narrow and specific to its members, Defendants' representation may be inadequate.

B. Outlaw Has a Significant Protectable Interest in Nondiscrimination Based on Sexual Orientation

"The requirement of a significantly protectable interest is generally satisfied when the 'interest is protectable under some law, and . . . there is a relationship between the protected interest and the claims at issue.'" *Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003) (quoting *Sierra Club v. United States EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993). The

"relationship" requirement is generally satisfied only if the resolution of the plaintiff's claims will actually affect the applicant. *Id.* The Policy protects Outlaw's members from discrimination on the basis of sexual orientation. Outlaw's interest in having continued protection is related to this litigation because HCF seeks an exemption to the Policy to exclude students who are gay, lesbian or bisexual. The Ninth Circuit has allowed public interest groups to intervene when their purposes were sufficiently related to the challenged government action. *See, e.g. Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397-98 (9th Cir. 1995) (conservation group active in listing the Springs Snail as an endangered species had sufficient interest in suit challenging that listing); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-27 (9th Cir. 1983) (Audubon Society devoted to protecting birds and who participated in creation of Birds of Prey Conservation Area had sufficient interest in suit challenging its establishment); *Washington State Bldg. Constr. Trades v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982) (public interest group that supported the ballot measure prohibiting importation of low-level radioactive waste had sufficient interest in suit challenging its legality); *Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980) (National Organization of Women had sufficient interest in suit challenging the validity of the ratification process for the Equal Rights Amendment). Likewise Outlaw, dedicated to

fighting and preventing discrimination on the basis of sexual orientation, has a significant protectable interest in this litigation.[1]

C. The Disposition of the Action May impair or Impede Outlaw's Ability to Protect its interest

The Ninth Circuit approaches the "impair or impede" requirement pragmatically: "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (quoting Fed. R. Civ. P. 24 advisory committee's notes). If HCF is allowed to exclude gay, lesbian, and bisexual students, Outlaw's ability to protect its interest in nondiscrimination on the basis of sexual orientation may be impaired or impeded.

D. Outlaw's Application Is Timely

The Court must consider three factors in determining the timeliness of a motion to intervene: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *United*

---

[1] Having found a significant protectable interest in nondiscrimination, the Court need not address Outlaw's additional argument regarding its interest in the disbursement of student activity fees.

States v. Alisal Water Corp., 370 F.3d 915, 921 (9th Cir. 2004) (quoting *California Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1119 (9th Cir. 2002)). First, this case is in its early stages. The Court has not yet heard the parties' anticipated motions for summary judgment and has not yet set a trial date. Second, based on the fact that this case is relatively new, HCF will not suffer significant prejudice. Moreover, Outlaw offered to provide discovery to HCF before the close of discovery. (Rply. Br. at 7.) If HCF believes it needs additional time to conduct discovery, it may seek to extend the discovery deadline. Third, Outlaw explained that it moved to intervene as soon as it became aware that this case would not be fully resolved by Defendants' motion to dismiss, and thus, became concerned that its interests might be adversely affected by the litigation. (*Id.* at 10.) *See United States v. Oregon*, 913 F.2d 576, 589 (9th Cir. 1990) ("A party must act . . . as soon as he "knows or has reason to know that his interests might be adversely affected by the outcome of the litigation.") Thus, the Court concludes that Outlaw's motion to intervene is timely. *See Nikon v. ASM Lithography B.V.*, 222 F.R.D. 647, 650 (N.D. Cal. 2004).

E. Defendants May Not Adequately Represent Outlaw's Interest.

The Ninth Circuit has identified three factors to consider when determining whether existing parties adequately represent an intervenor applicant's

interest: "(1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect." *United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002) (citations omitted). The requirement "is satisfied if the applicant shows that representation of his interest 'may be' inadequate." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). The burden of making this showing is minimal. *Id.*

There is "an assumption of adequacy when a government agency is acting on behalf of a constituency that it represents." *Arakaki v. Cayetano*, 324 F.3d 1078, 1087 (9th Cir. 2003) (citing *City of Los Angeles*, 288 F.3d at 401). However, this presumption may be overcome where the prospective intervenor's interests may be "more narrow and parochial than the interests of the public at large." *Californians for Safe and Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998); *see also Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995) (citing *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 1000-01 (8th Cir. 1993) (finding that, because the county's and landowners' "local and individual interests" were not shared by the general state citizenry, the State would not adequately represent those interests); *Natural Res. Def. Council*

v. Costle, 561 F.2d 904, 912 (D.C. Cir. 1977) (finding that a good faith disagreement may arise between the Environmental Protection Agency's broad enforcement concerns and the intervenors' more narrow industrial impact concerns); 3B Moore's Federal Practice, ¶ 24.07[4] at 24-78 (2d ed. 1995) ("inadequate representation is most likely to be found when the applicant asserts a personal interest that does not belong to the general public.").

In *Mendonca*, the court allowed a union to intervene as defendants in an action against state agencies regarding the preemption of California's Prevailing Wage Law ("CPWL"). 152 F.3d at 1190. The court noted that the employment interests of the union members in receiving the prevailing wage were potentially more narrow than the state's broader interest in upholding CPWL generally, and therefore the union had made a sufficient showing of inadequacy. *Id.* As in *Mendonca*, Outlaw's members have a personal interest in the enforcement of the Policy that is more narrow than Defendants' general interest in nondiscrimination because they would he among the students directly affected by HCF's proposed exemption from the Policy. Likewise Defendants' representation may be inadequate.

Additionally, Outlaw offers a necessary perspective on the litigation. In *Sagebrush Rebellion Inc. v. Watt*, the Audubon Society, an organization devoted to protecting birds and their habitats, was entitled to intervene in an action regarding the Birds of Prey Conservation Area. 713 F.2d 525, 526 (9th Cir. 1983).

The plaintiff had actively opposed the Secretary of the Interior's creation of the wildlife area, while Audubon Society had promoted it. *Id.* While the Secretary shared Audubon's ultimate interest in preserving the area, the circumstances supported intervention. *Id.* at 528. The Ninth Circuit reasoned that: "[i]n addition to having expertise apart from that of the Secretary, the intervenor offers a perspective which differs materially from that of the present parties to this litigation." *Id.*

Similarly, Outlaw is a student organization devoted to protecting against discrimination on the basis of sexual orientation at Hastings. (Outlaw Br. at 1.) HCF seeks to exclude members and officers based on their sexual orientation. (*Id.* at 2.) While Defendants have the same ultimate interest in upholding the Policy generally, Outlaw offers a different, particularized perspective, and has therefore met its burden to show inadequate representation.

CONCLUSION

Accordingly, the Court HEREBY GRANTS Outlaw's motion to intervene as of right and as such will not address permissive intervention pursuant to Rule 24(b). The Court FURTHER ORDERS that Outlaw shall meet and confer with Defendants to avoid duplicative briefing on overlapping issues, where possible.

IT IS SO ORDERED.

Dated: July 29, 2005

/s/ Jeffrey S. White
JEFFREY S. WHITE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law, Plaintiff, *vs.* MARY KAY KANE, *et al.*, Defendants.	Civil Action No.: C 04 4484 JSW Action Filed: October 22, 2004 DECLARATION OF STEVEN H. ADEN IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (Filed Oct. 7, 2005) Judge: Hon. Jeffery S. White

DECLARATION OF STEVEN H. ADEN
IN SUPPORT OF PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

* * *

[Pleading Omitted, Select Exhibits Attached]

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law,

Plaintiff,

vs.

MARY KAY KANE, in her official capacity as Chancellor and Dean of the University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law; et al.,

Defendants.

NO. C 04 4484 JSW

DEPOSITION OF
JUDY HANSEN CHAPMAN
Wednesday, July 6, 2005

Reported by:
Thomas A. Libatique, CSR
Certification No. 1504

* * *

[29] A. It comes from our nondiscrimination policy that was passed by the board and updated by the board based on federal, state and education code.

Q. And which policy is that?

A. Which policy?

Q. Is that the policy on nondiscrimination?

A. Yes.

Q. So this Nondiscrimination Compliance Code, is it fair to say that this Nondiscrimination Compliance Code is a product of the policy on nondiscrimination?

A. I don't really know what it is a product of. I assume it was the same as the nondiscrimination policy. Why it is called a code here, it was just the way it was given from the general counsel at the time.

Q. When you were looking to see that student organization bylaws comply with this Nondiscrimination Compliance Code, what are you looking for?

A. First, is the organization open to all Hastings students. Second, are there any other groups mentioned that are somehow omitted.

Q. Are you looking for any particular [30] language in the bylaws?

A. No.

Q. So is it fair to say that student organizations don't have to quote the language at the bottom of page 22 of this handbook?

A. That would be fair to say. Some simply say we'll follow the Nondiscrimination Compliance Code. They don't repeat the whole thing, if that is what you mean.

Q. Yes. When you sign – you previously testified that when you sign the registration form that that indicates that you reviewed everything and it meets the standard.

A. Yes.

Q. When you sign the registration form does that mean that the student organizations bylaws comport with this Nondiscrimination Compliance Code?

A. To the best of my judgement, yes.

Q. You mentioned that in looking at the bylaws to see if they comply with this Nondiscrimination Compliance Code you check to see if they are open to all students. When you say open to all students, does that mean that participation must be open to all students?

* * *

[42] MR. TRACEY: Q. On the top of the bylaws?

A. Because this isn't the only group that didn't want to redo the bylaws.

Q. Why don't we go back to Exhibit E then.

A. This one?

Q. Yes, to the actual bylaws.

A. I think this is from 2000-2001?

Q. I think so, Judy. It appears that we are not going to be able to reach anything conclusively.

A. Okay.

Q. Have you seen these bylaws before?

A. Yes.

Q. And have you previously approved these bylaws?

A. Yes.

Q. If you could turn with me to, I believe what should be the second page of these bylaws. It is Bates numbered page 33 and Section II under Article 3. It says "Voting members in addition to meeting the criteria listed in Section 1 of this article, voting members shall be students who acknowledge in writing their agreement with the following Statement of Faith," and the actual CLS Statement of Faith follows but I won't read the

* * *

[93] you know. The hope is they will come to us if they need us but they pretty much function independently.

Q. So does the nondiscrimination policy mainly come into play when you're in the registration process?

A. Primarily, yes, and when a new student group, when they are designing their bylaws, when they are starting from scratch we would have to discuss it.

Q. Is the primary concern then that the bylaws comply with the policy of nondiscrimination?

A. The bylaws in that that is the basis upon which a student organization operates.

Q. Do you do anything to check in on student groups to see if they are complying with the policy on nondiscrimination?

A. Actively, no. It is such a small community, things may come up occasionally but we don't go looking for it, no, but it may come to me.

Q. When you say it may come to you, what do you mean?

A. A student may come concerning something. For example, when this whole thing came up some

* * *

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION
– oOo –

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law, Plaintiff, vs. MARY KAY KANE, in her official capacity as Chancellor and Dean of the University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law, et al., Defendants.	NO. C 04 4484 JSW

TELEPHONIC DEPOSITION OF
ISAAC FONG
July 13, 2005

REPORTED BY: MONA M. RUSSO, CSR 8771
JOB #369612

* * *

[43] and Julie Chan, correct?

A. Right.

Q. And either you – you would typically lead the Bible study and the discussion that followed, right?

A. Right.

Q. Now, other attendees would attend the 2004-2005 meetings, correct?

A. Right.

Q. Dina said that they would at times lead the prayers during these meetings. Is that true?

A. Occasionally.

Q. There were no rules about whether someone could lead the students attending those meetings in prayer, right?

A. Well, there may be an understanding that the person who is leading in prayer be a Christian.

Q. Was this understanding written down anywhere?

A. No.

Q. Did there ever come a time when someone tried to lead a prayer that you didn't believe was Christian?

A. No.

Q. So is it fair to say that this understanding never really came up at any time during that year?

A. It wasn't an issue.

Q. Now, is there a difference between members and [44] attendees that could lead the students in prayer?

A. Between members and attendees?

Q. Yes. In other words, someone who leads students in prayer, would you first ask them if they were a member?

A. No, I wouldn't.

Q. Now, you maintain a Yahoo! message group for the CLS Hastings; is that true?

A. Right.

Q. And you maintain contact information for the people involved in the group? Is that also correct?

A. Yes, I do.

Q. How do you go about sending out information about CLS Hastings? How do you disseminate it to members and attendees?

A. Through the Yahoo! group.

Q. How does that work?

Do you send an e-mail out to everybody, or do you just make it available for people to come look?

A. I send it to the address on Yahoo!, and then Yahoo! automatically sends it to everybody on the list.

Q. Are there two different lists for members and attendees, or is it one list?

A. It's just one list.

Q. Now, during your leading the Bible studies in

* * *

[46] Q. You only discussed it one time in the context of this litigation?

A. Right.

Q. I would like to direct your attention to what's been previously marked as Exhibit 27. Do you have that there?

MR. TRACEY: Yes. I have handed it to him.

MR. SCHULTZ: Q. Can you identify this document?

A. Yes. It's the Membership Statement of Faith.

Q. It's titled "Membership Statement of Faith and Sexual Morality Standards"; is that true?

A. Right.

Q. Have you ever seen this document before?

A. Yes.

Q. When did you see it?

A. Let's see. Sometime during the time in which we were preparing to register Hastings CLS with the CLS National.

Q. How did you come to see this document?

Was it on the Website, or did you get it in a packet, or how did you –

A. I don't remember, probably both.

Q. Have you ever discussed this Membership of Statement of Faith and Sexual Morality Standards at any [47] time at any meeting of CLS Hastings?

A. No, not in detail, no.

Q. I'm just asking at any time.

A. We didn't discuss like this particular specific language, but we discussed the idea that CLS had a statement concerning sexual morality and our commitment to that.

Q. And that was during the same meeting that you just mentioned earlier?

A. Right.

Q. And at no other time did you discuss that?

A. I don't remember another time.

Q. You led the Bible studies, correct?

A. Right.

Q. Okay. I would like to direct your attention to Exhibit 41, what's been previously marked as Exhibit 41.

A. Okay. I'm looking at it now.

Q. It's entitled "Serving Christ and the Hastings comm." It's an activity calendar.

A. Right.

Q. Do you recognize this document?

A. Yes, I do.

Q. It's an activity calendar for CLS Hastings for the 2004-2005 year, right?

* * *

[57] A. They would just come and participate in meetings but not become official members.

Q. There's no difference between what attendees and members do at these meetings, correct?

A. If they are just coming to participate in meetings by coming to participate in the worship and prayer and offering and sharing prayer requests and offering their points of view during discussion, giving announcements about things that they were doing that weekend and asking if people wanted to come, then there would not be a distinction between attendees and members.

Q. What is the distinction? You just said everything that goes on in the meetings.

A. If people wanted to lead Bible studies or if they wanted to be officers in the group or if they wanted more generally the privileges of membership, i.e., to be able to vote on who they want the leaders to be or set the future course of the group in terms of the general direction and the very concrete details, then they would have to be members to do that.

Q. So it's fair to say that these benefits haven't caused the other attendees to join?

A. That these benefits have not caused the other attendees to join?

* * *

[91] A. I think that would be fair to say.

Q. Did she say that she didn't see the necessity of the lawsuit given that no homosexuals were trying to join CLS? Would that be fair to say as well?

A. Not that I know of.

Q. Dina said that it was her understanding that Julie Chan told you that she could no longer adhere to the bylaws. Does that sound right to you?

A. Yes. That sounds right.

Q. What particular bylaws could she no longer adhere to? What part of the bylaws was at issue with her?

A. From what I understand, the part in the bylaws concerning personal conduct.

Q. What kind of personal conduct?

A. I would say concerns about lifestyle being led.

Q. Okay. What aspect of the lifestyle are we talking about? Do you know?

A. Such things as concerns with drinking, for instance.

Q. You said drinking?

A. Right.

Q. Okay. What else?

A. Apart from that, concerns about being in a [92] relationship with someone who is not a Christian.

Q. Anything else?

A. No.

Q. So she told you that she didn't want to – I'm sorry. Strike that.

She wanted to resign her position as secretary because she didn't agree with the prohibitions against drinking, being in a relationship with a non-Christian, and also because she didn't feel that being Christian required her to exclude homosexuals from membership in the group; is that fair?

A. No. She was indicating that she was participating in these activities, and she did not think that it was in conformity with the standards set forth for CLS officers, and she was also unsure about what she thought concerning membership and people who were practicing homosexuals.

Q. Did you have discussions with any other members or attendees that related to their limiting participation or involvement in CLS Hastings for any reason?

A. I'm sorry. Say that again. I couldn't hear you.

Q. Did you have any discussion at any time with any other members or attendees of CLS Hastings that

* * *

EXHIBIT C

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

HANDBOOK FOR STUDENT ORGANIZATIONS

* * *

ANNUAL REGISTRATION OF STUDENT ORGANIZATIONS

All new and continuing student organizations and journals must register each year with the Office of Student Services, Room 213, 200 McAllister, (415)

565-4773. Registration forms may be submitted throughout the year. However, only student organizations who submit registration forms by mid-September will be eligible to request ASUCH funding for the fall semester. A general meeting of student organizations is held within the first few weeks of each school year; the meeting place and time are announced in the *Hastings Weekly*. Registration forms and other pertinent information are distributed at that time. Representatives, preferably the President and Treasurer, from each organization should attend.

To register as a student organization, the following forms and materials must be completed each year and submitted to the Office of Student Services (forms and additional information are available in the Office of Student Services):

1. *Student Organization Registration Form* (Exhibit A),
2. *License Agreement for Use of College Name* (Exhibit B),
3. *Bylaws of Organization* (Exhibit C)

A. Liability of Organizations

Hastings does not sponsor student organizations and therefore does not accept liability for activities of student organizations. Organizations are responsible for their own contracts and for damages to person or

property resulting from activities sponsored by the organizations.

1. Each organization must agree to comply with the requirement that it inform members and those doing business with the organization that it is not College-sponsored and that the College assumes no responsibility for its activities.
2. The responsibility of officers for the activities of their organizations includes the individual responsibility of each officer for payment in full of debts incurred by the organization.
3. The accounts of all organizations are subject to inspection and/or audit by the College.

B. Officers

Registered student organizations and journals should notify Student Services of any change in officers during the year.

In order to maintain continuity, each student organization and journal must notify Student Services by **4/15/05** of the elected or proposed officers for the following year.

ALCOHOLIC BEVERAGES AT CAMPUS EVENTS

Policies and Regulations:

1. In 1988/89, ASUCH passed a resolution requiring that all campus events where alcohol is served

have an **equal amount of non-alcoholic beverages** available for participants.

2. If you wish to sell beer or wine by individual servings or serve hard liquor, a one-day alcoholic beverage license is needed. See instructions below.

3. If any alcoholic beverages (including beer and wine) are to be served at a campus event, it must be indicated on the *Room Reservation Request* (Exhibit D).

4. Do not provide alcoholic beverage to individuals not associated with Hastings. It has been reported that glasses of beer have been given to passersby. This causes problems with the security of your event.

5. In advertising social events where alcoholic beverages are to be served, representations such as "All you can drink" are discouraged.

6. Alcoholic beverages cannot be served on campus before **3:45 p.m.**

7. Alcoholic beverages **must remain in the location** in which they are served.

Procedures for Obtaining a Daily Alcoholic Beverage License

The organization desiring the license is responsible for obtaining all documentation.

1. Obtain an Application for *Police Department Recommendation for a Temporary Alcoholic Beverage License* (Exhibit E) from the Office of Student

Services, Room 213, 200 McAllister at least 2 weeks prior to the event

* * *

Below is a list of caterers who are pre-qualified to provide catering services to the College. Only these caterers may be used for on-campus events.

- California Rose Catering, 415-346-1943
- Wild Awakenings, 415-255-1928
- Knights Catering, 415-861-3312
- The Law Café, 415-565-4693

Note: The pre-qualification requirement does not include the delivery of pizzas, sandwiches and food platters by outside caterers and food vendors.

COLLEGE SEAL AND LOGOS

The College seal is used by U.C. Hastings only for formal and official college purposes. Student organizations may not use the College seal. The official logos may be used as an alternative for events/activities officially sponsored by student organizations. Last year ASUCH held a student competition, and a new logo was selected using the Golden Gate Bridge. See Exhibit J for all logos. Student organizations may obtain print-ready copies of the logos from the Office of Student Services.

COMMERCIAL ORGANIZATIONS

Commercial entities (e.g., bar review courses, computerized legal research systems) have restrictions on their participation in campus activities for advertising purposes. Please check with the Director of Student Services for the regulations. For the list of *Bar Review Company Access Regulations* see Exhibit K. Registered student organizations may request funding for activities and special events from the bar review course (or similar) companies. When a company co-sponsors an event, there may be sponsor acknowledgment on the publicity posters and banners at the event. However, during the event there must not be any direct sales or marketing of the course, and no materials about the course can be distributed. A small table with exhibit materials about the company will be allowed.

CONTRACTS

All contracts entered into by student organizations for items such as reservations of party facilities, T-shirts, mugs, or services, need to be cleared through the Director of Student Services. If contracting with a disc jockey, student organizations must receive a copy of his/her license with BMI and/or ASCAP.

EMAIL/INTRANET ACCESS

Registered student organizations may request an email address from Eric Noble, noblee@uchastings.edu. **College resources such as the email system**

are not to be used for commercial, religious or political purposes. Use of the Hastings Network, including email services, computers, etc., constitutes acceptance of the *Computer Resources Acceptable Use Policy*, which is described in the *Student Guidebook* and on the Internet (www.uchastings.edu/computers_01/policies.htm). Student organizations may send mass email to students only for purposes of distributing official organization announcements. Such mass emails may be sent through the ASUCH account or by sending the message to Student Services (see below). Non-official, unsolicited email messages constitute *spam* and are unacceptable under the above policy.

Any student organization may create and maintain a web page on the Hastings Intranet. Contact Eric Noble for more information.

EMAIL MESSAGES TO STUDENTS

As a registered student organization, you may send email to all students or to a specific class regarding an activity/event you are sponsoring. You can use the ASUCH office computer or email the message to chapmanj@uchastings.edu. Allow at least two (2) days for distribution. Indicate key information in the subject line. Include a contact person and email address in the message in case students desire additional information. Keep messages as brief as possible. Use the whole name of your organization in the fall in order to allow time for new students to familiarize

themselves with the acronyms used by student groups. Include the desired text in your e-mail. Do not include any attachments; they will not be forwarded.

EQUIPMENT INVENTORY

All equipment (e.g., answering machines) purchased by registered student organizations with funds raised by the organization, including ASUCH allocations, becomes property of the College. All such equipment, when acquired, must be immediately reported to the Director of Student Services for the purpose of obtaining proper insurance and establishing identifications and College inventory. Once inventoried, the equipment can be serviced by the College service contracts.

* * *

EXHIBIT D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION
– oOo –

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law,	)	
Plaintiff,	)	
vs.	)	NO. C 04 4484 JSW
MARY KAY KANE, in her official capacity as Chancellor and Dean of the University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law, et al.,	)	
Defendants.	)	

DEPOSITION OF
DINA HADDAD

July 8, 2005

REPORTED BY: MONA M. RUSSO, CSR 8771
JOB #369162

* * *

[60] Q. Yeah. Was anybody else present at the meeting?

A. No.

Q. Isaac wasn't present?

A. No.

Q. Tell me what occurred at the meeting, the first meeting that you recall on the subject of registering HCF.

A. At the meeting I had asked her how I would go about registering student groups because it was still early in the academic year, and as I said, we were really anticipating a strong HCF year, and I didn't want to get bogged down with registration during the school year. And we knew that we had until, I believe, the beginning of October, so we didn't jump the gun, but we were in there early.

So she went over the basic framework and paperwork, and we talked a little bit about what the groups would be. I had said that we were looking to put a prolife group, and she was excited that there would be a conservative group on campus since we do have a – I believe Choice for – some choice group. I apologize. I don't know the name.

And I had said, "Well, HCF is also looking to affiliate – HCF is also looking to become Christian [61] Legal Society in our affiliation."

And she had taken the nondiscrimination – she had first presented the bylaws and the different paperwork, and they were all different, color-coded.

And then she presented one of them and said, "Oh. That's great, fantastic. Just make sure that both Silenced Right and HCF abide by the nondiscrimination policy, but particularly HCF, the CLS, because when you go to a national group, often, especially" – or something to the effect that, "When you join a group of that nature, their policy doesn't match ours, and we're required to follow this policy."

So she had given me the policy, and I glanced over it. And in my file work, I also had the Christian Legal Society convention packet, that we were planning to attend this conference, and she said, "Oh. Is that a national conference?" And I said, "Yes. We're planning to attend," and she said, "You know, we have travel funds for these things." And that was the first time I had known that there were travel funds.

So she had said, "Well, if you're interested in going to the conference, apply for the travel funds," and I said, "Thank you. I didn't know that," and I would get back to her with our paperwork and our new constitution, but we would be the same group. We would

* * *

[64] and whether I have time to actually have meetings will be determined. I just want the name there."

And she had said, you know, "It's great to have even the name, you know, to give the appearance that we have a balanced student body. We have a diverse student body, and we like to have diversity."

Q. Okay, I think you told me that when she told you to make sure that both of the constitutions or both of the organizations would abide by the college's nondiscrimination policy, she gave you a copy of the policy or showed you a copy of the policy?

A. She gave me a copy.

Q. Did you have any further discussion at that point about the policy other than that it existed, she gave you a copy of it and told you to make sure that – I guess you also said that often national groups might not have a provision that says that they will comply with it.

Did she say anything else about the policy or did you have any further discussion on that subject at that point?

A. Not that I remember.

Q. At the time you met in this first meeting with Judy Chapman, had you already initiated the process of applying to affiliate with CLS?

* * *

[89] Ms. Chapman?

A. We came in, we sat down, and she told us that our bylaws were not in accord with the school's requirements, and we asked her why, and she pointed out exactly what it was that was keeping us from registration. We spoke about what it was that she felt that she was legally standing on, what foundation to deny us registration on those grounds, because the nondiscrimination policy was a – in our opinion, a school code, a school regulation.

She had said that there was a state law, a state law that would prevent her from extending HCF registration if they didn't abide by this nondiscrimination policy.

I remarked that from our understanding, the federal law and the First Amendment would allow us to register, and that by preventing us from registration, you are keeping us from being a Christian group and upholding to our beliefs because the way it would be applied would prevent us from accepting people who hold our tenets and desire to live a Christ centered life.

She remarked that she wasn't sure about the federal law, she is not a lawyer, but that she would run it through the general counsel. She had already run it through the general counsel, and the general counsel had

* * *

[91] A. Yes.

Q. You said at the outset, "She pointed out exactly what it was that was keeping us from registration." What did she point out in that regard?

A. She pointed to religion and sexual orientation, that it was missing in ours, in our constitution, meaning the national CLS constitution that we adopted as HCF.

Q. And that's because those bylaws state that the CLS chapter will not discriminate on various grounds specified but omits from those grounds religion and sexual orientation, right?

A. Correct.

Q. Okay. Did she tell you anything else that was keeping you from registration, to use your words?

A. No.

Q. It was the omission of those two categories?

A. Correct.

Q. So she didn't mention the Statement of Faith then?

A. I don't think she did. I believe if she did mention a Statement of Faith, it must have been in relation to like the idea of religion, but I believe she was just focused on the clause.

Q. When you said she referred to state law or a

* * *

[110] was going to step down from leadership.

Q. And what was your understanding as to the principal reasons that she decided to step down from leadership?

A. She didn't believe that she could abide by the bylaws.

Q. Why was that?

A. For her own personal reasons.

Q. Did she tell you or Isaac what those reasons were?

A. I was never clear on them.

Q. Did they have anything to do with her religious beliefs?

A. More so her religious walk, her abiding by the bylaws and being a leader who lives by those tenets.

Q. So if I'm to understand what you're telling me, she felt that she could not abide by the tenets in her personal life?

A. Correct.

Q. Did that relate in any way to sexual orientation issues?

A. No.

Q. Did it relate to other kinds of sexual conduct issues?

A. I'm not sure.

* * *

[124] Bible study would be a topic that was predesigned and a lesson that would be planned, and people would follow along with their Bibles and read the scripture along, and then we would lead it into discussion about the lesson or passage that we were studying. Afterwards we would take prayer requests, pray with one another, and spend some time in fellowship.

Q. A lot of this sounds very familiar to me from my own faith. Who would typically introduce the Bible topic through the lesson or passage, one of the leaders?

A. Correct.

Q. Did other attendees on occasion lead those discussions, or did they tend to be led mostly by the leaders?

A. The discussions were led by the leaders. We had worship led by attendees, prayer by various people who decided they felt they wanted to pray.

Q. One term that's not familiar to me in my faith is "fellowship."

What do you mean when you say "fellowship"?

A. To converse with one another, to enjoy conversation, share food.

Q. Socializing?

A. Socializing.

* * *

[129] Law Students, and the Jewish Law Students Association?

A. I don't know.

Q. You're not aware of any reason to think that Hastings intended to discriminate against religious student organizations as distinct from, for example, political organizations or single issue organizations or law review organizations?

A. I wouldn't know what Hastings' position was.

Q. Can we go off the record for a minute?

MR. TRACEY: Sure.

(Whereupon, a recess was taken.)

MR. SCHULMAN: I have a few more questions on the percipient side, and then I will do a clear segue into the 30(b)(6) stuff.

MR. TRACEY: Okay.

MR. SCHULMAN: Q. Dina, I think you told me in your description of the typical fellowship meeting that the leaders generally introduced the Bible topic, the lesson or passage, and led the discussion, but that on occasion other participants led the group in prayer; is that right?

A. Mh-hm.

Q. And those other participants could have included or did include the other member of CLS or nonmembers of CLS; is that right?

[130] A. Yes.

Q. And would that include both the opening prayer, if there was one, and/or later prayer requests?

A. Yes.

Q. How did you determine whether somebody attending would lead the group in prayer?

Is it if they were moved to do so, in effect?

A. Would anyone like to close in prayer? Then that person could close.

Q. And it would be open to anybody who felt moved to do so?

A. Yes.

Q. During the course of the various meetings that the group held during – the chapter held during the 2004-5 academic year, other than the September 28th meeting that you've already described to me, were there any other meetings in which there was discussion at chapter meetings of homosexuality as a topic?

A. Not as a topic.

Q. Were there any other meetings at which there was discussion of homosexuality in relation, for

example, to a particular Biblical passage that was the subject of the lesson?

A. No.

Q. Were the discussions of the Hastings policy on

* * *

[158] assumed that we were starting from scratch.

Q. Okay. But just to be clear, regardless of what uncertainty may have existed on September 23rd, 2004, when this letter was finalized, drafted, and sent to Hastings, your testimony sitting here today as the Rule 30(b)(6) of the chapter is that the first sentence, which I just read to you, is inaccurate; is that right?

A. Yes.

Q. And your understanding, rather, is that the Hastings chapter of the Christian Legal Society has been affiliated with the national Christian Legal Society since 2004-5?

A. Correct.

Q. Okay. Regardless of this question of formal affiliation, what knowledge do you have as to the nature of the organization that used the name Hastings Christian Legal Society during the 1990s?

In other words, do you have any basis for concluding that it was, in essence, a Christian student organization with similar goals and missions and objectives to those of the chapter that you assisted in leading last year?

A. Other than what is in the documents and in the constitution, I don't know. Whether they fall through their constitution is anyone's best guess.

* * *

EXHIBIT E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION
– oOo –

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law, Plaintiff, vs. MARY KAY KANE, in her official capacity as Chancellor and Dean of the University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law, et al., Defendants.	NO. C 04 4484 JSW

DEPOSITION OF
DAVID NAMMO

July 7, 2005

REPORTED BY: MONA M. RUSSO, CSR 8771
JOB #369162

* * *

[10] Student Ministries, and that's the bylaws and my letter to them with the affiliation agreement and the bylaws. Prior to me, Dan Babarik and Charlie Emmerich ran the Law Student Ministries office out of Northbrook, Illinois, and made –

MR. ADEN: Would you spell those names, please.

THE WITNESS: Charlie Emmerich is E-m-m-e-r-i-c-h, and Dan Babarik is B-a-b-a-r-i-k.

And when they ran the office, then they made the decision, and then when I took over as director, then I made the decision.

MR. ADEN: Thank you. I'm sorry to interrupt you.

MR. SCHULTZ: Q. When did you take over as director?

A. I took over as director late 2002, I believe. I'm going to have to think about that one. No, late 2001, Sorry.

Q. So since late 2001, the only thing that's gone into the Hastings file are the things that you just

described, the bylaws, the affiliation agreement, and the letter to Isaac Fong?

A. Yes.

Q. What were the other documents in the file

* * *

[50] A. In the law student bylaws?

Q. Yes.

A. I don't think so.

Q. And there was nothing previous to 2002 that addressed homosexuality with respect to members?

A. No.

Q. If a homosexual individual wanted to become a member of CLS today, would they be allowed to become a member?

A. That depends.

Q. What does it depend on?

A. On their view of homosexuality, and that's what's laid out in the sexual morality standards.

Q. So what would a homosexual individual have to have in order to be able to join CLS?

A. Can you repeat that?

Q. You said it depended on their views of homosexuality. What views would a member have – homosexual member have to have in order to become a member of CLS National?

A. As the board laid out, "In view of the clear dictates of scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying [51] such an individual from CLS membership.

"As fellow members of the Body of Christ, members of the Christian Legal Society are bound to engage members who are involved in sexual immorality in a dialogue leading to repentance."

Number 8: "Failing evidence of repentance, the scripture requires that the unrepentant member be treated as an unbeliever. In appropriate circumstances, the CLS regards the expulsion of a member pursuant to Article 4, Section 6 of the bylaws as an action taken in furtherance of that mandate."

And that also would back itself up in keeping somebody from joining instead of throwing them out, if that makes sense.

Q. Previous to Exhibit 27, was there anything in writing concerning homosexuals becoming members of CLS National?

A. Not that I can remember.

Q. Are you aware of anyone being expelled from a law school chapter for being homosexual, a CLS law school chapter for being homosexual?

MR. ADEN: Objection. That misstates the record. I do not believe the witness has spoken of a membership in a local chapter. Therefore, there is no expulsion. I don't mean to coach the witness at all,

* * *

[60] A. I was, yes.

Q. And you're aware that it existed in 2003-2004 at Hastings?

A. Probably. I don't have any specific recollection.

Q. Do you know whether that was – Hastings Christian Fellowship, as it existed in 2003 and 2004, whether it was an officially affiliated chapter of CLS?

A. It was not. They officially affiliated this past fall, September 2004, I believe.

Q. Has there ever –

A. I might have the month wrong.

Q. So in the 2004-2005 school year is the first time that there was a local chapter at CLS Hastings?

A. An affiliated CLS chapter, correct.

Q. So previous to 2004, there has never been an actual officially affiliated chapter of CLS at Hastings?

A. Correct, to my knowledge.

Q. I would like the court reporter to mark this, an e-mail that's dated September 9th, 2004, as Exhibit 29.

(Whereupon, Defendants' Exhibit 29 was marked for identification.)

MR. SCHULTZ: Q. Let the record reflect that you're looking at the document, Exhibit 29.

* * *

EXHIBIT E

[LOGO] Christian Legal Society

Membership Statement of Faith and Sexual Morality Standards

RESOLUTION OF THE EXECUTIVE COMMITTEE OF THE BOARD OF DIRECTORS OF CHRISTIAN LEGAL SOCIETY

WHEREAS, among the purposes of the Christian Legal Society (CLS) as enumerated in its Bylaws, is "To proclaim Jesus as LORD through all that we do in the field of law and other disciplines;" and

WHEREAS, in light of current events relating to human sexuality and the meaning of marriage and the family both in the courts and throughout

American society broadly, it is important to reaffirm at this time certain Biblical standards for sexual morality;

THEREFORE, the Executive Committee of the Board of Directors believes it timely to confirm CLS' interpretation of its Statement of Faith as set forth in Article 2, Section 1 of the Bylaws insofar as it relates to Biblical standards for sexual morality, as follows:

BE IT RESOLVED: That the Statement of Faith as set forth in Article 2, Section 1 of the CLS Bylaws be interpreted as follows:

1. The Preamble to the Statement of Faith, referring as it does to Jesus Christ as Savior of all who trust and believe in him, affirms that Christ saves from sin and justifies all who come to him in repentance seeking forgiveness and cleansing.

2. The third paragraph of the Statement of Faith, acknowledging as it does Christ's "vicarious death for our sins," affirms that it is Christ alone who is able to save from sin through His death on the cross, resulting in God's forgiveness of our sins and the establishment of peace between us and God.

3. The fourth paragraph of the Statement of Faith, in recognizing "[t]he presence and power of the Holy Spirit in the work

of regeneration," affirms that the work of the Holy Spirit cancels the power of sin to enslave the believer thereby enabling the believer to freely give glory to God, serve others and grow to be ever more like Jesus Christ.

4. The fifth paragraph of the Statement of Faith, in acknowledging the Bible as "the inspired Word of God," affirms that the Holy Scripture is the revelation of the will of God to man, and the ultimate source of authority for faith and life.

5. The Holy Scripture declares that the "acts of the sinful nature" of which the repentant believer is forgiven and from which he or she is to be cleansed include all acts of sexual conduct outside of God's design for marriage between one man and one woman, which acts include fornication, adultery, and homosexual conduct. Exodus 20:14; Matthew 15:19; Romans 1:27; I Corinthians 6:9-10.

6. In view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership.

7. As fellow members of the Body of Christ, members of the Christian Legal Society

are bound to engage members who are involved in sexual immorality in a dialogue leading to repentance. James 5:19-20.

8. Failing evidence of repentance, the Scripture requires that the unrepentant member be treated "as an unbeliever." Matthew 18:17. In appropriate circumstances, the CLS regards the expulsion of a member pursuant to Article 4, Section 6 of the Bylaws as an action taken in furtherance of that mandate.

Adopted by the CLS Executive Committee: March 25, 2004

EXHIBIT F

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Attorneys for Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law, Plaintiff,	No. C 04 4484 JSW Action Filed: October 22, 2004 DEFENDANTS' RESPONSE TO FIRST SET OF INTERROGATORIES Judge: Hon. Jeffrey S. White

v.

MARY KAY KANE, in her official capacity as Chancellor and Dean of the University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law; *et al.*,

Defendants.

PROPOUNDING PARTY:

Plaintiff Christian Legal Society Chapter of University of California, Hastings College of the Law

RESPONDING PARTY:

Defendants Mary Kay Kane, Chancellor and Dean of the University of California, Hastings College of the Law; et al.

SET NUMBER:

One

Defendants Mary Kay Kane, Chancellor and Dean of the University of California, Hastings College of the Law ("Hastings"); Judy Chapman, Director of Student Services for Hastings; and Maureen E. Corcoran, Eugene L. Freeland, Carin T. Fujisaki, John T. Knox, Jan Lewenhaupt, James E. Mahoney, Brian D. Monaghan, Bruce L. Simon, John K. Smith, and Tony West, Board of Directors of Hastings (collectively, "Defendants") hereby respond to Plaintiffs' First Set of Interrogatories in accordance with

Federal Rule of Civil Procedure 34 and the Local Rules of the Northern District Court of California, as follows:

GENERAL OBJECTIONS

Defendants respond to each of Plaintiff's First Set of Interrogatories subject to the following General Objections, which each specific response below incorporates by reference.

1. Defendants have not completed the investigation, collection of information, and discovery relating to this litigation. The following responses are based on, and thus limited by, the information currently known and/or discovered in the course of preparing these responses. Accordingly, Defendants reserve the right to amend and/or supplement these responses upon further discovery and to produce at trial and in pretrial motions and proceedings, and/or to refer to, any additional evidence, facts, documents, or information – whether consistent or inconsistent with these responses – that they or their counsel have not yet discovered, or whose relevance they have not yet discerned.

2. Defendants object to each Interrogatory to the extent that it calls for information protected by the attorney-client privilege, the work product doctrine, the right of privacy, or any other privilege according to law.

3. Defendants object to these Interrogatories on the grounds that they are overbroad as applied to this action and seek information neither relevant to this action nor reasonably calculated to lead to the discovery of admissible evidence.

4. As used herein, an objection that an Interrogatory is "overbroad" shall include an objection that the Request is not relevant to the subject matter involved in the pending action, is not reasonably calculated to lead to the discovery of admissible evidence and/or is not expressed with reasonable particularity.

5. As used herein, an objection of "unduly burdensome" shall include an objection that the Interrogatory is so oppressive as to be unduly burdensome in the context of this litigation.

6. Defendants' responses are made expressly subject to, and without waiver of, any objections to the competency, relevancy, or admissibility as evidence of any of the information referred to or produced hereby.

7. Defendants object to the Interrogatories – including but not limited to the definitions and instructions set forth in the Interrogatories – to the extent they purport to impose requirements that are different from, or in addition to, those imposed by Federal Rule of Civil Procedure 34(a) or other applicable rule or statute. In responding to the Interrogatories, Defendants will comply with their obligations under the Rules. Subject to and without waiving each of the foregoing General Objections,

Defendants respond to the specific Interrogatories as follows:

RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1:

Identify each person who prepared or assisted in the preparation of the responses to these interrogatories.

RESPONSE TO INTERROGATORY NO. 1:

In addition to their General Objections, which are incorporated herein, Defendants object to this Interrogatory on the grounds that it calls on Defendants to disclose communications between Defendants and their counsel and Defendants' counsels' analysis and evaluation on behalf of Defendants in the course of their preparation of these responses. Accordingly, the Interrogatory calls for information protected by the attorney-client and work product privileges. Defendants also object to this Interrogatory on the grounds that it is vague and ambiguous as to the terms "prepared" and "assisted." Subject to and without waiving these objections, Defendants answer:

Defendant Judy Chapman, Director of Student Services.

INTERROGATORY NO. 2:

Identify any expert witnesses you intend to call at any trial or hearing in this matter. For each such expert witness, please state the following:

(a) His/her identity;

(b) His/her educational background, training and experience and an identification of other actions in which said witness has offered expert testimony;

(c) The subject matter on which the expert is expected to testify;

(d) The substance of the facts and opinions to which the expert is expected to testify; and

(e) A summary of the grounds for each such opinion.

RESPONSE TO INTERROGATORY NO. 2:

In addition to their General Objections, which are incorporated herein, Defendants object to this Interrogatory on the grounds that it calls for Defendants to disclose the identity of expert witnesses they intend to call in contravention of the disclosure schedule set forth in Rule 26(a)(2)(C) of the Federal Rules of Evidence. Subject to and without waiving these objections, Defendants answer:

Defendants have not yet determined the identity of the expert witnesses they intend to call at a trial or hearing in this matter. Defendants remain open to

entering into a stipulated schedule with the CLS-Hastings for disclosure of expert witnesses at a later date, but have not at this time reached an agreement as to the dates of such disclosures.

INTERROGATORY NO. 3:

Identify any and all federal, state, and local laws you contend prohibit DC Hastings from extending registered student organization status to HCF because of the group's membership and leadership policies.

RESPONSE TO INTERROGATORY NO. 3:

In addition to their General Objections, which are incorporated herein, Defendants object to this Interrogatory on the grounds that it is compound. Subject to and without waiving these objections, Defendants answer:

Hastings' policy on nondiscrimination and its application to Plaintiff is consistent with applicable federal, state and local laws including, but not limited to, Cal. Educ. Code §66270, Article I, Section 31 of the California Constitution, Titles VI and VII of the Civil Rights Act of 1964, Title IX of the Educational Amendments of 1972 (45 (CF 86), and Sections 503 and 504 of the Rehabilitation Act of 1973.

INTERROGATORY NO. 4:

State the full and complete definition of "sexual orientation" and any criteria used in applying the "sexual orientation" provision of DC Hastings' Policy on Nondiscrimination. With respect to this interrogatory, please identify the source of such definition or criteria, any and all documents relating to such definition or criteria, and any and all person or persons with knowledge of such definition or criteria.

RESPONSE TO INTERROGATORY NO. 4:

In addition to their General Objections, which are incorporated herein, Defendants object to this Interrogatory on the grounds that it is compound. Subject to and without waiving these objections, Defendants answer:

The Policy on Nondiscrimination uses the common, ordinary meaning of the term "sexual orientation." There is no "full and complete definition" or "criteria" for the term "sexual orientation" as it is used in the Policy on Nondiscrimination set forth in any document in Hastings' possession, custody, or control.

INTERROGATORY NO. 5:

State the full and complete definition of "religion" and any criteria used in applying the "religion" provision of UC Hastings' Policy on Nondiscrimination. With respect to this interrogatory, please identify the

source of such definition or criteria, any and all documents relating to such definition or criteria, and any and all person or persons with knowledge of such definition or criteria.

RESPONSE TO INTERROGATORY NO. 5:

In addition to their General Objections, which are incorporated herein, Defendants object to this Interrogatory on the grounds that it is compound. Subject to and without waiving these objections, Defendants answer: The Policy on Nondiscrimination uses the common, ordinary meaning of the term "religion." There is no "full and complete definition" or "criteria" for the term "religion" as it is used in the Policy on Nondiscrimination set forth in any document in Hastings' possession, custody, or control.

INTERROGATORY NO. 6:

State the full and complete definition of "arbitrary or unreasonable discriminatory practices" and any criteria used in applying the phrase from UC Hastings' Policy on Nondiscrimination. With respect to this interrogatory, please identify the source of such definition or criteria, any and all documents relating to such definition or criteria, and any and all person or persons with knowledge of such definition or criteria.

RESPONSE TO INTERROGATORY NO. 6:

In addition to their General Objections, which are incorporated herein, Defendants object to this Interrogatory on the grounds that it is compound. Subject to and without waiving these objections, Defendants answer:

The Policy on Nondiscrimination uses the term "discriminatory practices" as it is used in common, ordinary practice, consistent with federal and state laws barring discrimination. "Discriminatory practices" are, by definition, commonly understood to be arbitrary and unreasonable. There is no "full and complete definition" or "criteria" for the term "arbitrary or unreasonable discriminatory practices" as it is used in the Policy on Nondiscrimination set forth in any document in Hastings' possession, custody, or control.

INTERROGATORY NO. 7:

Identify any and all parts of HCF's membership and leadership policies you contend violate the "sexual orientation" provision of the Policy on Nondiscrimination.

RESPONSE TO INTERROGATORY NO. 7:

Subject to and without waiving their General Objections, which are incorporated herein, Defendants answer:

CLS-Hastings' policy and practice set forth in paragraph 3.8 of its First Amended Verified Complaint For Declaratory and Injunctive Relief ("FAC"): "A person who engages in homosexual conduct or adheres to a viewpoint that homosexual conduct is not sinful would not be permitted to become a member or serve as an HCF officer."

INTERROGATORY NO. 8:

Identify any and all parts of HCF's membership and leadership policies you contend violate the "religion" provision of the Policy on Nondiscrimination.

RESPONSE TO INTERROGATORY NO. 8:

Subject to and without waiving their General Objections, which are incorporated herein, Defendants answer:

CLS-Hastings' policy and practice set forth in paragraphs 3.2 and 3.5 of its First Amended Verified Complaint For Declaratory and Injunctive Relief ("FAC"): "All members of the national Christian Legal Society, including student members, must sign a Statement of Faith indicating that the member holds certain Christian viewpoints commonly regarded in both the Roman Catholic and Protestant evangelical traditions as orthodox. . . . Pursuant to the constitution and rules for CLS student chapters . . . HCF

requires its members and officers to sign the national Christian Legal Society's Statement of Faith."

INTERROGATORY NO. 9:

Identify any and all parts of HCF's membership and leadership policies you contend are "legally impermissible" as the term is used in the Policy on Nondiscrimination.

RESPONSE TO INTERROGATORY NO. 9:

Subject to and without waiving their General Objections, which are incorporated herein, Defendants answer:

The policies and practices set forth in response to Interrogatories seven and eight above.

INTERROGATORY NO. 10:

Identify any and all parts of HCF's membership and leadership policies you contend 8 are "arbitrary or unreasonable discriminatory practices" as the phrase is used in the Policy on 9 Nondiscrimination.

RESPONSE TO INTERROGATORY NO. 10:

Subject to and without waiving their General Objections, which are incorporated herein, Defendants answer:

The policies and practices set forth in response to Interrogatories seven and eight above.

INTERROGATORY NO. 11:

Do you contend that the term "groups" in UC Hastings' Policy on Nondiscrimination includes registered student organizations? With respect to this interrogatory, please identify the source of your contention, identify any and all documents that relate to your contention, and identify the person or persons with knowledge of the definition and scope of the term "groups" as used in the Policy on Nondiscrimination.

RESPONSE TO INTERROGATORY NO. 11:

In addition to their General Objections, which are incorporated herein, Defendants object to this Interrogatory on the grounds that it is compound. Subject to and without waiving these objections, Defendants answer:

The term "groups" in Hastings' Policy on Nondiscrimination includes registered student organizations. There is no definition or criteria for the term "groups" as it is used in the Policy on Nondiscrimination set forth in any document in Hastings' possession, custody, or control. Defendant Judy Chapman, Director of Student Services at Hastings, has knowledge of the definition and scope of the term.

INTERROGATORY NO. 12:

Do you contend that UC Hastings' Policy on Nondiscrimination covers the leadership practices of registered student organizations? With respect to this interrogatory, please identify the source of your contention, identify any and all documents that relate to your contention, and identify the person or persons with knowledge of the coverage and application o [sic] the Policy on Nondiscrimination.

RESPONSE TO INTERROGATORY NO. 12:

In addition to their General Objections, which are incorporated herein, Defendants object to this Interrogatory on the grounds that it is vague and ambiguous as to the term "leadership practices" and that it is compound. Subject to and without waiving these objections, Defendants answer:

It is Hastings' policy not to interfere with the internal practices of a registered student organization other than to ensure that the organization's policies do not violate the Policy on Nondiscrimination. Under the express terms of the Policy on Nondiscrimination, if a registered student organization adopts a policy or practice that bars access to its leadership positions on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation, then it is in violation of the Policy on Nondiscrimination. Other than the Policy itself, there is no document that specifically addresses whether "leadership practices" are covered by the Policy on Nondiscrimination.

Defendant Judy Chapman, Director of Student Services at Hastings, has knowledge of coverage and application of the Policy.

INTERROGATORY NO. 13:

Do you contend that UC Hastings' Policy on Nondiscrimination covers the membership practices of registered student organizations? With respect to this interrogatory, please identify the source of your contention, identify any and all documents that relate to your contention, and identify the person or persons with knowledge of the coverage and application o [sic] the Policy on Nondiscrimination.

RESPONSE TO INTERROGATORY NO. 13:

In addition to their General Objections, which are incorporated herein, Defendants object to this Interrogatory on the grounds that it is vague and ambiguous as to the term "membership practices" and that it is compound. Subject to and without waiving these objections, Defendants answer:

It is Hastings' policy not to interfere with the internal practices of a registered student organization other than to ensure that the organization's admissions policies do not violate the Policy on Nondiscrimination. Under the express terms of the Policy on Nondiscrimination, if a registered student organization adopts a policy or practice that bars students from becoming members on the basis of race, color,

religion, national origin, ancestry, disability, age, sex or sexual orientation, then it is in violation of the Policy on Nondiscrimination. Other than the Policy itself, there is no document that specifically addresses whether "membership practices" are covered by the Policy on Nondiscrimination. Defendant Judy Chapman, Director of Student Services at Hastings, has knowledge of coverage and application of the Policy.

INTERROGATORY NO. 14:

Identify each and every complaint received by UC Hastings, Defendants and/or their predecessors in interest alleging that a registered student organization violated the Policy on Nondiscrimination or its applicable predecessor for the academic years 1995 to present.

RESPONSE TO INTERROGATORY NO. 14:

Subject to and without waiving their General Objections, which are incorporated herein, Defendants answer:

Defendants are unaware of any such complaints.

INTERROGATORY NO. 15:

Identify all applicants for registered student organization status who have been denied such status by any agency, department, officer or employee of UC Hastings in whole or in part because they did not comply with the Policy on Nondiscrimination or any

other applicable nondiscrimination policy for the academic years 1995 to present.

RESPONSE TO INTERROGATORY NO. 15:

Subject to and without waiving their General Objections, which are incorporated herein, Defendants answer:

Defendants are unaware of any such applicants, other than Plaintiff.

INTERROGATORY NO. 16:

Identify the person or persons tasked with enforcing the Policy on Nondiscrimination.

RESPONSE TO INTERROGATORY NO. 16:

In addition to their General Objections, Defendants object on the grounds that the Interrogatory seeks information concerning the application or enforcement of the Policy on Nondiscrimination to groups and individuals other than registered student groups, and as such seeks information irrelevant to CLS-Hastings' claims and beyond the scope of this litigation. Subject to and without waiving their objections, Defendants answer:

Defendants Chancellor and Dean Mary Kay Kane and Director of Student Services Judy Chapman are tasked with enforcing the Policy on Nondiscrimination

with respect to students and registered student organizations.

INTERROGATORY NO. 17:

Identify any and all procedures that exist at UC Hastings for investigating a claim that a student organization violated the Policy on Nondiscrimination.

RESPONSE TO INTERROGATORY NO. 17:

Subject to and without waiving their General Objections, which are incorporated herein, Defendants answer:

Sections 34.11 of Hastings' Policies and Regulations Applying to College Activities, Organizations and Students.

INTERROGATORY NO. 18:

Identify each and every student organization given an exemption, whether partial or total, written or verbally acknowledged, from the Policy on Nondiscrimination or its applicable predecessor for the academic years 1995 to the present.

RESPONSE TO INTERROGATORY NO. 18:

Subject to and without waiving their General Objections, which are incorporated herein, Defendants answer:

Defendants are unaware of any such exemptions.

INTERROGATORY NO. 19:

Identify any and all student organizations that have requested exemptions, whether partial or total, written or verbally acknowledged, from the Policy on Nondiscrimination or its applicable predecessor for the academic years 1995 to the present, but been denied the requested exemption by UC Hastings.

RESPONSE TO INTERROGATORY NO. 19:

Subject to and without waiving their General Objections, which are incorporated herein, Defendants answer:

Defendants are unaware of any such requests, save the request from CLS-Hastings that is the subject of this litigation.

INTERROGATORY NO. 20:

Identify all student organizations whose membership and/or leadership policies you have reason to believe are in violation of UC Hastings' Policy on Nondiscrimination, but against whom no complaint has been filed.

RESPONSE TO INTERROGATORY NO. 20:

Subject to and without waiving their General Objections, which are incorporated herein, Defendants answer:

Defendants are unaware of any such student organizations.

INTERROGATORY NO. 21:

Identify any and all revisions and/or amendments to the Policy on Nondiscrimination or its applicable predecessor for the academic years 1995 to present.

RESPONSE TO INTERROGATORY NO. 21:

Subject to and without waiving their General Objections, which are incorporated herein, Defendants answer:

The Policy on Nondiscrimination was adopted in June, 1990 and amended to its current form in June 2002.

INTERROGATORY NO. 22:

Identify any and all rules, regulations, or policies of UC Hastings and/or the UC Hastings Board of Directors that you contend prohibit discrimination on any basis by students, registered or unregistered student organizations, employees, departments, or divisions of UC Hastings.

RESPONSE TO INTERROGATORY NO. 22:

In addition to their General Objections, which are incorporated herein, Defendants object to the portion of the Interrogatory that purports to seek information on Hastings' policy on discrimination outside of the context of registered student organizations on the grounds that such information is irrelevant to CLS-Hastings' claims and outside the scope of the instant litigation. Subject to and without waiving their objections Defendants answer:

(1) the rules, regulations, and policies set forth or otherwise referenced in Sections 20.00, 51.00, 91.10 through 91.50 and 93.00 of Hastings' Policies and Regulations Applying to College Activities, Organizations and Students;

(2) the Policy and Procedure On Sexual Harassment approved on December 4, 1996;

(3) the Section II(A)(2) of the University of California Hastings College of the Law Faculty Rules and Procedures;

(4) the Personnel Policy and Procedure Guideline in the Management Personnel Policy and Procedure Handbook; and

(5) the Personnel Policy and Procedure Guideline in the Staff Personnel Policy and Procedure Handbook.

INTERROGATORY NO. 23:

Do you contend that the use of the UC Hastings name and logo by a registered student organization pursuant to the License Agreement for Use of College Name, attached as Exhibit B to the Excerpts of Policies and Regulations Applying to College Activities, Organizations and Students, renders the registered student organization a "Hastings-sponsored program[ ] and activit[y]" as that phrase is used in the Policy on Nondiscrimination? With respect to this interrogatory, please identify the source of your contention, identify any and all documents that relate to your contention, and identify the person or persons with knowledge of the process for entering into a licensing agreement to use the school's name and logo.

RESPONSE TO INTERROGATORY NO. 23:

In addition to their General Objections, which are incorporated herein, Defendants object to this Interrogatory on the grounds that it is compound. Subject to and without waiving these objections, Defendants answer:

The registration of a student organization renders it an organization operating under a Hastings-sponsored "program" within the meaning of the terms of the Policy on Nondiscrimination. As set forth in Hastings' License Agreements for use of the name by student organizations, Hastings does not endorse or otherwise assume legal responsibility for the actions

of registered student organizations licensed to use the Hastings name or logo. Nonetheless, by using the Hastings name, student groups agree to be bound by the Policy on Nondiscrimination, which expressly applied to "[a]ll groups" using its name, including registered student groups recognized as part of Hastings' Office of Student Services "program" of coordinating and supporting social and academic groups formed by Hastings students.

INTERROGATORY NO. 24:

Identify any and all student organizations that have applied to use the UC Hastings' name and logo from the 1995 academic year to present.

RESPONSE TO INTERROGATORY NO. 24:

In addition to their General Objections, which are incorporated herein, Defendants object to this Interrogatory on the grounds that it is overbroad, burdensome, and that it seeks information irrelevant to CLS-Hastings' claims and outside the scope of the instant litigation. Defendants also object on the grounds that the Interrogatory seeks a compilation of information that is otherwise available to Plaintiff in the form of student group registration forms for the applicable time period, which Defendants have concurrently provided to Plaintiff.

DATED: June 6, 2005.

ETHAN P. SCHULMAN
MATTHEW R. SCHULTZ
HOWARD RICE
NEMEROVSKI CANADY
FALK & RABKIN
A Professional Corporation

ELISE K. TRAYNUM
General Counsel and
Secretary to the Board
HASTINGS COLLEGE
OF THE LAW
UNIVERSITY OF CALIFORNIA

By: /s/ Matthew R. Schultz
MATTHEW R. SCHULTZ
Attorneys for Defendants

VERIFICATION

I, Judy Chapman, am the Director of Student Services at University of California, Hastings College of Law. I am authorized to make this verification on behalf of University of California, Hastings College of Law. I have reviewed Defendants' Response to First Set of Interrogatories and am familiar with the contents thereof. I am informed and believe that the responses stated therein are true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this verification was hereby

executed on this 6th day of June 2005 at San Francisco, California.

/s/ Judy Chapman
Judy Chapman
Director of Student Services
at University of California,
Hastings College of Law

EXHIBIT G

Bylaws of Hastings Koinonia
Date: August 17, 2004
Revised: August 17, 2004

Article I – Name of Organization

The name of this organization shall be "Hastings Koinonia."

Article II – Purpose

Section 1. The purpose of this organization is to study the Bible, evaluate the evidence in support of the Bible's reliability, and discuss the Christian worldview and its logical consequences with the students of UC Hastings College of the Law. ("Hastings")

Section 2. Hastings Koinonia shall comply with the Polices and Regulations Applying to Hastings Activities, Organizations, and Students.

Article III – Membership

Section 1. Any full-time student at Hastings may become a member upon completion of a membership application and payment of membership fees, as they become due, the amount of which shall be established by the officers. Upon completion of the application and payment of prescribed fee, that new member shall be classified as an active member.

Section 2. Any person who is not a full-time student at Hastings may attend meetings or activities.

Section 3. Membership may cease by cancellation upon the member's request.

Section 4. Any active member who misses a semester of regularly scheduled meetings shall be dropped from rolls and must then re-apply for membership under Art. III Section I of these bylaws.

Section 5. Membership may cease by a vote of the active members if the member is found to be involved in gross misconduct.

Section 6. *Non-discrimination clause:* We will not restrict membership based upon race, color, national origin, religion, sex, physical and mental disability, medical condition (cancer-related or genetic characteristics), ancestry, marital status, age, sexual orientation, citizenship, status as a covered veteran (special disabled veteran, Vietnam-era veteran or any other veteran who served

on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized), or any other legally protected class.

Article IV – Officers

Section 1. There shall be two (2) officers of Hastings Koinonia.

Section 2. The officers of this organization shall be President and Treasurer.

Section 3. Only active members who are full-time Hastings students are eligible to serve as officers.

Section 4. The duties of the officers shall be determined by the President, with the advice and consent of all of the officers listed in Art. IV Section 2.

Section 5. Any other post not shown in Section 1 may be established upon need by the decision of the officers.

Section 6. The duration of the officers' terms shall be one academic year, or until new officers are elected.

Section 7. The election of new officers shall be during the final meeting of the Spring Semester. The officers shall nominate a panel of officers, and other panels of officers may be nominated by the active members. Election shall be for the entire panel of officers by a majority vote of all active members at the meeting who choose to vote. (A "panel" of

officers refers to all of the officers listed in Art. IV Section 2 being nominated as a group.)

Section 8. In the event of resignation or termination of an officer by ⅔ majority vote, the remaining officer shall appoint new officers.

Section 9. In the event of resignation or termination of both officers, new officers shall be elected under Article IV, Section 7 to serve for the remainder of the academic year.

Article V – Meetings

Section 1. The organization shall have their regular meetings held once a week unless otherwise ordered by the officers.

Section 2. The officers will call for meetings and any other emergency meetings as deemed necessary.

Section 3. A quorum for the transaction of business shall consist of 25% of the active members of the organization, but less than a quorum may adjourn any meeting.

Section 4. All votes shall be by simple majority, unless specified otherwise.

Section 5. The president or a designated officer shall preside at all meetings of the organization.

Article VI – Parliamentary Authority

The rules contained in the current edition of *Robert's Rules of Order Newly Revised* shall govern the organization in all cases to which they are applicable and in which they are not inconsistent with these bylaws and any special rules of order the organization may adopt.

Article VII – Amendment of Bylaws

Section 1. Any change, amendment, and addition to this Constitution will be affected by ⅔ majority vote of the total number of members of the organization, provided that the amendment has been submitted in writing

Section 2. All amendments, additions or deletions shall be filed in writing with the Office of Student Services.

Article VIII – Dissolution

If this organization is disbanded, all unspent funds will be allocated to other student organizations or other non-profit organizations.

EXHIBIT H

Students Raising Consciousness at Hastings

Constitution

Mission

We, the members of Students Raising Consciousness at Hastings, are established to work and struggle toward creating a conscious environment and to critically educate our campus about pertinent issues and struggles of different communities, particularly focused on race, sexual orientation, and gender. We do ordain and establish this constitution and subscribe to the regulations and policies stated hereinafter.

ARTICLE I – Name of Organization

The name of this organization shall be SRCH, an acronym for Students Raising Consciousness at Hastings.

ARTICLE II – Purpose of Organization

The purpose(s) of this organization shall be to do the following:

i. To struggle against forms of oppression that are perpetuated by sexist, heterosexist, racist, classist, and capitalist systems of power.

ii. To support communities who are most vulnerable to the above stated forms of oppression. The primary form of support includes raising consciousness.

iii. To educate the community critically about how the current systems of power maintain these conditions of oppression for the specific communities.

ARTICLE III – Membership practice

Active membership of this organization shall be based on the following criteria:

A. Eligibility for Membership

i. Any person supporting the mission of SRCH shall be eligible for membership.

B. Criteria for Membership

i. Any person may become a SRCH member by attending two meetings.

E. Meetings

i. General meetings are on a monthly basis.

ii. Board meetings are twice a month.

F. Absences

i. When Board Members are absent from meetings, they will either abstain from voting but can contribute to the discussion, via internet or speaker phone.

ii. Vacant positions can be filled by a temporary appointment to be determined by consensus of the board.

H. Voting

Decision-making in SRCH shall be based on consensus by the board. When there is no consensus

a member shall make a motion to "Call for a formal vote by secret ballot."

i. When a board member is absent from a meeting, it is up to the absent member to contribute to the discussion through other means (via e-mail or conference calling) but in the final analysis, they will abstain their vote.

I. Resignation or Removal of Board Members

i. To resign, a board Member must submit a written statement to the board.

ii. Any member may be removed by a consensus of the board for any of, but not limited to, the following:

a) not supporting or representing the mission to the satisfaction of the board.

b) extended and unexplained absences.

J. Adding new members to the Board

Any potential Board Member must be a General Member. The process of adding new Board Members is through elections.

K. Structure of Governance

i. Decision making and policy remains within the board.

ii. The board is based on yearly appointment, based on consensus.

iii. In principle, decisions by the board are to be determined by discussion and consensus. If there

is no consensus, a system of secret ballots will be utilized.

ARTICLE IV – Positions

A. President

i. Responsible for overseeing all the committees.

ii. Responsible for representing the organization on all affairs.

B. Vice President(s)

i. Responsible for chairing committees within the organization.

ii. Responsible for documenting goals and progress of committee.

iii. Responsible for assisting the President in organization affairs.

C. Secretary

i. Responsible for taking notes during board and monthly general meetings.

ii. Responsible for creating the agenda for board and monthly general meetings.

D. Treasurer

i. The Treasurer shall be a member nominated annually and appointed by the board.

ii. Any member may be nominated and appointed for the position of Treasurer.

iii. The Treasurer shall represent SCRH in all financial matters, including, but not limited to, signatory responsibility.

ARTICLE VI – Financial records

1. Any member of the board shall have full access to the financial records of this organization.

2. The treasurer shall be responsible for collecting and recording checking account donations and grants.

3. When relevant, a formal audit of accounts will be conducted annually.

ARTICLE VII – Amendments

Amendments to the constitution shall be approved by a consensus of board members. If consensus is not reached, refer to Article III, H. All amendments shall be in agreement with regulations and policies of SRCH.

Signed _____ Dated Filed _____

Title _____

EXHIBIT K

Bylaws of the
HASTINGS REPUBLICANS ("HR")
First Adopted February 19, 2003
Amended September 12, 2004

ARTICLE 1 NAME OF ORGANIZATION

Section 1 The name of this organization shall be the Hastings Republicans (HR)

ARTICLE 2 CALIFORNIA COLLEGE REPUBLICANS; CHARTER MEMBERSHIP

Section 1 The Hastings Republicans shall be an official chapter of the California College Republicans and, as such, shall register and meet all charter requirements of the California College Republicans

Section 2 Unless explicitly set forth herein, this organization shall operate under the constitution and bylaws of the statewide California College Republicans.

ARTICLE 3 PURPOSE

Section 1 The Hastings Republicans shall endeavor to advance Republican Party principles with sensitivity to the issues and demands particular to law students

Section 2 The Hastings Republicans shall execute this objective through the following purposes, in compliance with

the Policies and Regulations Applying to College Activities, Organizations, and Students of the University of California, Hastings College of the Law;

Section 3 HR shall endeavor to create a social and professional network for its members;

Section 4 HR shall endeavor to create volunteer and professional opportunities for its members;

Section 5 HR shall endeavor to create a forum in which members may explore current social, legal, and public policy issues.

ARTICLE 4 MEMBERSHIP

Section 1 Active members are those who have paid mandatory dues and shall be called "HR Member".

Section 2 Membership shall be restricted to students at Hastings.

Section 3 Dues shall be set by the membership of the club. There is no minimum requirement for dues.

Section 4 Membership is open to all Hastings Students, and membership rules shall not violate the Nondiscrimination Compliance Code of Hastings.

ARTICLE 5 OFFICERS; GENERALLY

Section 1 The officers of this organization shall consist of at least Six Executive Board positions, which shall include Chairman, Vice-Chairman, Secretary, Treasurer, Social Chair, and Communications Director.

Section 2 A 1L Representative shall be established upon reaching a minimum of number of 15 1L members. The 1L Representative shall be chosen by a vote of all eligible Hastings Republicans 1L Students. This provision shall not apply during 2002-2003 Academic Year.

Section 3 The member holding the office of Treasurer shall not serve in any other office of the organization.

Section 4 The officers shall perform duties prescribed by these bylaws and by the parliamentary authority adopted by this organization.

Section 5 All active members are eligible for the Executive Board.

Section 6 Only 1Ls, who are active members, are eligible for 1L Representative.

Section 7 The method of nomination shall be from an active member. Officers of the organization shall be elected by secret ballot to serve for one academic year. Elections shall be held at the second regular meeting of the spring term,

and all officers shall take office the following meeting after their election and shall remain in office until their successors are elected.

Section 8 Only HR Members may vote for officers or are eligible for the Executive Board.

Section 9 If the office of Chairman shall become vacant for any reason, the Vice-Chairman shall fill the vacancy for the remainder of the term, or at the Vice-Chairman's request or the request of ⅓ of active membership he or she shall order an election for the remaining term of that office. If any office other than Chairman shall become vacant, that vacancy shall be filled by an appointment by the Chairman and ⅘ approval of the Executive Board.

Section 10 The Chairman shall create Executive Board positions as he or she deems appropriate with the majority approval of the current Executive Board.

Section 11 No officer shall be eligible to serve for more than 1 term in the same office (one academic year). Officers of the 2002-2003 academic term may serve in the same office again once.

ARTICLE 6 OFFICERS; DUTIES

Section 1 *CHAIRMAN*; The Chairman shall serve the following functions:

(a) Generally, the Chairman shall be responsible for strategy and external functions of the organization, including serving as the organization's principal fundraiser.

(b) Ensure the club registers as a chapter with the Republican Party, and develops appropriate relationships with senior party members on the appropriate County, State and National Levels; and relationships with fellow Republican organizations.

(c) Ensure that regular meetings occur of the club once monthly; unless waived by a majority of members.

(d) Represent the club at Republican Party statewide and regional meetings (or send a representative);

(e) Ensure that the club develops and implements a plan for political action;

(f) Provide regular updates to the appropriate Republican Party Contact;

(g) Guide the club to recruit new members, and to involve all members in Republican Party participation.

(h) If an Advisory Board is established, report to such Board every quarter on the status of the organization.

(i) At the end of the term, prepare a transition binder for the incoming HR Chairman which shall include all pertinent administrative and financial documents.

Section 2 *VICE-CHAIRMAN*; The Vice-Chairman shall serve the following functions:

(a) The Vice-Chairman shall serve as a back-up to the Chairman for the above duties;

(b) The Vice-Chairman with the Social Chair shall also be responsible for encouraging nonparticipating Republicans to become involved.

(c) At the end of the term, prepare a transition binder for the incoming Vice-Chairman which shall include all pertinent information as to how to best fulfill their duties.

Section 3 *SECRETARY*; The Secretary shall serve the following functions:

(a) Generally, the Secretary shall be responsible for day-to-day management and the internal functions of the organization.

(b) The Secretary shall focus on Member retention and services;

(c) The Secretary shall keep organizational records, and shall comply with any applicable laws;

(d) At the end of the term, prepare a transition binder for the incoming

Secretary which shall include all pertinent information as to how to best fulfill their duties.

Section 4 *TREASURER*; the Treasurer shall serve the following functions:

(a) Generally, the Treasurer shall be responsible for managing the financial and fiduciary obligations of the organization;

(b) The Treasurer shall assist the Chairman in her or his duties as principal fundraiser;

(c) The Treasurer shall work with the Chairman and Vice Chairman to ensure that all membership dues arc paid and a current list of HR members;

(d) The Treasurer shall keep financial records, and shall comply with any applicable laws;

Section 5 *1L REPRESENTATIVE*; the 1L Representative shall serve the following functions:

(a) Generally, the 1L Rep shall be responsible for representing the views of the current 1L class.

Section 6 We have expressly not provided for a 2L or 3L Representative, as their views should be represented by the current Executive Board.

ARTICLE 7 MEETINGS

Section 1 The regular meetings of the organization shall be held at least once every 30 days from September to April, unless otherwise ordered by the organization.

Section 2 A regular meeting shall consist of reports from officers.

Section 3 Special meetings can be called by either of the Chairman or by the request of five active members. At least two days notice is required.

Section 4 Forty percent (40) of the entire active membership (rounded up) shall constitute a quorum for the transaction of business, but less than a quorum may adjourn any meeting.

Section 5 The Chairman shall preside over all the regular meetings of the organization.

Section 6 Each member shall be allowed one vote at club meetings. Proxy voting shall not be allowed for elections or other purposes unless specifically allowed by the club prior to the meeting.

ARTICLE 8 PARLIAMENTARY AUTHORITY

Section 1 The rules contained in the current edition of Robert's Rules of Order Revised shall govern the organization in all cases to which they are

applicable and in which they are non inconsistent with these bylaws and any special rules of order the organization may adopt.

ARTICLE 9 AMENDMENT of BYLAWS

Section 1 These bylaws can be amended at any regular meeting of the organization by a two-thirds (⅔) vote except for the requirement of a ¾ super-majority vote to raise dues beyond $10 per academic year, which may be amended by a ⅘ vote, provided that the amendment has been submitted in writing at the previous meeting.

EXHIBIT O

[Bylaws of La Raza Law Students Association]

ARTICLE I

GOALS AND OBJECTIVES

THE ASSOCIATION SHALL BE AND IS COMMITTED TO ACHIEVING AND PURSUING THE FOLLOWING OBJECTIVES:

1. Establishing a sense of community amongst Raza students on campus through Political and Social events and through academic support.

2. Developing competent Raza attorneys to achieve representation in the legal community and to aid our respective Raza communities through effective legal representation and leadership.

3. Fostering and developing links to the Raza communities so as to develop an identity between the Association and the Raza communities.

4. Integrating Raza students within the decision-making process apparatus at Hastings so as to have a determining effect on recruitment and other administrative policies that affect Raza students.

5. Promoting cultural, political, and social awareness within the Association and the Hastings community.

6. Creating and maintaining a viable and supportive Raza Alumni network.

ARTICLE II

ANTI-DISCRIMINATION

It is the policy of this Association not to discriminate on the basis of race, sex, color, creed, national origin, ancestry, age sexual orientation, or disability. This clause shall not in [sic] be interpreted in any way to conflict with goals and objectives of the Association as outlined in Article I.

ARTICLE III

MEMBERSHIP

1. Membership in this Association shall consist of Associate and Policy standing.

a. Associate membership encompasses all students of Hastings College of the Law who are of Raza background. Associate membership can be conferred by the body upon a non-Raza and non-law students as an honorary gesture in appreciation of such person's contribution to the Association.

b. Policy membership encompasses students of Raza background who are studying at Hastings and who:

1. Pay their dues on a timely basis. Timeliness shall be determined by the Treasurer according to the financial situation of the individual. The Treasurer shall submit a report to the Secretary indicating who is in compliance with this provision, and;

2. attend meetings regularly or who actively participate in committee work. Attendance shall be taken by the Secretary at all general meetings.

2. Voting rights are conferred upon Policy members.

ARTICLE IV

AUTHORITY TO REPRESENT THE ASSOCIATION

1. The Board may appoint Policy members as official representatives of the Association to social and political functions as they arise and will attempt to defray the expenses of the individuals appointed.

2. The Board may appoint spokespersons as deemed necessary.

ARTICLE V

ELECTIONS

1. It is the policy of this Association to achieve parity among the sexes within the Board of Directors, i.e. to achieve equitable division of Board positions as between male and female Association members.

~~a. Equitable division means that if the Chairperson is a male or vice versa, the Vice Chairperson position shall be reserved for a Policy member of the opposite gender. Additionally, one male and one female shall be elected as first year class representatives.~~

~~b. The Association shall make good faith efforts to achieve parity in representation among the seven remaining Board positions. This Association will consider a 4 male/3 female split of these positions to be in compliance with the objectives of the subsection. Any split below the recommended minimum shall be unacceptable to this Association.~~
(deleted September 8, 2000)

2. This Association shall make good faith efforts to encourage and develop viable leadership among the women Association members.

3. The election process shall be implemented so as to effect the policy of Article V §s 1 and 2.

4. Preliminary Procedures and Rules

a. Elections for officers shall be conducted within sixty (60) days prior to the end of the Spring semester.

b. Notice of the elections shall be made at a general meeting 2 weeks just prior to the elections.

c. The current/incumbent Board shall appoint an impartial election supervisor.

d. Except for the first year class representatives, the elected offices shall be open to the entire general body.

e. Elections for first year class representatives shall be held within thirty (30) days after the start of the Fall semester.

5. Nominations

a. Except for first year class representatives, any member may nominate another member for an office.

b. First year class representatives shall be nominated by first year class members during the fall semester.

c. If a person nominated for an office is present when she or he is nominated, that person will be asked to decide whether she or he accepts or declines that nomination. If the nominee is absent, that nominee must decide within three days whether to accept or decline that nomination. Failure to accept within the specified period will be deemed a refusal of that nomination.

6. Election Procedures

a. All Pal icy [sic] members shall be entitled to vote for the officers and representatives of the Association.

b. Prior to the elections, each candidate may present their qualifications to the general body.

c. Elections shall be by secret ballot.

d. The ballots shall be counted by the election supervisor.

e. Officers shall be elected by a majority of those voting. In the event no candidate obtains a majority, there shall be a run-off election. In a run-off election the individuals obtaining the two highest voted numbers will participate in a subsequent run-off.

f. To promote the widest participation possible, each office shall be voted upon separately.

g. Ballots shall be saved for one week after the election in case a member wishes to have a recount.

h. If a Policy member is unable to attend the election and wishes to vote, the election supervisor shall accept a verified absentee ballot prior to the elections. There shall be no voting by proxy.

7. Assuming duties and resignations

a. New officers shall assume their duties and responsibilities of office on the first Monday following the end of the Spring semester (after exams).

b. If an officer cannot continue in her or his office, that officer shall submit a written resignation to the Board. Notice of the resignation will be given to the general body at

the next general meeting. The vacancy shall be filled as quickly as possible by a general election.

ARTICLE VI

STANDING COMMITTEES

1. This Association hereby creates six standing committees. They shall be known as the:

a. Political Affairs Committee

b. Recruitment/Admissions Committee

c. Graduation/Alumni Affairs Committee

d. Treasury/Fundraising Committee

e. Academic Affairs Committee

f. Cultural Affairs Committee

2. The chairperson of each respective standing committee shall be a member of the General Board.

a. The chairperson of each standing committee shall be responsible for implementing strategies to achieve the objectives of her/his committee.

b. The chairperson of each committee shall keep the Board abreast of the developments within their committees.

ARTICLE VII

1. The Board shall be comprised of eleven (11) members: the chairperson, vice-chairperson, secretary,

two first year class representatives and the chairs of the six standing committees.

2. The duties of the officers shall include:

a. Chairperson

1. impartially chairing the Board and general body meetings, implementing modified rules of order and conduct.

2. coordinating and facilitating the general management of this Association.

3. assuring that Board members, including the Chair, at no time act unilaterally.

4. performing other duties that may be prescribed by the Board.

5. serving in this capacity for a full school-year term.

b. Vice-Chairperson

1. serving as the Chairperson, in her/his absence.

2. assisting the Chairperson and the Secretary in coordinating the management of this Association.

3. publishing a bi-weekly newsletter.

4. coordinating media events.

5. performing other duties that may be prescribed by the Board.

6. coordinating emergency communications.

7. serving in this capacity for a full school-year term.

c. Secretary/Historian

1. taking, and maintaining a file of the minutes of this Association.

2. assuring that the minutes accurately reflect the topics of discussion and an accounting of any votes taken.

3. maintaining a membership attendance record.

4. establishing and maintaining a history of Association events.

5. maintaining a file of incoming and outgoing correspondence.

6. maintaining and distributing an Up-to-date membership roster.

7. supplying a member with public Association documentation upon request.

8. assisting the Chairperson and Vice-Chairperson with the overall management of this Association.

9. performing those other duties that the Board may prescribe.

d. First year Class Representatives

1. acting as liaisons between the Raza first year class, the Board, and the standing committees.

2. encouraging and obtaining participation in this Association among the Raza first year class.

3. scheduling and coordinating the annual first-year student social within sixty (60) days after the start of the Fall semester.

4. conducting a survey among the first year Raza class to establish their area of interests and how this Association may address their needs and concerns.

5. acting in this capacity for the full school year t e tin [sic].

6. performing those other duties that the Board may prescribe.

e. Political Affairs Committee Chairperson

1. acting as the official Association representative in matters between this Association and the Hastings administration.

2. acting as liaison between this Association and the other LEOP organizations.

3. acting as liaison between this Association and the local Raza community.

4. establishing and maintaining communication with other Raza associations at other law schools.

5. monitoring the production level of her/his committee members.

6. obtaining the objectives of this standing committee.

7. keeping the Board abreast of the developments within this committee.

8. performing those other duties that the Board may prescribe.

9. serving in this capacity for the full school year term.

f. Recruitment/Admissions Committee Chairperson

1. establishing communication with the Hastings Admissions office within the 45 days after the start of the Fall semester.

2. coordinating this Association's undergraduate recruitment efforts.

3. establishing and maintaining a current mailing list of undergraduate Raza pre-law associations.

4. creating a network among undergraduate Raza associations to disseminate information about the study of law at Hastings.

5. coordinating this Association's participation in the Admissions process during the Spring semester.

6. assuring that the other LEOP readers give due deference to this Association's evaluation of prospective Raza students.

7. monitoring the production level of her/his committee members.

8. obtaining the objectives of this standing committee.

9. keeping the Board abreast of the developments within this committee.

10. performing those other duties that the Board may prescribe.

11. serving in this capacity for the full school year term.

g. Graduation/Alumni Affairs Committee Chairperson

1. consulting with the Raza third year class to determine the scope of the class' graduation celebration and consequent financial needs.

2. actively assisting the Treasurer in the implementation of fundraising activities for this committee's activities.

3. maintaining a current roster of this Association's alumni.

4. coordinating activities which will enhance alumni participation in this Association's various programs.

5. monitoring the production level of her/ his committee members.

6. obtaining the objectives of this standing committee.

7. keeping the Board abreast of the developments within this committee.

8. performing those other duties that the Board may prescribe.

9. serving in this capacity for the full school year term.

h. Treasury/Fundraising Committee Chairperson

1. acting as the Treasurer of this Association.

2. maintaining and up-dating this Association's financial records.

3. preparing this Association's budget within 45 days after assuming the duties as Treasurer.

4. informing the Board as to the financial status of this Association on a regular basis and upon request.

5. paying this Association's obligations in a timely fashion.

6. actively promoting fundraising and pursuing funding from likely sources.

7. monitoring the production level of her/his committee members.

8. obtaining the objectives of this standing committee.

9. keeping the Board abreast of the developments within this committee.

10. performing those other duties that the Board may prescribe.

11. serving in this capacity for the full school year term.

i. Academic Affairs Committee Chairperson

1. developing and implementing an academic support program for Raza first year students.

2. acting as this Association's liaison with the LEOP program.

3. establishing and maintaining a current academic resource library.

4. assisting upper-class students in need of academic assistance.

5. monitoring the production level of her/ his committee members.

6. obtaining the objectives of this standing committee.

7. keeping the Board abreast of the developments within this committee.

8. performing those other duties that the Board may prescribe.

9. serving in this capacity for the full school year term.

Cultural Affairs Committee Chairperson

1. planning and implementing this Association's cultural and social activities.

2. coordinating this Association's annual "16 de Septiembre" celebration.

3. establishing and maintaining communications with other Raza law students' associations so as to promote networking among our associations.

4. maintaining a library of Raza literature and other relevant publications.

5. monitoring the production level of her/his committee members.

6. obtaining the objectives of this standing committee.

7. keeping the Board abreast of the developments within this committee.

8. performing those other duties that the Board may prescribe.

9. serving in this capacity for the full school year term.

3. Board meetings

a. Board meetings shall be impartially chaired by the Chairperson.

b. Board meeting shall be open to this Association's entire membership. Member [sic] shall have the right to participate in deliberations during Board meetings. However, only Board members shall have the right to vote upon any issue presented.

c. The Board shall develop agendas for the general body meetings.

d. The Board may, in emergency situations, take appropriate actions.

e. A majority of the Board members must be present for there to be a quorum.

f. All decisions by the Board shall require a majority of the present quorum.

g. There shall be no voting by proxy at Board meetings.

h. The Board may not delegate unilateral decision-making.

i. Three Board members may call a special Board meeting. Special meeting [sic] are subject to all the limitations of regular Board meetings.

ARTICLE VIII

IMPEACHMENT/EXPULSION PROCEEDINGS

1. The power to impeach or expel shall remain exclusively within the discretion of the general body. This power may be exercised at any general body meeting.

2. Members, officers, or representatives of this Association may be impeached or expelled for the following reasons:

a. violation of this constitution.

b. misappropriation of Association funds. c. neglecting the duties of an office.

d. defaming, embarrassing, or subjecting this Association to undue criticism.

e. unauthorized use of this Association's name, logo, or letterhead.

f. any other conduct or activity which damages this Association in any way.

3. A two-thirds vote shall be required to impeach or expel a member, officer, or representative.

4. A motion to impeach or expel may be offered from the floor of a general body meeting. The motion shall specify the justification(s) for such action.

5. Only Policy members may present a motion to impeach or expel.

6. Any individual subject to impeachment/expulsion shall have the right to be heard.

7. If an officer is impeached under this section, that position shall be filled by an election.

ARTICLE IX

MEETINGS

1. General body meeting shall be held weekly. Weekly meeting may be cancelled if the general body or the Board deem it necessary.

2. All members shall sign the attendance roll.

3. The Chairperson shall announce the agenda at the start of the meeting and receive any changes, corrections, or additions there- to.

4. The meetings shall proceed according to the agenda.

5. General body meetings shall substantially conform to Robert's Rules of Order, Revised.

6. A quorum will be presumed during the course of a general body meeting. However, any Policy member may request a quorum count when an important issue is being acted upon by the general body. A majority of all Policy members constitutes a quorum for this purpose.

ARTICLE X

SUMNER [sic] DUTIES OE' [sic] THE BOARD AND ITS COMPOSITION

1. During the summer break, the Board shall be comprised of all eleven members of the general Board, plus any policy member of this Association that notifies the Chairperson of their willingness to participate on the Board during the summer.

a. the names, addresses, and phone numbers of these additional Board participants shall be published to the general body within thirty days prior to this Association's last meeting of the Spring semester.

b. the additional Board participants shall have full Voting privileges during the summer.

2. This augmented Board shall conduct all the general business of the Association during the summer. This augmented Board shall have the power

to make decisions on any matters concerning this Association that arise during the summer and require immediate action.

3. The augmented Board shall plan and implement the summer picnic, deal with any matters relating to the Hastings Disqualified Students Committee, and lay the foundation for the annual "16 de Septiembre" celebration –

4. IL [sic] is further understood that if a quorum of the general Board is present at any of summer meetings, any business properly within the purview of the general Board may be conducted.

a. This section, however, shall not be construed to limit the voting privileges of any additional Board participant.

ARTICLE XI

AMENDMENTS TO THIS CONSTITUTION

1. Any Policy member may propose amendment(s) of this Constitution.

2. A two-thirds vote shall be required to effect an amendment. This section is subject to the limitations of Article IX, S 6.

3. A proposed amendment shall be voted upon only after a minimum of two weeks notice has been given to the general body.

This Constitution was amended during the Spring of 1985.

AMENDMENT TO THE HASTINGS LA RAZA LAW STUDENTS' CONSTITUTION March 26, 1993

ARTICLE VII

1. The Board shall be comprised of twelve (12) members: the chairperson, vice-chairperson, secretary, two first-year class representatives, California La Raza Law Students' Association statewide representative, and the chairs of the six standing committees.

2. The duties of the officers shall include:

K. La Raza Statewide Representative

1. Act as official Association representative in matters between the Association and California La Raza Law Students' Association.

2. Maintain open communication with the statewide organization and keep the Board and membership abreast of all statewide business.

3. Establish and maintain communications with other Raza law students' associations so as to promote networking among our associations.

4. Encourage participation in this statewide organization amongst the members of the Association.

5. Attend all regional and statewide meetings, or make arrangements for attendance by any other informed Association representative.

EXHIBIT P

Legal Vines Bylaws
September 9, 2003

Article I

Section 1. The name of the organization is "Legal Vines".

Article II

Section 1. The purpose of the Legal Vines organization is to promote and facilitate the education about and appreciation of wine and wine-related topics, including but not limited to: the process of wine-making, the history of wine, the business side of the wine industry, and the use of wine in personal and business settings.

Section 2. Legal Vines will focus on inclusive and fun programs, as opposed to a snobbish or elitist view of wine.

Section 3. Appropriate and related peripheral interests are proper subjects for Legal Vines activities, including, but not limited to education and appreciation of beers, spirits, cigars, art, music, theater and culture.

Section 4. The organization will comply with the Polices [sic] and Regulations Applying to College Activities, Organizations and Students.

Article III

Section 1. Any full-time student at UC Hastings may become of [sic] a member of Legal Vines upon reaching 21 years of age.

Section 2. There shall be no membership fee.

Article IV

Section 1. The sole officer of Legal Vines shall be a President.

Section 2. Any 2L or 3L member of Legal Vines may hold the office of President.

Section 3. The President's duties shall include: the continued promotion of Legal Vines as an active organization at Hastings; facilitating, planning and organizing events related to Legal Vines' purpose as stated under Article II above; membership recruitment and retention; and both nominating candidates for the next President.

Section 4. The President shall serve for one academic year at a time, chosen by the members of Legal Vines upon the outgoing President's nomination. Nothing prevents a member from serving as President for two consecutive years. If the Presidency becomes vacant for any reason at any time during an academic year, the members of Legal Vines shall convene to select a new President.

Article V

Section 1. The President may amend these bylaws at his or her discretion unless the membership of Legal Vines exceeds 10 people.

Section 2. If the membership of Legal Vines exceeds 10 people, a two-thirds majority vote of the membership is required to amend these bylaws. A vote may take place by email.

Section 3. Any member may propose a bylaw amendment, but the President must call a vote for any amendment to be valid.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law, Plaintiff, v. MARY KAY KANE, et al., Defendants.	No.: C 04 4484 JSW Action Filed: October 22, 2004 JOINT STIPULATION OF FACTS FOR CROSS-MOTIONS FOR SUMMARY JUDGMENT Date: December 2, 2005 Time: 9:00 a.m. Judge: Hon. Jeffery S. White

(Filed Oct. 7, 2005)

COME NOW Plaintiff Christian Legal Society Chapter of the University of California, Hastings College of the Law a/k/a Hastings Christian Fellowship and Defendants Mary Kay Kane, *et al.* and, pursuant to Rule 56 of the Federal Rules of Civil Procedure, Local Rule 56-2 and this Court's Standing Orders, enter their Joint Stipulation of Facts for Cross-Motions for Summary Judgment as follows.

THE PARTIES

1. Plaintiff Christian Legal Society at the University of California, Hastings College of the Law ("Plaintiff" or "CLS") is an unincorporated student organization made up of students attending the University of California, Hastings College of the Law ("Hastings") in San Francisco, California.

2. Hastings is a public law school located in San Francisco, California, and part of the University of California system of schools. *See* 6/6/05 Deposition of Mary Kay Kane ("Kane Depo.") at 11-12.

3. Defendant Mary Kay Kane is the Chancellor and Dean of Hastings. As Chancellor, her duties consist of overseeing the business side of the campus, including property, holdings, and investments, representing Hastings before the California State Assembly, and acting as the liaison between Hastings and other segments of the University of California. *See id.* at 11-12. As Dean, her duties include, *inter alia,* supervising the academic side of the school and generally managing the internal operations of the College. *See* Kane Depo. at 12-13.

4. Defendant Judy Chapman is the Director of the Office of Student Services of Hastings. *See* 6/6/05 Deposition of Judy Hansen Chapman ("Chapman Depo.") at 9. Her duties include, among others, overseeing the registration of student organizations at Hastings and the enforcement of Hastings' Policy on Nondiscrimination with respect to students and registered student organizations. *See id.* at 11, 95-98.

5. Defendants Maureen E. Corcoran, Eugene L. Freeland, Carin T. Fujisaki, John T. Knox, Jan Lewenhaupt, James E. Mahoney, Brian D. Monaghan, Bruce L. Simon, John K. Smith, and Tony West (collectively, Director Defendants) are members of the Board of Directors of Hastings. The Director Defendants have had no contact with CLS concerning the registered status of CLS, CLS's bylaws, or CLS's refusal to abide by Hastings' Policy on Nondiscrimination. *See* Pl.'s Supp. Resp. to Def.'s First Set of Interrogs. No. 24. Defendants Kane and Chapman have the exclusive authority to enforce the Policy on Nondiscrimination with respect to registered student organizations at Hastings. *See* Kane Depo. at 67. Decisions by Defendants Kane and Chapman concerning the registration of student organizations are not subject to appeal to the Director Defendants. *See id.* at 67-68.

REGISTRATION OF STUDENT ORGANIZATIONS AT HASTINGS

6. Hastings permits student organizations to register with its Office of Student Services. *See* Kane Depo. at 62-63, Exhibit 1.

7. During the 2004-2005 academic year, approximately sixty (60) student organizations registered with Hastings. *See* Chapman Depo. at 92; First Amended Verified Complaint ("FAC"), Ex. C. A copy of a list of these organizations is attached as Exhibit A. Of these sixty (60) organizations, three (3) were

religious in nature: Hastings Association of Muslim Law Students, Hastings Jewish Law Students Association, and Hastings Koinonia. *See Id.*

8. Hastings seeks to promote a diversity of viewpoints among registered student organizations, including viewpoints on religion and human sexuality. *See* Kane Depo. at 18, 53.

9. Student organizations must be registered in order to gain access to the following benefits:

(a) Use of the Hastings name and logos. *See* Chapman Depo. at 57-58; Kane Depo. Ex. 1 at 21.

(b) Use of certain bulletin boards in the basement of Snodgrass Hall. *See* Chapman Depo. at 55-56; Kane Depo. Ex. 1 at 6, 63.

(c) Eligibility for a Hastings organization email address. *See* Chapman Depo. at 58; Kane Depo. Ex. 1 at 7.

(d) Eligibility to send out mass emails through Associated Students of the University of California at Hastings ("ASUCH"), *See* Chapman Depo. at 61; Kane Depo. Ex. 1 at 7.

(e) Eligibility for a student organization account with fiscal services at Hastings. *See* Chapman Depo. at 61; Kane Depo. Ex. 1 at 9.

(f) Eligibility to apply for student activity fee funding awarded at ASUCH's discretion.[1] *See* Chapman Depo. at 17, 61; Kane Depo. Ex. 1 at 9, 63.

(g) Eligibility to apply for limited travel funds through the Office of Student Services.[2] *See* Chapman Depo. at 65; Kane Depo. Ex. 1 at 17-18.

(h) Ability to place announcements in the Hastings Weekly, a weekly newsletter prepared and distributed by the Office of Student Services. *See* Chapman Depo. at 67-68; Kane Depo. Ex. 1 at 13.

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[1] ASUCH receives money to allocate to registered student organizations through a voluntary student activity fee the Hastings student body imposed on itself by a vote and a mandatory student activity fee imposed by Hastings. *See* Exhibit 1 to Kane Depo. at 66; *see also* Kane Depo. at 64. ASUCH has discretion to allocate student activity fee funds to registered student organizations as it sees fit. *See* Chapman Depo. at 62. No College administrator, faculty member or other employee of Hastings approves ASUCH's budget. *See* Chapman Depo. at 62.

[2] The Office of Student Services receives the money to provide travel funds to registered student organizations from vending machine commission monies. *See* Chapman Depo. at 63; *see also* Kane Depo. at 64; Exhibit 1 to Kane Depo. at 17. The amount of travel funds available each academic year averages between four and five thousand dollars. *See* Chapman Depo. at 64; *see also* Exhibit 1 to Kane Depo. at 17. In allocating travel funds, the Office of Student Services considers the total number of registered student organizations applying for travel funds, where the student group is traveling, and the expected cost of the travel. *See* Chapman Depo. at 64. The Office of Student Services attempts to allocate travel funds among all the applicant registered student organizations in an equitable manner. *See* Chapman Depo. at 64.

(i) Eligibility to apply for permission to use limited office space at the College. *See* Chapman Depo. at 73; Kane Depo. Ex. 1 at 14.

(j) Eligibility for the use of an organization voice mailbox for telephone messages. *See* Chapman Depo. at 73; Kane Depo. Ex. 1 at 18.

(k) Listing on the Office of Student Services' website and any hard copy lists, including the Student Guidebook and admissions publications, such as the Hastings Bulletin. *See* Chapman Depo. at 73-75; *id.* Ex. 16 at Doc. No. UCH00363.

(l) Participation in the Student Organizations Faire held once a year.[3] *See* Chapman Depo. at 76-77.

(m) Use of the Student Information Center for distribution of organization materials to the Hastings community. *See* Kane Depo. Ex. 1 at 63.

10. Registered student organizations are also eligible to apply for permission to use Hastings' rooms

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[3] Each year UC Hastings holds the Student Organizations Faire from 10:00 am to 2:00 pm one day the week after the deadline for registering student organizations. *See* Chapman Depo., at 76-77. At the Student Organizations Faire, each registered student organization has a table set up where they hand out materials and meet new students. *See* Chapman Depo., at 76-77; Haddad Depo., at 85. The Student Organizations Faire provides an opportunity for registered student organizations to publicize their organization's existence and attract new members. *See* Chapman Depo., at 76-77; Haddad Depo., at 85.

and audio-visual equipment for meetings. *See* Chapman Depo. at 69-70; Kane Depo. Ex. 1 at 13-15, 63. As discussed below in paragraphs 58, 61, CLS, although not currently registered, is eligible to apply for permission to do so as well. *See* Chapman Depo. at 69-70.

11. Non-registered organizations also have access to different bulletin boards located on the College's Campus and may use chalkboards to make announcements. *See* Chapman Depo. at 55-56.

12. As a condition of becoming a registered student organization at Hastings, and gaining access to the benefits enumerated above, the College requires organizations to comply with the College's Policies and Regulations Applying to College Activities, Organizations and Students ("Policies and Regulations"). *See* Kane Depo. Ex. 1 at 20, 63. A copy of the Policies and Regulations is attached as Exhibit B.

13. Among other things, the Policies and Regulations provide that Hastings and the University of California "neither sponsor nor endorse" registered student organizations. *See* Kane Depo. Ex. 1 at 3, 62; Kane Depo. at 52-53; Defs.' Resp. to Pl.'s Interrogs. No. 23. Registered student organizations are required to enter into a license agreement in order to use Hastings' name and logos,which provides that the organization "will inform its members and include in all its written materials that [Hastings] does not sponsor the organization nor its activities and that [Hastings] assumes no legal responsibility for the

organization, its officers or members, or any of its activities." *See* Kane Depo. Ex. 1 at 3, 63.

14. Among other things, the Policies and Regulations also require registered student organizations to abide by the Policy on Nondiscrimination ("Nondiscrimination Policy"), Section 20.00 of the Policies and Regulations. *See* Chapman Depo. at 28-29; Kane Depo. at 54; *id.* Ex. 1 at 22, 65.

15. The Nondiscrimination Policy provides:

> The College is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, College-owned student residence facilities and programs sponsored by the College, are governed by this policy of nondiscrimination. The College's policy on nondiscrimination is to comply fully with applicable law.
>
> The University of California, Hastings College of the Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities. (*See* Kane Depo. Ex. 1 at 65)

16. The Nondiscrimination Policy was adopted in June of 1990 and amended to its current form in June of 2002. Def.'s Resp. to Pl.'s First Set of Interrogs., No. 21. Hastings uses the terms in the

Policy, including "sexual orientation" and "religion," according to their common, ordinary meaning. *See* Defs.' Resp. to Pl.'s Interrog. Nos. 4-5; Kane Depo., at 29, 38. Since its adoption in 1990, no student organization at Hastings (except CLS) has ever sought an exemption from the Policy. *See* Def.'s Resp. to Pl.'s Interrog. No. 19.

17. In order to become a registered student organization, a student organization's bylaws must provide that its membership is open to all students and the organization must agree to abide by the Nondiscrimination Policy. *See* Chapman Depo. at 30, 45; Kane Depo. at 48-50. A student organization's failure to comply with the Nondiscrimination Policy will result in the denial or revocation of the status and privileges of being a registered student organization. *See* Kane Depo. Ex. 1 at 20, 63; Kane Depo. at 66-67.

18. Hastings requires that registered student organizations allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs. *See* Kane Depo. at 49; Chapman Depo. at 29-31. Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization. *See* Kane Depo. at 50.

19. Hastings has never received a complaint that a student organization discriminates on the basis of religion or sexual orientation. *See* Kane Depo.

at 30; Chapman Depo. at 98; Defs.' Resp. to Pl.'s Interrog. No. 14.

20. Section 34.11 of the Policies and Regulations provides registered student organizations with an opportunity to request to be heard by the Director of Student Services before facing revocation or denial of registration, loss of privileges or other sanctions for failure to comply with College policies or regulations. *See* Kane Depo. at 65-67; Kane Depo. Ex. 1 at 63; Chapman Depo. at 97-98. No such request has ever been made and no formal hearing has ever occurred. *See id.*

21. A registered student organization may appeal any decision made by the Director of Student Services to the Dean of the College of the Law. *See* Kane Depo. at 67-68; Defs.' Resp. to Pl.'s Interrogs. No. 16. Student organizations may not appeal the decisions of either the Director of Student Services or the Dean of the College of the Law regarding revocation or denial of registration, loss of privileges or other sanctions to the Hastings Board of Directors. *See* Kane Depo. at 68.

CLS PREDECESSOR STUDENT ORGANIZATIONS PRIOR TO THE 2004-2005 ACADEMIC YEAR

22. From the 1994-1995 academic year to the 2003-2004 academic year, a student organization calling itself either the Hastings Christian Legal Society ("HCLS") or the Hastings Christian Fellowship

("HCF") existed as a registered student organization at Hastings. *See* 7/8/05 Deposition of Dina Haddad ("Haddad Depo.") at 144.

23. From the 1994-1995 academic year through the 2001-2002 academic year, these organizations used the same set of bylaws. *See* Haddad Depo. at 146-47; *id.* Ex. 43. These bylaws appear to be an old version of the chapter bylaws sent to student chapters throughout the years by the National Christian Legal Society ("CLS-National"), a national group described in more detail in paragraphs 31-36, infra. *See* 7/7/05 Deposition of David Nammo ("Nammo Depo.") at 40-41. Despite these groups' use of these bylaws, they were not officially affiliated with CLS-National. *See* Haddad Depo. at 145.

24. A copy of the bylaws used by HCLS from the 1995-1996 through the 2001-2002 academic years is attached as Exhibit C.

25. In the 2002-2003 and 2003-2004 academic years, the organization registered using a different set of bylaws. Under the section titled "Membership," these bylaws provided: "HCF welcomes all students of the University of California, Hastings College of Law." *See* Haddad Depo. at 36-38; Haddad Depo. Ex. 37. These bylaws did not require that those participating in HCF be members of CLS-National. *Id.* During these years, HCF did not exclude members on the basis of religion or sexual orientation. *See* Haddad Depo. at 153. A copy of these bylaws is attached as Exhibit D.

26. During the 2003-2004 academic year, HCF held bi-weekly Bible studies, in addition to a social gathering at Baker Beach, an Easter event in which Hastings students were invited to church service, an Easter basket drive, and a Christmas toy drive. *See* Haddad Depo. at 27-28. Approximately five (5) to seven (7) students attended these meetings and events. *See* Haddad Depo. at 32.

27. One participant in these meetings was known by other members of the group to be a practicing lesbian. *See* 7/13/05 Deposition of Isaac Fong ("Fong Depo.") at 31, 37; Haddad Depo. at 41-42. She voluntarily ceased attending HCF's meetings sometime in the Fall of 2003. *See* Fong Depo. at 34-35.

28. At least two participants also attended these meetings who held beliefs inconsistent with what CLS considers to be orthodox Christianity. *See* Fong Depo. at 35-37.

29. From the 1994-1995 academic year to the 2004-2005 academic year, there was an average of less than five (5) members of CLS-National participating in HCLS and HCF during any given year. *See* Pl.'s Supp. Resp. To Defs.' Interrogs., No. 8. From the 1994-1995 academic year to the 2004-2005 academic year, a total of thirty-one (31) Hastings students were official members of CLS-National. *See* Pl.'s Resp. To Defs.' Interrogs., No. 8. During the 2002-2003 and 2003-2004 academic years, there were no official

members of CLS-National in HCF. *See* Pl.'s Resp. To Defs.' Interrogs., No. 8.

THE INSTANT LITIGATION

30. At the close of the 2003-2004 academic year, leadership of HCF (as it was then named) passed to three individuals for the 2004-2005 academic year: Isaac Fong (President), Dina Haddad (Vice President), and Julie Chan (Treasurer). *See* Haddad Depo. at 13-14. These individuals assumed leadership informally and no formal vote of the HCF membership was taken to elect them. *See* Haddad Depo. at 49, 79.

31. Over the course of the summer, Ms. Haddad and Mr. Fong decided to officially affiliate their student organization with the national organization known as the Christian Legal Society ("CLS-National"), a nationwide association of Christian lawyers, law students, law professors, and judges that maintains both attorney and law student chapters across the country. *See* FAC ¶ 3.1.

32. CLS-National requires its formally associated student chapters to use a specific set of bylaws, copies of which are sent to any interested student group along with a registration packet containing information and advice as to how to start and maintain a student group. *See* Nammo Depo. at 29-33, 85-86, 94. A copy of these bylaws is attached as Exhibit E.

33. The required bylaws promulgated by CLS-National for use during the 2004-2005 academic year require any student wishing to become a member or officer to sign a "Statement of Faith." The Statement of Faith provides:

Trusting in Jesus Christ as my Savior, I believe in:

- One God, eternally existent in three persons, Father, Son and Holy Spirit.
- God the Father Almighty, Maker of heaven and earth.
- The Deity of our Lord, Jesus Christ, God's only Son conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
- The presence and power of the Holy Spirit in the work of regeneration.
- The Bible as the inspired Word of God. (*See* FAC, Ex. A)

34. It is CLS's position that certain conduct including, but not limited to, unrepentant homosexual conduct is inconsistent with the Statement of Faith and provides grounds for barring or disqualifying someone from becoming a CLS member or serving as a CLS officer. *See* FAC ¶3.8; Nammo Depo. at 50-51; *id.* Ex. 27.

35. Individuals who refuse to sign or affirm the CLS-National's Statement of Faith are not permitted to be CLS members or officers. *See* Haddad Depo., at 96-97; Chapman Depo. Ex. 14 at 1-2. Students with religions that have tenets different from those set forth in the Statement of Faith are barred from membership and leadership positions. *See* Nammo Depo. at 50-51; FAC ¶3.11.

36. Under CLS-National's required bylaws, only CLS-National members may vote for or remove officers, amend the group's constitution, or stand for election to an officer position. *See* Chapman Depo. Ex. 4 at 2; Fong Depo., at 57. Any student, however, may attend CLS's meetings and other activities, regardless of their religion or sexual orientation. *See* Haddad Depo. at 38, 97; Fong Depo. at 40-41.

37. In early September 2004, Ms. Haddad and Mr. Fong applied to the Office of Student Services for travel funds to travel to CLS-National's annual conference. *See id.* at 69-70. On or about September 9, 2004, Ms. Chapman informed Ms. Haddad via email that the Office of Student Services had set aside $250.00 in travel funds to cover Ms. Haddad and Mr. Fong's expenses associated with attending the conference. *See* Chapman Depo. at 66, 102; Chapman Depo. Ex. 17.

38. Thereafter, on September 17, 2004, CLS submitted its registration form, license agreement for use of college name and (using the form bylaws sent out by CLS-National) its new set of bylaws to the

Office of Student Services. *See* Chapman Depo. at 108; *id.* Ex. 21.

39. On September 21, 2004, Ms. Chapman informed Mr. Fong via email that CLS's bylaws did not appear to be compliant with the Nondiscrimination Policy and invited him to meet with her to discuss changing them. *See* Haddad Depo. at 83; Chapman Depo. at 100, Ex. 19. A copy of this letter is attached as Exhibit F.

40. On September 23, 2004, Mr. Fong, Ms. Haddad, and Ms. Chan met with Ms. Chapman to discuss CLS's bylaws. *See* Chapman Depo. at 82; Haddad Depo. at 88. At the meeting, Ms. Chapman informed the students that CLS's bylaws were not compliant with the religion and sexual orientation provisions of the Nondiscrimination Policy and that they would need to be amended in order for CLS to become a registered student organization at Hastings. In response, Ms. Haddad handed Ms. Chapman a letter prepared by CLS-National's counsel stating that unless Hastings agreed by September 30, 2004, to allow CLS to become a registered student organization, CLS would commence legal action against the College. *See* Haddad Depo. at 99-100; Kane Depo. Ex. 3 at 7. A copy of this letter is attached as Exhibit G.

41. On or about October 1, 2004, Hastings informed CLS via a letter that "to be one of our student-recognized organizations, [CLS] must open its membership to all students irrespective of their

religious beliefs or sexual orientation." *See* Haddad Depo. at 102; Kane Dep. Ex. 9. A copy of this letter is attached as Exhibit H.

42. On or about October 11, 2004, Ms. Chapman informed Ms. Haddad via email that the $250.00 in travel funds previously set aside for travel to the CLS-National conference had been withdrawn because of CLS's failure to become a registered student organization. See Chapman Depo. at 66, 107; see also id. Ex. 20. A copy of this email is attached as Exhibit I.

43. On or about October 22, 2004, CLS filed the instant lawsuit against Hastings.

CLS DURING THE 2004-2005 ACADEMIC YEAR.

44. CLS held weekly Bible-study meetings beginning on August 31, 2004. *See* Fong Depo. at 47-48; *id.* at 69; *id.* Ex. 41; Haddad Depo. at 51. In addition to Bible studies, CLS hosted a beach barbeque, a Thanksgiving dinner, a campus lecture on the Christian faith and the legal practice, several fellowship dinners, an end-of-year banquet during the 2004-2005 academic year, and several informal social activities. *See* Haddad Depo., Ex. 41 at 1-2; Fong Depo. at 48-52; Haddad Depo. at 122-23. Also, CLS invited Hastings students to attend Good Friday and Easter Sunday church services with the group. *See* Haddad Depo. Ex. 41 at 1-2; Fong Depo. at 50.

45. On September 23, 2004, CLS participated in the annual Student Organizations Faire. *See* Chapman Depo. at 82.

46. Ms. Haddad, Mr. Fong, and Ms. Chan did not inform those attending CLS meetings in 2004-2005 that they decided to formally affiliate the organization with CLS-National or that they had decided to change the group's name and bylaws until September 28, 2004. *See* Haddad Depo. at 106-107; Fong Depo. at 67. CLS's officers did not put their decision to change the group's bylaws to a vote. *See* Haddad Depo. at 102, 106.

47. Approximately fifteen (15) students attended the September 28, 2004, meeting. *See* Fong Depo. at 71. Following the meeting, at least four (4) students ceased attending CLS functions. *See* Fong Depo. at 87. Also, CLS's Treasurer resigned from her position and her membership in CLS in January 2005. *See* Haddad Depo. at 110; Fong Depo, at 91-92.

48. Between nine (9) to fifteen (15) Hastings students (including CLS's officers) regularly attended CLS's meetings and activities during the 2004-2005 academic year. *See* Haddad Depo. at 113. Aside from CLS's officers, one became an official member of CLS-National during that year by signing the Statement of Faith. *See* Haddad Depo. at 113.

49. During CLS's weekly Bible study meetings in 2004-2005, the meetings typically would open and close with prayer, praise and worship, and include announcements, Bible study, sharing of prayer

requests, group prayer, and a time of fellowship. *See* Pl.'s Resp. to Defs.' Interrog. No. 13; Fong Depo. at 42; Haddad Depo. at 123-24. The Bible study was led by one of CLS's remaining officers. *See* Fong Depo. at 47; Haddad Depo., at 124.

50. At no time during the 2004-2005 academic year did any known non-Christian student seek to join CLS as a member, become an officer, or attend any of its meetings. *See* Fong Depo. at 52-53; Haddad Depo. at 125, 126-27.

51. During the 2004-2005 academic year, any attendee or member was welcome to lead the group in prayer, share prayer requests, and otherwise participate in prayer. *See* Haddad Depo. at 124, 129-30; Fong Depo. at 43.

52. During the 2004-2005 academic year, the topic of homosexuality was not discussed at CLS's meetings outside of the September 28, 2004, meeting referenced in paragraph 47 and occasional updates by Ms. Haddad or Mr. Fong concerning the instant litigation. *See* Haddad Depo. at 130; Fong Depo. at 45.

53. The specific language of CLS-National's Statement of Faith was not discussed at these meetings outside of Mr. Fong's or Ms. Haddad's occasional updates concerning the instant litigation. *See* Fong Depo. at 45. While the Statement of Faith was not referenced, the beliefs reflected therein were discussed during CLS's Bible studies.

54. At no time during the 2004-2005 academic year did any known gay, lesbian, or bisexual person student seek to join CLS as a member or officer or attend any of its meetings. *See* Fong Depo. at 52-53; Haddad Depo. at 125, 126-27.

55. CLS-National has expelled one member from membership due to the fact that CLS believed that he held beliefs inconsistent with the Statement of Faith. *See* Nammo Depo. at 53-58.

56. During his deposition, CLS's Director of Membership Ministries and Director of Law School Ministries, who is responsible for coordinating and administering CLS's membership procedures and addressing membership issues, testified that he was unaware of any instance in which a known gay, lesbian, or bisexual person sought to join CLS-National or was expelled from CLS-National. See Nammo Depo. at 22-25, 51-52.

57. CLS is not aware of any instance in which a known gay, lesbian, or bisexual person or non-Christian was expelled from HCLS or HCF from the 1994-1995 through the 2003-2004 academic years. Haddad Depo. at 153.

58. Although Hastings informed CLS in October of 2004 that it was free to make use of its facilities for meetings, CLS never requested such use at any time during the 2004-2005 academic year. Pl.'s Suppl. Resp. To Def.'s Interrog. No. 6.

CLS DURING THE 2005-2006 ACADEMIC YEAR.

59. Due to its noncompliance with the Nondiscrimination Policy, CLS is the only organization of which Hastings is aware that is made up of Hastings students that is not registered with the College. *See* Chapman Depo. at 23-24; Defs.' Resp. To Pl.'s Interrog., Nos. 15, 18, 19.

60. On or about August 29, 2005, Hastings, upon learning that CLS was continuing to use the Hastings name, informed CLS that it could no longer call itself "Hastings Christian Fellowship" and must remove the name "Hastings" from its name. *See* Ex J.

61. On or about September 21, 2005, Hastings' General Counsel reiterated Hastings' offer of its facilities for meetings, and stated that CLS could reserve rooms and the patio area on campus for its events. A copy of this email is attached as Exhibit K.

62. On or about September 21, 2005, in response to CLS's requests, Hastings' General Counsel also informed CLS that while it was free to use chalkboards and generally available bulletin boards on the campus to announce its events, CLS did not have permission to use the Student Information Center for distribution of organization materials, nor the Hastings Weekly or ASUCH weekly emails to make announcements. *See* Ex. L.

63. On or about September 20, 2005, the CLS officers for the 2005-2006 academic year were elected

by a formal vote of the CLS membership. *See* Doc. Nos. CLSHAS02188-CLSHAS02194; *see also* Pl.'s Second Supp. Resp. to Defs.' Interrog. No. 7.

64. To date, there are seven (7) members of CLS for the 2005-2006 academic year, including the three (3) CLS officers. *See* Pl.'s Second Supp. Resp. to Defs.' Interrog. No. 7, 8, and 10.

Stipulated this ___ day of October, 2005.

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UNIVERSITY OF CALIFORNIA
[LOGO] HASTINGS COLLEGE OF THE LAW
California's First Law School

EXHIBIT A

Student Organizations

UC Hastings College of the Law

2004-2005 Registered Student Organizations

ORGANIZATION	DESCRIPTION/ PURPOSE	CONTACT	PHONE/ EMAIL/SIC
American Bar Association/Law Student Division (ABA/LSD)	To benefit the professional and personal lives of Hastings students, as well as contribute positively to the community.	Nina Paul	pauln@uchastings.edu
American Constitution Society – Hastings Chapter (ACS)	To revitalize and transform the legal debate from our classrooms to our courtrooms. We seek to counter the dominant vision of American law today, a narrow conservative vision that lacks appropriate regard for the ways in which the law affects people's lives.	Andy Green	greenan@uchastings.edu
Amnesty International, Hastings Chapter (AIHC)	To monitor human rights violations through letter writing campaigns and to educate the public about human rights violations throughout the world.	Saki Bailey	sakigmkcsb@yahoo.com
Asian/Pacific American Law Student Association (A/PALSA)	To provide academic, professional, and peer support to Asian/Pacific Americans and other minority students at Hastings. We provide networking opportunities, bring issues affecting the Asian American community to the campus, and promote cultural awareness and diversity.	Brian Wang	wangbr@uchastings.edu
Associated Students of the University of California Hastings College of the Law	To represent the student body	Elaine Cheung	cheunge@uchastings.edu

Association of Communications, Sports & Entertainment Law (ACSEL)	To provide students of like-minded interests in pursuing careers in sports & entertainment law opportunities to learn more about issues surrounding the profession and provide support to become successful in said professions.	Bryan Bergman	hastingsacsel@yahoo.com
Association of Students for Kids (ASK)	To educate and inform the UC Hastings student body and surrounding legal community about career and volunteer copportunities [sic] available to law students and attorneys in the areas of juvenile justice, education, and child welfare through sponsorship of informational speakers, panels & community service projects.	Erin Denniston	edennist@hotmail.com
Black Law Students Association (BLSA)	To articulate and promote the professional needs and goals of Black law students; to foster and encourage professional competence; and bring about change within the legal system in order to make it responsive to the needs of the Black community.	Barbra Williams	williaba@uchastings.edu bwmseduc@aol.com
Clara Foltz Feminist Association (CFFA)	To raise awareness of feminist issues on campus; bring women attorneys to campus to talk with students re: careers; celebrate Hastings alumnae at Annual Reception.	Ariel Sosna	ariel_sosna@yahoo.com
Employment and Labor Law Students Association (ELLSA)	To provide a platform for academic and peer support, community service, networking with local and regional employment and labor attorneys, and a forum for discussion of ideas in the employment and labor sector.	Amy Leung	ELLSA@uchastings.edu

Environmental Law Society (ELS)	To create a forum for all students to be involved in a range of environmental activities; encourage environmental awareness and activism among UCH students; influence campus policies relating to environmental responsibility; support students in pursuing careers in environmental law and making contacts with professionals in the field; and establish and maintain working relationships with other law schools, and local and national environmental groups.	Meghan Quinlivan	quinliva@uchastings.edu
General Assistance Advocacy Project (GAAP)	To help homeless and marginally housed residents of San Francisco by helping them obtain the public benefits to which they are entitled.	Jeremy Price	succotash@mac.com
Hastings 1L Students Association	To make the transition into law school less stressful and a little more fun.	Dria Fearn	fearna@uchastings.edu
Hastings Aikido Society	To promote physical and mental well-being of Hastings students through the study of Aikido.	R. Masa Shiohira	rmshiohira@aol.com
Hastings Association of Muslim Law Students	To promote a greater understanding of Islamic law & culture in our community and to help members network with one another.	Ahmed Ibrahim	ibrahima@uchastings.edu
Hastings Business Law Journal Development Group (HBLJ-DG)	To develop and publish the Hastings Business Law Journal	Liz Chien	lizziechien@sbcglobal.net
Hastings Chinese Law & Culture Society (HCLCS)	To create further awareness of Chinese law and culture within the Hastings Community	Andy Green	andrwgreen@yahoo.com
Hastings Communications and Entertainment Law Journal (COMM/ENT)	To publish a law journal on contemporary issues in communications and entertainment law.	Andrew Massey Pondra Perkins	comment@uchastings.edu

Hastings Constitutional Law Quarterly (CLQ)	To publish an innovative and scholarly review on current issues relating to Constitutional Law.	Michelle Altick	clq@uchastings.edu
Hastings Democratic Caucus (HDC)	To provide a public forum on campus for the exchange of ideas relating to the political and social issues of the day, to provide a source of information relating to career paths for lawyers in the world of politics, and to promote student activism.	Christiana Dominguez	hastingsdems@yahoo.com
Hastings Federalist Society	To foster critical debate on the meaning and interpretation of the Constitution.	Isaac Fong	isaacf@ocf.berkeley.edu
Hastings to Haiti Partnership (HHP)	To strengthen the rule of law in Haiti by facilitating the exchange of democratic ideas and legal doctrines between Haiti and American law students.	Angie Perone	peronea@uchastings.edu
Hastings Health Law Journal Development Team	To provide an interdisciplinary forum for discussion amongst academics and professionals in the areas of law and medicine; to foster discussion and scholarship in published format in the areas of health law, policy, practice, etc.	Mary Cobb	cobbm@uchastings.edu
Hastings Health Law Organization (HHLO)	To inform interested students of current trends in the field of Health Law & Policy; to provide info regarding careers in these areas; to sponsor forums for the discussion of vital issues regarding Health Care Law and Policies.	Rachelle Acuna	acunanar@uchastings.edu
Hastings Ice Hockey	To bring together Hastings students and alumni to experience the joy of hockey.	Dan Chau	chaud@uchast.ngs.edu
Hastings Independent (hastings-i)	To facilitate open communication among members of the Hastings community through an online periodic news magazine (www.hastings-i [sic] org)	Brian Wang	bwangsta@hotmail.com

Hastings Intellectual Property Organization (HIPO)	To promote the study of intellectual property law among the students of UC Hastings and to provide students with information on careers in the field.	Elias Batchelder	eliasbatchelder@yahoo.com
Hastings International & Comparative Law Review (HICLR)	To edit, publish, and market an annual volume of original legal research of current interest and utility in the area of international and comparative law.	Paul Tobias	hiclr@uchastings.edu
Hastings International & Comparative Law Society (HICLS)	To encourage student interest in international law and comparative law and to provide information about careers in international law.	Anood Taqui	anoodtaqui@yahoo.com
Hastings Intramural Basketball League	To organize an intramural league.	Brian O'Toole	otooleb@uchastings.edu
Hastings Jewish Law Students Association (HJLSA)	To promote understanding of Jewish culture and its relation to the legal community, provide a forum for Jewish students to meet and network; and represent student interests to Hastings administration.	Emily Holzer	HJLSA@uchastings.edu.
Hastings Koinonia	To study the Bible, evaluate the evidence in support of the Bible's reliability, and discuss the Christian worldview and its logical consequences with the students of UC Hastings College of the Law.	Joseph Song	songj@uchastings.edu
Hastings Law Journal (HLJ)	To publish articles, notices, essays, speeches, and book reviews on a side [sic] variety of topics.	John Stanley	hlj@uchastings.edu
Hastings Motorcycle Riders Club (HMRC)	To advance the interests of and form a community for motorcycle and scooter riders at UC Hastings College of the Law.	Ryan Shough	shoughr@uchastings.edu

Hastings Outdoor Club	To provide the Hastings community with an opportunity to come together and experience the outdoors. We organize a wide range of activities from hiking and mountain biking to mountaineering, rock-climbing and skiing.	Eli Mark	marke@uchastings.edu
Hastings OUTLAW	To promote a positive atmosphere at Hastings for lesbians, gay men, bisexuals, transgendered, and queer students. The objective of the organization is to educate the community at large about the issues and concerns specific to lesbians, gay men, bisexuals, transgendered, and queer persons in order to alleviate and eradicate homophobia, transphobia, racism, sexism, and other affronts to the dignity of individual human beings.	Michael Flynn	hastings_outlaw@yahoo.com
Hastings Public Interest Law Foundation (HPILF)	To raise money for grants funding student public interest work, to sponsor envisioning public interest and to create a community of students dedicated to community public interest law.	Simona Agnolucci	hpilf2000@hotmail.com
Hastings Race & Poverty Law Journal (HRPLJ)	To promote and inspire discourse in the legal community regarding issues of race, poverty, social justice and the law. This journal is committed to addressing disparities in the legal system. We will create an avenue for compelling dialogue on the subject of the growing marginalization of racial minorities and the economically disadvantaged.	Ivy Suriyopas	hrplj@uchastings.edu

Hastings Republicans	To advance Republican Party principles with sensitivity to the issues and demands particular to law students. Hastings Republicans shall create a forum in which members may explore current social, legal, and public policy concerns.	Robert Forozandeh	hastingsrepublicans@yahoo.com
Hastings Soccer Club	To provide students, faculty and staff with an opportunity to play soccer.	Paul Swiller	paswiller@aol.com
Hastings West-Northwest Journal of Environmental Law and Policy	To publish a regionally specific environmental law & policy journal focusing on California & the Pacific Northwest, including materials relevant to law & policy in the West and Pacific Northwest (but not focused on the region).	Avinash Kar	wnw@uchastings.edu
Hastings Women's Law Journal (HWLJ)	To promote scholarship while recognizing the unique concerns of communities who have traditionally been denied a voice. WLJ enhances the school's academic diversity and contributes to schoarly [sic] thought by publishing two issues a year and hosting an annual symposium. We strongly believe that the law is a solution for the ills of the human condition, not merely a means of gaining and preserving privilege and position.	Carrey Wong	womenslj@uchastings.edu
Hui Ikepono: Hastings Hawaii Club	To promote education about Hawaiian culture, support students seeking employment opportunities in Hawaii, and create a social and professional network of students, faculty, alumni, and community members that are interested in the Hawaiian islands.	Mariel Kusano	kusanom@uchastings.edu, hui_ikepono@yahoo.com

Internet, Technology & Venture Group	To promote professional & social development for members. We intend to foster a greater undrstanding [sic] of the Internet, technology, and venture capital and its application of the law.	Veronica Besmer	vbesmer@hotmail.com
Japanese Law Society (JLS)	To help students share information and experiences about Japanese law, language, and Japanese-American culture.	Mariko Nakanishi	hastingsjls@yahoo.com
Korean American Law Students Association (KALSA)	To provide a platform for academic and peer support, community service, networking with local and regional bar association and a celebration of cultural identity and heritage.	Grace Lee	leeg@uchastings.edu
La Raza Law Students Association	To establish a sense of community amongst Latino/a students on campus through political, social, cultural and academic support. Also, to establish links to the Latino/a communities so as to develop a relationship between the association and the Latino/a communities.	Rodolfo Estrada	restrada @stanfordalumni.org
Law Students for Choice	To educate, organize, and support pro-choice law students to ensure tha [sic] a new generation of lawyers will be prepared to sucessfully [sic] defend and expand reproductive rights.	Lacey Clarke	clarkel@uchastings.edu
Legal Vines	To focus on wine appreciation, emphasizing fun over snobishness [sic], and education about the wine industry.	Joseph Ferrucci	ferrucci@uchastings.edu
Middle Eastern Law Students Association (MELSA)	To provide a support system for all Middle Eastern students, to explore and celebrate the diverse cultures of the Middle East and to provide a forum for discussion of legal issues pertaining to the Middle East.	Sarah Eskandari and Hengameh Safaei	eskandar@uchastings.edu

The National Lawyers Guild – Hastings (NLG-Hastings)	To raise awareness of social issues, on campus and in the community.	David Annicchiarico	annicchi@uchastings.edu
Native American Law Students Association (NALSA)	To recruit Native Americans, establish a supportive resource for members, participate in cultural and community activities and to explore and learn of legal issues related to Native Americans and the indegenous [sic] around the world.	Little Fawn Boland	little_fawn_boland @hotmail.com
Phi Alpha Delta International Law Fraternity, Temple Chapter (PAD)	To provide a professional legal association and serve the social and civic needs of Hastings students.	Jim Harwood	jim_harwood@msn.com
Silenced Right – National Alliance Pro-Life Group at UC Hastings College of the Law	To educate the community upon the undeniable truth that all human life from the moment of conception until natural death is sacred and has inherent dignity. This dignity is to be preserved and sustained through the promotion and defense of the culture of life.	Brendan Kenny	kennyb@uchastings.edu
South Asian Law Students Association (SALSA)	To promote South Asian student issues within the Hastings community	Parul Das Alpana Samant	parul24@aol.com alpanasamant@hotmail.com
Students Raising Consciousness at Hastings (SRCH)	To promote awareness at Hastings via spoken word, art and dance.	Farah L. Amarre Vianey Ramirez	lamarref@uchastings.edu
Third Year Class Council, Class of 2005	To obtain funding for and plan a third year party and other graduation events for U.C. Hastings graduating class of 2005.	Michael Carney	carneym@uchastings.edu
UC Hastings Snowboard and Ski Club	To provide a recreational and social outlet to students through group activities, like organized trips to ski resorts, etc.	Robert Woelfel	hastingssnowlovers @yahoo.com

UC Hastings Student Animal Legal Defense Fund	To provide a forum for education, advocacy & scholarship aimed at protecting the lives and advancing the interests of animals through the legal system.	Lorranie Fischer	fischerl@uchastings.edu
UC Hastings "Tenderloins" Ultimate Club	To provide an opportunity for Hastings students to participate in the wonderful bonding and athletic experience of ultimate frisbee.	Merlyn Goeschl	goeschlm@uchastings.edu
Vietnamese American Law Society (VALS)	To celebrate Vietnamese culture and provide a social network for whomever is interested.	Daniel Duy Fogarty	fogartyd@uchastings.edu

* All student organizations may be contacted via regular mail at University of California, Hastings College of the Law, 200 McAllister St., San Francisco, CA 94102

EXHIBIT B

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

HANDBOOK FOR STUDENT ORGANIZATIONS

Handbook for Student Organizations

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ANNUAL REGISTRATION OF STUDENT ORGANIZATIONS

All new and continuing student organizations and journals must register each year with the Office of Student Services, Room 213, 200 McAllister, (415) 565-4773. Registration forms may be submitted throughout the year. However, only student organizations who submit registration forms by mid-September will be eligible to request ASUCH funding for the fall semester. A general meeting of student organizations is held within the first few weeks of each school year, the meeting place and time are announced in the *Hastings Weekly*. Registration forms and other pertinent information are distributed at that time. Representatives, preferably the President and Treasurer, from each organization should attend.

To register as a student organization, the following forms and materials must be completed each year

and submitted to the Office of Student Services (forms and additional information are available in the Office of Student Services):

1. *Student Organization Registration Form* (Exhibit A),
2. *License Agreement for Use of College Name* (Exhibit B),
3. *Bylaws of Organization* (Exhibit C)

A. Liability of Organizations

Hastings does not sponsor student organizations and therefore does not accept liability for activities of student organizations. Organizations are responsible for their own contracts and for damages to person or property resulting from activities sponsored by the organizations.

1. Each organization must agree to comply with the requirement that it inform members and those doing business with the organization that it is not College-sponsored and that the College assumes no responsibility for its activities.
2. The responsibility of officers for the activities of their organizations includes the individual responsibility of each officer for payment in full of debts incurred by the organization.
3. The accounts of all organizations are subject to inspection and/or audit by the College.

B. Officers

Registered student organizations and journals should notify Student Services of any change in officers during the year.

In order to maintain continuity, each student organization and journal must notify Student Services by **4/15/05** of the elected or proposed officers for the following year.

ALCOHOLIC BEVERAGES AT CAMPUS EVENTS

Policies and Regulations:

1. In 1988/89, ASUCH passed a resolution requiring that all campus events where alcohol is served have an **equal amount of non-alcoholic beverages** available for participants.
2. If you wish to sell beer or wine by individual servings or serve hard liquor, a one-day alcoholic beverage license is needed. See instructions below.
3. If any alcoholic beverages (including beer and wine) are to be served at a campus event, it must be indicated on the *Room Reservation Request* (Exhibit D).
4. Do not provide alcoholic beverage to individuals not associated with Hastings. It has been reported that glasses of beer have been given to passersby. This causes problems with the security of your event.

5. In advertising social events where alcoholic beverages are to be served, representations such as "All you can drink" are discouraged.
6. Alcoholic beverages cannot be served on campus before **3:45 p.m.**
7. Alcoholic beverages **must remain in the location** in which they are served.

Procedures for Obtaining a Daily Alcoholic Beverage License

The organization desiring the license is responsible for obtaining all documentation.

1. Obtain an *Application for Police Department Recommendation for a Temporary Alcoholic Beverage License* (Exhibit E) from the Office of Student Services, Room 213, 200 McAllister at least 2 weeks prior to the event.

* * *

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EXHIBIT C

Bylaws of
Hastings Christian Legal Society

A Recognized Student Chapter of the
Christian Legal Society

ARTICLE I – NAME

The name of this organization shall be the Hastings Christian Legal Society ("HCLS").

ARTICLE II – PURPOSE AND GOALS

SECTION 1

Purpose: The purposes of HCLS are the mutual support, encouragement, fellowship, and spiritual growth of students at Hastings College of the Law ("Hastings"). Included within this purpose are the following objectives: to encourage those who identify themselves as followers of Jesus Christ to more truthfully live out their commitment in their personal and academic lives, to prepare members for future lives as Christian attorneys, and to provide a witness and outreach for Jesus Christ in the Hastings community.

SECTION 2

Goals: The major goals of HCLS shall be:

(1) To provide a means of fellowship, support, and edification among Christians in the Hastings community;

(2) To promote awareness and applicability of ethical, Biblical, and Christian principles at Hastings and the legal community in the Bay Area;

(3) To encourage Christian students to view the law as a ministry;

(4) To clarify and promote the concept of a Christian lawyer;

(5) To help Christian students integrate their faith with their academic and future professional lives;

(6) To develop a vision among the Hastings community for the promotion of justice, religious liberty and reconciliation in accordance with the principles set forth in the Bible;

(7) To encourage, disciple and aid Christian students in preparing for the legal profession;

(8) To provide a forum for the discussion of legal matters relating to Christianity, Christian ethics, and social values;

(9) To cooperate with bar associations and other organizations in asserting and maintaining high standards of legal ethics;

(10) To develop a concern among Hastings for the legal needs of the poor and needy, churches and other charitable organizations;

(11) To provide a link between Christian Legal Society ("CLS"), HCLS, and Hastings and to encourage

students and attorneys to become and remain active members of CLS and supporters of its objectives.

Section 3

In all official HCLS activities, the members and organization of HCLS will comply with the *Policies and Regulations Applying to College Activities, Organizations, and Students.*

ARTICLE III – MEMBERSHIP

SECTION 1

Members: Membership in HCLS shall be open to all students, faculty, administration, or staff at Hastings who willingly subscribe to the purposes and goals of HCLS as set forth in Article II. Membership in CLS shall not be a requirement of membership in HCLS, but CLS membership shall be greatly encouraged. Only the President shall be required to be a member of CLS, as provided in Article IV, Section 2.

SECTION 2

Voting Members: In addition to meeting the criteria listed in Section 1 of this Article, voting members shall be students who acknowledge in writing their agreement with the following statement of faith:

Statement of Faith:

Trusting in Jesus Christ as my Savior, I believe:

(1) The Bible as the inspired word of God;

(2) The deity of our Lord, Jesus Christ, God's son;

(3) The vicarious death of Jesus Christ for our sins, His bodily resurrection and His personal return;

(4) The presence and power of the Holy Spirit in the work of regeneration.

(5) Jesus Christ, God's son, is Lord of my life;

SECTION 3

Termination of Membership: Any member who, for any reason, at any time ceases to meet the criteria listed in Section 1 of this Article, shall immediately cease to be a member of HCLS. In addition to the above reasons, a voting member shall cease to be a voting member if the member explicitly repudiates the statement of faith set forth in Section 2 of this Article.

ARTICLE IV – OFFICERS

SECTION 1

Number: The officers of HCLS shall be the President, Director of Fundraising & Treasury, Director of Events, Director of Activities, and Director of Encouragement and such other officers as may be elected by the voting members of HCLS pursuant to Article V.

SECTION 2

Qualifications: All officers must be *voting* members of HCLS throughout their term in office. The President *must* be a member in good standing of CLS throughout the term in office. It is greatly encouraged that all officers be members of CLS but shall not be required.

SECTION 3

Duties: The duties of the officers of HCLS shall be as follows:

A President:

1. The President shall preside over meetings of HCLS or its officers. The President shall operate as HCLS' representative to Hastings, the Associated Students of Hastings ("ASH"), and any and all other matters for which a formal representative of HCLS is required and/or appropriate. The President shall also serve as HCLS' primary contact with CLS and shall advise the CLS national office of any significant operational or policy conflicts or any and all such other problems within HCLS or between HCLS and Hastings. The president shall also serve as the primary contact between HCLS and any HCLS faculty sponsor and/or attorney advisor.

2. The President shall be responsible for filling [sic] an annual report, to be mailed to CLS promptly after the election of officers, containing:

(i) The names, addresses and telephone numbers of newly elected officers;

(ii) The names, addresses and telephone numbers of voting and non-voting members; and,

(iii) a summary of HCLS activities.

3. The President shall, together with the Director of Fundraising & Treasury, have signature authority over the release of any funds held by HCLS.

(B) Director of Fundraising & Treasury ("DoF&T"):

1. The DoF&T shall assist the President in the discharge of his or her duties, as the President may direct, and shall perform such other duties as from time to time may be assigned by the President.

2. The DoF&T shall be responsible for the financial affairs of HCLS, including but not limited to the payment of funds, deposits and disbursements from HCLS' bank accounts pursuant to procedures set forth by Hastings, and the maintenance of all financial records of HCLS.

3. The DoF&T shall, together with the President, have signature authority over the release of any funds held by HCLS. Except as provided in Section (A)3 and Section (B)3, no Member, Voting Member, or Officer may release funds or secure indebtedness on behalf of HCLS.

4. The DoF&T shall be responsible to [sic] for creating, organizing, overseeing, and managing HCLS fundraising efforts.

5. The DoF&T shall be responsible for providing to the President a statement of HCLS' financial status not less than once a semester. The DoF&T shall also provide to the President a written summary of each fundraising function, including, therein, a statement of how much was raised and who participated.

6. In the absence of the President, or in the event of the President's inability or refusal to act, the DoF&T shall perform the duties of the President, and, when so acting, shall have all of the powers of, and be subject to all of the restrictions upon, the President.

(C) Director of Events ("DoE"):

1. The DoE shall assist the President in the discharge of his or her duties, as the President may direct, and shall perform such other duties as from time to time may be assigned by the President.

2. The DoE shall be responsible for creating, organizing, overseeing, and managing HCLS events. The purpose of said events are the furtherance of the goats set forth in Article II Section 2.

3. The DoE shall provide to the President a written summary of each event including, therein, a

statement of how many HCLS members, and Non-HCLS members attended.

(D) Director of Activities ("DoA"):

1. The DoA shall assist the President in the discharge of his or her duties, as the President may direct, and shall perform such other duties as from time to time may be assigned by the President.

2. The DoA shall be responsible for the planning, creating, organizing, overseeing and carrying-out of social activities for HCLS members. The purpose of said events shall be in furtherance of the goals set forth in Article II Section 2.

3. The DoA shall provide to the President, a written summary of each event including, therein, a statement of how many HCLS members, and Non-HCLS members attended.

(E) Director of Encouragement ("DE"):

1. The DE shall assist the President in the discharge of his or her duties, as the President may direct, and shall perform such other duties as from time to time may be assigned by the President.

2. The DE shall be responsible for encouraging HCLS members in their spiritual growth.

3. The DE shall be responsible for recognizing HCLS members' personal achievements and disappointments and prepare an appropriate response

on behalf of HCLS. Examples of responses include, but are not limited to: cards; letters; public recognition; and, announcements in official Hastings or CLS publications.

(F) Other Officers

Any other HCLS officers shall have such duties as are assigned to them by the President.

Section 4

Term of Office: The term of office for all HCLS officers shall begin on the first day of classes immediately following the beginning of the new year and shall continue until the last day of finals of the Fall semester; provided, however, that an officer's term in office shall automatically terminate if said officer ceases to meet the qualifications for office set forth in Article IV, Section 2; and, provided further, that the voting members of HCLS may, at any time, by a two-thirds vote of all voting members, remove any officer from office.

Section 5

Vacancies: In the event that any HCLS office or offices shall become Vacant at any time, the President shall appoint officers *pro tem*, who shall meet the qualifications for office set forth in Article IV, Section 2, and who shall remain in office until the last day of finals of the Fall semester.

ARTICLE V – ELECTIONS

Section 1

Nomination: Nominations for HCLS officers shall be made prior to the last general meeting of the Fall semester. Any voting or non-voting member may nominate a voting member to be an officer.

Section 2

Elections: In the last meeting of the Fall semester an election shall take place of all HCLS officers. The President shall mail written notice of the meeting at which elections are to be held to all voting members of HCLS at least 4 calendar days prior to the election day. Such notice shall include the names of all officer nominees and the offices to which such nominees have been nominated. The election shall be held pursuant to procedure set forth by the President; provided, however, that at the request of any voting member of HCLS, the election shall be held by secret written ballot. All officers shall be elected by simple majority of voting members in attendance at the election meeting. If two nominees receive an equal number of votes for any office, a run-off election shall be held at such time and pursuant to such procedures as shall be established by the President. Any amendments of changes to HCLS Bylaws must be approved by a two-thirds vote of all voting members.

ARTICLE VI – MEETINGS

Section 1

Frequency: HCLS members shall meet on a regular basis, but not less than once every two weeks, at times and places to be determined by the officers of HCLS.

Section 2

Notice: Except as provided in Article V, Section 2, no notice of meetings is required.

Section 3

Order: The order and structure of the meetings shall be set by HCLS officers in accordance with the purposes and goals set forth in Article II.

ARTICLE VII – ADOPTION

These bylaws shall take effect immediately upon the agreement to its provisions by at least three students who wish to form HCLS, each of who [sic] meets the qualifications for a voting member set forth in Article III, Section 2, at an organizational meeting.

THESE BYLAWS ADOPTED ON: October 1, 1992 *BY:*

Signed: Jonathan L. Block
Jonathan L. Block

June Blanc
June Blanc

Karen Kinney
Karen Kinney

Anja Frendenthal

EXHIBIT D

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW
STUDENT ORGANIZATION REGISTRATION
Academic Year 2003-2004

Formal Name of Organization:

Hastings Christian Fellowship

All registered student organizations will comply with the Policies and Regulations Applying to College Activities, Organizations and Students as stated in the Handbook for Student Organizations and submit financial records as required by the College. Failure to

comply may result in loss of status as a registered student organization.

Purpose of organization:

To be a light on campus: visible and approachable, a resource and a conduit to churches and Bible studies, particularly for new students, by first creating a community for fellowship, sensitive to the needs of the students and God's plan, and flexible to that [end].

Membership Fees (if any): 0

Faculty Advisors (if any): N/A

Officers and Executives: *Note: The responsibility of officers for the activities of their organizations includes the individual responsibility of each officer for payment in full of debts incurred by the organization.*

Name of Officers	Class	Position	Phone	Email
Shiloh Sorbello	2L	President	(415) 558-8106	sorbello@uchastin
Jessica Duncan	2L	Treasurer	(415) 902-4532	jessica_allison@hotmail
Cara Watts	2L	Secretary	(415) 252-5614	carawatts@hotmail

(If applicable) Organization's Phone # _____

Email _____

Primary contact person Shiloh Sorbello and preferred method of contact (email, telephone or SIC

folder) e-mail SORBELLO@UCHAST [Illegible] which can be released to the public.

Print Name: /s/ Shiloh Sorbello

/s/ Shiloh Sorbello
Signature of Representative

9/8/03
Date Registration Form Submitted to Student Services

APPROVED IN ACCORDANCE WITH COLLEGE POLICIES:

/s/ [Illegible]
Signature of Director of Student Services

9/9/03
Date of Registration

To complete the Registration package, please attach to this form:

(A complete package must be submitted in order for an organization to be considered for registration.)

1. One copy of organization's most recent by-laws.
2. License Agreement for Use of College Name, completed and signed.
3. If you have an outside bank account, Registered Student Organization Account Information form, completed and signed; copy of bank signature card.

7/15/03

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

LICENSE AGREEMENT FOR USE OF COLLEGE NAME

WHEREAS, THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW (Hastings) has recognized as Hastings student organizations those organizations which have membership limited to Hastings students and which have legitimate, non-commercial goals; and

WHEREAS, such recognized student organizations, after registration with the Office of Student Services, are entitled to the use of Hastings facilities on a space available basis, equipment and services for meetings and other activities; and

WHEREAS, Hastings Christian Fellowship ("Organization") is a recognized, duly registered, student organization wishing to avail itself of the use of certain Hastings facilities, equipment and services for its activities.

NOW, THEREFORE, it is agreed as follows:

1. Hastings hereby grants to Hastings Christian Fellowship the nonexclusive, revocable right to use the name of Hastings College of the Law and logo in the promotion of its activities.

2. Permission to use the Hastings name and logo in connection with fund-raising efforts at the College by said organization is granted with the

understanding that said organization will make its fund-raising goals clear at the time funds are solicited, and further, that the Organization shall comply with the financial report requirements stated in the *Policies and Regulations Applying to Campus Activities, Organizations and Students* and with the Guidelines for Fundraising by student organizations as stated in the *Handbook for Student Organizations.*

3. The Organization, by and through its official representative, accepts the license to use the Hastings name and logo in accordance with the terms and conditions stated herein.

4. It is understood that the College is granting only a revocable license and that said license may be revoked at any time by the College without prior notice.

5. It is recognized that the College does not sponsor the Organization and is not responsible for the activities of said Organization. The Organization will inform its members and include in all its written materials that the University of California Hastings College of the Law does not sponsor the organization nor its activities and that Hastings assumes no legal responsibility for the Organization, its officers and members, or any of its activities.

6. This agreement is not assignable.

By /s/ Shiloh A. Sorbello
Student Organization Representative

/s/ Shiloh Sorbello
Printed Name

9/8/03
Date

By /s/ Judy Chapman
Judy Chapman, Director of Student Services

9/9/03
Date

Constitution of Hastings Christian Fellowship

ARTICLE I: Name and Purpose

Section I: Hastings Christian Fellowship

This organization shall be known as Hastings Christian Fellowship (HCF).

Section II: Purpose

The purpose of this organization is to be a light on campus: visible and approachable, a resource and a conduit to churches and Bible studies, particularly for new students, by first creating a community for fellowship, sensitive to the needs of the students and God's plan, and flexible to that end.

ARTICLE II: Membership

HCF welcomes all students of the University of California, Hastings College of the Law.

ARTICLE III: Officers

Section I: A leadership team shall be composed of at least two officers, including a treasurer.

Section II: Duties.

A. General Officers.

1. make all decisions relating to HCF, in accordance with Article I, Section II of these bylaws.
2. establish weekly group and leadership meetings;
3. create men's and women's small groups.
4. the number of General Officers shall be decided by a two-thirds vote of the leadership team.

B. Treasurer.

1. be responsible for all monies of HCF;
2. cause to be published in the Weekly or otherwise make publicly available, the initial funding allocation for the student organization.
3. creation of revenue and expenditure reports on a timely basis.
4. be responsible for budgeting, disbursement, and accounting of all travel funds.
5. shall implement decisions of the leadership team.

6. in addition to the Treasurer's specific duties, the Treasurer shall enjoy all rights and duties of the General Officers.

Section III: Elections.

A. Election of General Officers

1. General Officers shall be approved by the leadership team.

2. A person shall become a candidate by nomination or expressed interest.

B. Vacancies.

1. Incumbents who chose to remain shall maintain their position on the leadership team.

2. Vacancies shall be filled by nomination or expressed interest.

ARTICLE IV: Meetings.

Section 1: Frequency

A. The leadership team shall meet no less than once a week during each semester.

B. HCF shall meet once a week.

ARTICLE V: Interpretation

All questions of interpretation of this Constitution shall be decided by a majority vote of the leadership team.

ARTICLE VI: By-Laws

The Leadership team may adopt by-laws to regulate its internal affairs and for the administration and implementation of the Constitution.

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW
Academic Year 2003 to 2004

REGISTERED STUDENT ORGANIZATION ACCOUNT INFORMATION

This completed form should be submitted with the Registration form to the Office of Student Services, Room 213, 200 McAllister.

Name of Organization Hastings Christian Fellowship

Please check one, complete the requested information, and sign below.

☐ We have opened a Hastings account:

Account # _____

Authorized Signers _____

_____

☐ We intend to open a Hastings account.

☐ We have an outside bank account:

Federal Tax ID # _____

Bank Name and Address _____

_____

Type of Account(s)
☒ Checking ☒ Savings ☒ Other

Account Number(s) _____

Authorized Signers _____

_____

(Please attach copy of front
and back of signatory card.)

☑ We do not plan to open an account.

I have read and agree to comply with the regulations listed in the Handbook for Student Organizations.

9/8/03
Date

/s/ Shiloh A. Sorbello
Signature of Student
Organization Representative

/s/ Shiloh Sorbello
Printed Name

7/15/03

EXHIBIT F

Date: Tue, 21 Sep 2004 08:54:14 -0700
From: Judy Chapman <chapmanj@uchastings.edu>
Subject: Bylaws: Hastings Christian Fellowship/ Legal Society
To: isaac@ocf.berkeley.edu, fongi@uchastings.edu
Cc: mesquita@uchastings.edu, chapmanj@uchastings.edu
Reply-to: chapmanj@uchastings.edu
Organization: UC Hastings College of the Law
Priority: normal

Dear Isaac,

I asked our General Counsel to review the bylaws that you submitted for a Hastings chapter of CLS to be considered a registered student organization, and she said that the bylaws that you submitted for the Christian Legal Society are not compliant with Hastings Nondiscrimination Compliance Code and the bylaws will need to be revised accordingly. Please let me know when you are available to meet so we can discuss this matter. I will be on campus all day today, Tuesday. Thank you. Judy

---

Judy Chapman
Director of Student Services
UC Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102
415-565-4773
mailto: chapmanj@uchastings.edu

EXHIBIT G

[LOGO] Center for Law
and Religious Freedom

4208 Evergreen Lane, Suite 222
Annandale, Virginia 22003-3264
703/642-1070
FAX: 703/642-1075
Website: www.clsnet.org
clrf@clsnet.org

September 23, 2004

Ms. Judy Chapman
Director
Office of Student Services
Hastings College of Law
University of California
200 McAllister St.
San Francisco, CA 94102

RE: Processing Registration Packet for the
CLS Chapter
Christian Legal Society/University of
California Hastings College of Law
Our File No. LE1231

Dear Ms. Chapman:

We represent the Christian Legal Society Chapter of the University of California Hastings College of Law ("CLS chapter") in regard to the group's application to the University for status as a registered student organization. We are concerned that your

office's handling of this matter may violate the CLS chapter's federal First Amendment rights.

To assist the Office of Student Services in processing the CLS chapter's registration packet, we include here a brief overview of the membership and leadership policies of the Christian Legal Society and a synopsis of the pertinent law which we believe militate in favor of your office approving the chapter's registration packet.

I. Christian Legal Society and Student Chapters.

Christian Legal Society is a nationwide association of Christian lawyers, law students, law professors, and judges. The organization's purposes include providing a means of society, fellowship, and nurture among Christian lawyers; promoting justice, religious liberty, and biblical conflict resolution; encouraging, discipling, and aiding Christian law students; and encouraging lawyers to furnish legal services to the poor. In furtherance of its purposes, the national Christian Legal Society organization maintains both attorney and law student chapters across the country.

All members of the national Christian Legal Society, including student members, must sign a Statement of Faith indicating that the member holds certain Christian viewpoints commonly regarded in both the Roman Catholic and Protestant evangelical traditions as orthodox.

Any student is welcome to participate in CLS chapter meetings and other activities, regardless of religion, creed, sexual orientation, or membership or non-membership in any other protected class. However, pursuant to the constitution and rules for CLS student chapters of the national Christian Legal Society, the CLS Chapter requires its members and officers to sign and endeavor to live by the national Christian Legal Society's Statement of Faith.

CLS interprets its Statement of Faith to require that officers and members adhere to orthodox Christian beliefs, including the Bible's prohibition of sexual conduct between persons of the same sex. A person who engages in homosexual conduct or adheres to the viewpoint that homosexual conduct is not sinful would not be permitted to serve as a CLS chapter officer or member. A person who may have engaged in homosexual conduct in the past but has repented of that conduct, or who has homosexual inclinations but does not engage in or affirm homosexual conduct, would not be prevented from serving as an officer or member.

The University of California Hastings College of Law Chapter of the Christian Legal Society has been affiliated with the national Christian Legal Society at least since 1989. Our understanding is that, for the vast majority of this time, the CLS chapter has also been officially recognized by the University as a registered student organization. This year, as a condition of receiving and maintaining registered status, student organizations must affirm their compliance with

the University's Nondiscrimination Compliance Code. The policy prohibits student organizations from, among other things, discriminating on the basis of religion and sexual orientation. Because agreement with such a policy is inconsistent with the CLS chapter's Statement of Faith and its membership and leadership decisions based on that Statement of Faith, the CLS chapter requests that your office grant the group an exemption from the religion and sexual orientation portions of the Nondiscrimination Compliance Code and approve the group's registration packet.

II. Overview of Applicable Constitutional Law.

We believe the constitutional law summarized below strongly favors the Office of Student Service's decision to approve the CLS chapter's registration packet and grant the group an exemption from the religion and sexual orientation portions of the Nondiscrimination Compliance Code.

A. First Amendment Right of Expressive Association.

The United States Supreme Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). This right of

association plainly presupposes a right *not* to associate. *Dale v. Boy Scouts of America*, 530 U.S. 640, 648 (2000); *see also Democratic Party v. Wisconsin*, 450 U.S. 107 (1980) (stating "[T]he freedom to associate for common advancement of political beliefs . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people.")

To determine whether a group is protected by the First Amendment's expressive associational right, it must be determined whether the group engages in "expressive association" and, if so, whether the forced inclusion of an unwanted person would significantly affect the group's ability to advocate public or private viewpoints. *Dale,* 530 U.S. at 649-50. In *Dale*, despite the New Jersey Supreme Court's ruling that the state's anti-discrimination laws prohibited the Boy Scouts from removing a person from leadership because of his self-identification as a homosexual person, the United States Supreme Court reaffirmed that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." 530 U.S. at 648. The Court found that the Boy Scouts engaged in expressive activity by having adult leaders spend time with youth members, instructing and engaging them in outdoor activities in the hope of instilling good values. *Id.* at 649-50. Among the values the Scouts sought to instill was that homosexual conduct is not a healthy

form of behavior. The Supreme Court then determined that "the presence of a [homosexual] as an assistant scoutmaster would . . . surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs." *Id.* at 654.

Here, the decision of the CLS chapter to require its officers and members to affirm and endeavor to live by the group's Statement of Faith is protected by the First Amendment's expressive associational right. First, the CLS chapter is an expressive association. Like the Boy Scouts in *Dale*, the CLS chapter seeks to affirm and encourage certain values in its members. For the CLS chapter these values include the orthodox Christian beliefs articulated in the group's Statement of Faith.

Second, a University policy requiring student organizations to unreservedly affirm the University's Nondiscrimination Compliance Code prevents the CLS chapter from excluding people who disagree with or who cannot affirm its Statement of Faith and, therefore, "impair[s] the ability of the original members to express only those views that brought them together." *Roberts*, 468 U.S. at 623. One of the chief purposes of the CLS chapter is "cultivating spiritual growth through communal prayer, fellowship, and worship; learning to share one's faith; and devotional study of the Bible and classic Christian works." Form CLS Chapter Constitution, ¶ 2.2. The Statement of Faith requirement is the means by which the CLS chapter guarantees that its meetings include the desired worship and observance. Strict

application of the University's Nondiscrimination Compliance Code prevents the CLS chapter from requiring its members and leaders to adhere to orthodox Christian beliefs, including the prohibition of sexual conduct outside the confines of traditional marriage between a man and a woman, and thereby precludes the chapter from protecting the integrity of its group expression. Forcing the CLS chapter to include persons who overtly oppose the organization's tenets and message unquestionably affects the CLS chapter's ability to advocate orthodox Christian beliefs, whether publicly or privately. As such, the Office of Student Services should approve the CLS chapter's registration packet and grant the group an exemption from the religion and sexual orientation portions of the Nondiscrimination Compliance Code.

B. First Amendment Right of Free Speech.

The Free Speech Clause of the First Amendment, made applicable to the states by the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." UNITED STATES CONST. Amend. I. Among the forms of constitutionally protected speech is religious expression. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (stating, "[R]eligious worship and discussion . . . are forms of speech and association protected by the First Amendment"). Accordingly, discrimination against speech because of its religious content is presumed to be unconstitutional. *Capital Sq. Review Bd. v. Pinette*, 514 U.S. 753, 761 (1995) (holding that strict scrutiny

applied where expression was rejected "precisely because its content was religious").

In *Widmar*, the United States Supreme Court held that a state university, having made the decision to recognize and make its facilities available to a broad spectrum of student organizations, could not deny such status and benefits to a particular student organization because of the organization's religious speech or activities. *Widmar,* 454 U.S. at 267-68. A religious student group sought to use state university facilities for "prayer, hymns, Bible commentary, and discussion of religious views and experiences." *Id.* at 265, n. 2. The state university adopted a regulation that prohibited the use of university buildings or grounds "for purposes of religious worship or religious teaching." *Id* at 265. The Supreme Court stated that the university's policy "discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion." *Id.* at 269.

For the University of California Hastings College of Law to withhold status as a "registered student organization" because of the CLS chapter's Statement of Faith and the membership and officer decisions based on that statement of faith is to engage in the same discrimination against religious speech that *Widmar* forbids. Registered status carries with it the same bundle of rights that were at issue in *Widmar*, including access to meeting space and funding. Whether the University attempts to deny these benefits to the CLS chapter outright through the adoption

of a discriminatory regulation, as in *Widmar*, or indirectly by conditioning the receipt of these benefits on the CLS chapter's willingness to affirm the University's own views, the effect is the same – discrimination against a student organization because of its religious viewpoints and expression. "It is too late in the day to suppose that the liberties of religion and expression may be infringed by the denial of or placing of a condition upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Because the University's policy of conditioning recognized status on the CLS chapter's strict adherence to the Nondiscrimination Compliance Code is unconstitutional, your office should approve the chapter's registration packet. *See Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819 (1995) (holding that when a public university excludes a religious student publication from generally available funds, the university engages in unconstitutional viewpoint discrimination).

In addition to being viewpoint discriminatory, the University's policy of conditioning registered status on the CLS chapter's adherence to a nondiscrimination policy also violates the compelled speech doctrine. "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977). For example, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), the Supreme Court ruled that a

private group did not have to include a self-identifying homosexual group in its parade. The Court determined that every person participating in the parade affects the message conveyed by the organizers of the parade. To force the organizers to include an unwanted person in their parade was to alter the expressive content of their parade. Accordingly, the Court rejected the Massachusetts Supreme Court's application of state anti-discrimination laws regarding sexual orientation to the group's parade as "violat[ing] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573.

Likewise, for the University to deny registered status to the CLS chapter for refusing to include persons who disagree with the group's religious beliefs forces the group to convey a message contrary to the basic Christian tenets embodied in its Statement of Faith, including the Biblical prohibition on sexual conduct between persons of the same-sex. Because a student organization has a constitutional right "to decline to foster" ideological concepts, particularly those "they find morally objectionable," the Office of Student Services should approve the CLS chapter's registration packet and grant the group an exemption from the religion and sexual orientation portions of the Nondiscrimination Compliance Code. *Wooley*, 430 U.S. at 714-15.

C. First Amendment Establishment Clause Claim.

By conditioning recognized status on a student group's wholehearted endorsement of the University's Nondiscrimination Compliance Code, the University is failing to maintain neutrality between religious sects in violation of the Establishment Clause. The Establishment Clause forbids the government from making "any law respecting an establishment of religion." UNITED STATE CONST. Amend. I. It requires "governmental neutrality between religion and religion. The State may not adopt programs or practices which aid or oppose any religion." *Larson v. Valente,* 456 U.S. 228, 246 (1982). "[C]learly manifested in the history and logic of the Establishment Clause" is the principle "that no State can pass laws which aid one religion" or that "prefer one religion over another." *Everson v. Board of Education,* 330 U.S. 1, 15 (1947).

Rather than demonstrating neutrality, the University's insistence that student organizations affirm its Nondiscrimination Compliance Code prefers religious sects that condone homosexual conduct over more orthodox religious sects that believe homosexual conduct is impermissible. Most notably, the University's policy punishes religious student organizations from more orthodox religious sects by denying recognition and its attendant benefits if the clubs refuse to accept members or officers who either condone or advocate sexual conduct outside the confines of traditional marriage between a man and a woman. Consequently, imposition of the University's

Nondiscrimination Compliance Code on the CLS chapter's members and officers violates the Establishment Clause of the First Amendment.

D. First Amendment Right of Free Exercise of Religion.

The Free Exercise Clause of the First Amendment, made applicable to the States by incorporation into the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof.*" UNITED STATES CONST. Amend. I (emphasis added). The United States Supreme Court has interpreted the Free Exercise Clause such that laws "imposing special disabilities on the basis of religious views or religious status" are presumptively unconstitutional. *Employment Division v. Smith*, 494 U.S. 872, 877 (1990); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding that a local law targeting the use of animal sacrifice for religious purposes violated the Free Exercise Clause).

The University's Nondiscrimination Compliance Code imposes a special disability on the basis of religion and, therefore, violates the Free Exercise Clause. A stringent application of the Nondiscrimination Compliance Code forbids student organizations formed to further religious ideals, but not student organizations formed to promote other ideals.

For example, an environmentalist group may limit its officers to supporters of conservation and recycling. A Marxist club could require that its members and officers subscribe to the tenets of socialism. In each case, the groups "discriminate" on the basis of shared personal beliefs and the "discrimination" is not regulated by the University's Nondiscrimination Compliance Code. Yet a religious club, like the CLS chapter, is apparently forbidden by the University's Nondiscrimination Compliance Code from requiring its members and officers to affirm a common set of religious beliefs. To prohibit religious student organizations from using religiously-rooted criteria in their membership practices imposes a special disability on the basis of religion, which is just what *Smith* and *Lukumi* said the Free Exercise Clause forbids. Accordingly, to accommodate the religious exercise of the CLS chapter, your office should approve the CLS chapter's registration packet.

E. Fourteenth Amendment Right to Equal Protection.

The Equal Protection Clause of the Fourteenth Amendment provides, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." UNITED STATES CONST. Amend. XIV. The Equal Protection Clause, like the First Amendment, has been interpreted by the United States Supreme Court to prohibit the government from making distinctions based on religious classifications. *See*

Niemotko v. State of Maryland, 340 U.S. 268 (1951) (holding the Equal Protection Clause was violated when the park authority issued a park permit to the Order of Elks for a Flag Day ceremony but refused to issue a park permit to the Jehovah's Witnesses for a "Bible talk"); *see also McDaniel v. Paty*, 435 U.S. at 643 (White, J., concurring) (holding law barring clergy from public office unconstitutional on equal protection ground); *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (Frankfurter, J., concurring) (holding law prohibiting "any political or religious meeting in any public park" invalid on equal protection ground)[.] Accordingly, a religious classification is an "inherently suspect distinction." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

The University's Nondiscrimination Compliance Code violates the Equal Protection Clause by distinguishing between religious student organizations and non-religious student organizations. The University's Nondiscrimination Compliance Code forbids student organizations from using religious criteria in making membership and leadership decisions. While the nondiscrimination provisions apply to all campus organizations, the burden of the religion and sexual orientation provisions of the Nondiscrimination Compliance Code is overwhelmingly borne by religious student organizations. Non-religious student organizations are free to define themselves by requiring that their leaders and members show a firm commitment to the organization's cause. For example,

Students Against Drunk Driving can require its officers to take the pledge against drinking; or Students for Social Responsibility can require its officers and members to have a social conscience. Yet religious student organizations cannot require their officers and members to affirm what the majority of Protestants and Catholics consider orthodox Christian beliefs. Such disproportionate treatment between religious student organizations and non-religious student organizations is inherently suspect and, therefore, unconstitutional under the Equal Protection Clause. Consequently, your office should approve the CLS chapter's registration packet to ensure that all student organizations are treated similarly.

For the above reasons, we asked that the University provide written assurance that: (1) the University has created a formal, written exemption for religious student organizations from the religion and sexual orientation portions of the University's Nondiscrimination Compliance Code; (2) the University has adopted a written policy instructing University personnel to cease from requiring religious student organizations to affirm the religion and sexual orientation portion of the Nondiscrimination Compliance Code; and (3) the Office of Student Services has approved the CLS chapter's registration packet and granted the group the status and benefits of a registered student organization. If your office fails to provide these written assurances

by September 30, 2004, we will commence legal action against the University.

Very truly yours,

/s/ Via electronic signature

STEVEN H. ADEN, ESQ.
Chief Litigation Counsel
Center for Law and Religious Freedom

cc: Isaac Fong, CLS Chapter President
Gregory S. Baylor, Esq., CLRF Director

EXHIBIT H

[SEAL]

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW
OFFICE OF THE GENERAL COUNSEL

200 MCALLISTER STREET • SAN FRANCISCO, CALIFORNIA
94102-4978 • (415) 565-4787 • FAX (415) 565-4825
internet: *traynume@uchastings.edu*

Elise K. Traynum
General Counsel

October 1, 2004

Steven H. Aden, Chief Litigation Counsel
Center for Law and Religious Freedom
4208 Evergreen Lane, Suite 222
Annandale, VA 22003

Re: Christian Legal Society
University of California,
Hastings College of the Law

Dear Mr. Aden:

I am in receipt of your letter to Ms. Judy Chapman, Director of Student Services, regarding the processing of the registration packet for the Christian Legal Society. I want to assure you that Hastings does not wish to violate the CLS chapter's federal First Amendment Rights; however, under federal and state mandates, the College is prohibited from supporting any program or activity that would violate the civil rights of any [sic] our students.

We insist that to be one of our student-recognized organizations, CLS must open its membership to all students irrespective of their religious beliefs or sexual orientation, as it has in the past. According to our records, the Hastings chapter of CLS has adopted the Hastings bylaw prohibiting discrimination for membership since its formation. Quite frankly, we are perplexed by CLS's sudden pertinacious shift in philosophy to foreclose the opportunity for fellowship with it to all of our students.

If CLS wishes to form independent of Hastings we would be pleased to provide the organization the use of Hastings facilities for its meetings and activities. Unfortunately, we are precluded from utilizing student fees to fund its activities until CLS bylaws comport with the Hastings nondiscrimination compliance code.

If you have any questions regarding this matter, please do not hesitate to call me.

Very truly yours,

/s/ Elise K. Traynum
Elise K. Traynum

EKT:pht
cc: Judy Chapman

EXHIBIT I

From: Judy Chapman <chapmanj@uchastings.edu>
To: haddad Dina S_
Subject: Travel funds for HCLS
Cc: chapmanj@uchastings.edu
Reply-to: chapmanj@uchastings.edu
Date: Mon, 11 Oct 2004 13:20:04-0700

Dear Dina,

In light of your decision to submit the CLS bylaws and to not comply with the Hastings nondiscrimination compliance code, I must withdraw the approval of $250 for travel funding for you to attend the conference in October. Sincerely, Judy

---

EXHIBIT J

FW Request for Christian Legal Society
Christian Fellowship.txt

From: Steven H. Aden [mailto:saden@clsnet.org]
Sent: Thursday, September 01, 2005 2:39 PM
To: 'Ethan P. Schulman'; traynume@uchastings.edu
Cc: 'Tim Tracey'; gbaylor@clsnet.org; 'Isaac Fong', dina.haddad@gmail.com
Subject: Request for Christian Legal Society/ Christian Fellowship

Elise – Judy Chapman requested that we follow up on a request made by the organization formerly known as Hastings Christian Fellowship, now known as Christian Legal Society/Christian Fellowship, to have access to certain means of communicating to Hastings students regarding a bonfire the group is planning at Ocean Beach. The group would like to promote the event via campus e-mail, the online event calendar, flyers posted on campus, and chalkboards. Everyone would be welcome to come, of course.

Please respond at your earliest convenience, as I note that Ms. Chapman's response to Isaac Fong came much too late to assist the group with specific requests they had regarding events on 8/23 and 8/24/05. The string is provided below. Thank you.

Steven H. Aden, Esq.
Chief Litigation Counsel
Center for Law & Religious Freedom
4208 Evergreen Lane, Suite 222
Annandale, VA 22003-3264
Tel.: 703.642.1070 Ext. 3504
Fax: 703.642.1075
saden@clsnet.org

– Forwarded message –

Date: Mon, 29 Aug 2005 18:03:55 -0700
From: Judy Chapman <chapmanj@uchastings.edu>
To: Isaac Fong <isaacf@OCF.Berkeley.EDU>
Cc: traynume@uchastings.edu,
prestonb@uchastings.edu,
chapmanj@uchastings.edu
Subject: Re: events request – time sensitive

Dear Isaac,

I spoke today with Elise Traynum, our General Counsel, regarding your requests. You wrote that Hastings Christian Fellowship (HCF) is interested in conducting events. Because HCF is not a registered student organization and is not licensed to use the Hastings name, you cannot use the name of "Hastings" in your name or the promotion of your activities.

Per our policy on use of College properties, you may request to use the 198 Beach in order to staff a table. Please contact Betty Preston in the SIC to initiate your request and to specify the dates and times. I am sending Betty a copy of this email for her information.

Per the advice of our general counsel (Elise Traynum), if you wish anything else, please have your attorney contact Elise Traynum.

Sincerely,
Judy

Date sent: Fri, 19 Aug 2005 10:44:46 -0700 (PDT)
From: Isaac Fong <isaacf@OCF.Berkeley.EDU>
Subject: events request – time sensitive
To: Judy Chapman <chapmanj@uchastings.edu>

Dear Judy,

I hope you had a great summer. It's good to be back at school.

Hastings Christian Fellowship is interested in doing two events next week:

2L/3L Advice table Tuesday and Wednesday 8/23 and 8/24 We would like to hold an advice table on the beach where all students, especially 1Ls, can come to ask questions of the 2Ls and 3Ls who will staff the table, on classes, jobs, etc. We plan to have a poster-board with our club name and flyers with contact info and meeting info. We would like to promote this event via campus e-mail, the online event calendar, flyers posted on campus, and chalkboards. Everyone is welcome to come.

Beach Bonfire Friday 8/26

We are planning on having a bonfire at Ocean Beach again and we would also like to promote this event via campus e-mail, the online event calendar, flyers

posted on campus, and chalkboards. Everyone is welcome to come.

We want to know whether we can do any or all of these things listed above as a group that is not a registered student organization. Since we plan to hold these events on Tuesday, Wednesday, and Friday of this coming week, please let us know as soon as possible whether your answer is yes, no, or that you are unable to give us an answer at this time. If the latter, please let us know what your time frame is for giving us a definite answer.

Thank you very much and hope to hear from you soon.

– Isaac

EXHIBIT L

FW CLSHastings – Following Up.txt

From: Ethan P. Schulman
[eschulman@howardrice.com]
Sent: Wednesday, September 21, 2005 8:29 PM
To: Tim Tracey; Steven H. Aden
Subject: FW: CLS/Hastings – Following up

Steve and Tim:

It's unclear to me whether this e-mail was sent to you directly; in case it wasn't, I am reforwarding it.

Ethan

– Original Message –

From: Elise Traynum
[mailto:traynume@uchastings.edu]
Sent: Wednesday, September 21, 2005 5:23 PM
To: Ethan P. Schulman; Matt Schultz
Cc: Steven H. Aden; chapmanj@uchastings.edu
Subject: RE: CLS/Hastings – Following up

Tim, I apologize for the delayed response. Because CLS is not a registered student organization, at this point use of college resources is limited. The group may reserve rooms on campus for its events on a first come, first serve basis and it may use the 198 McAllister patio area (the "beach") as requested. The College provides a designated bulletin board where outside organizations may post signs, announcements, flyers, etc. CLS should check in the [sic] with college staff to post these materials.

SIC files, e-mail, and Hastings weekly publication are reserved for College sponsored events, and registered student organizations only.

The College does not have any rules restricting the use of chalkboards in the classrooms. Therefore, I believe that CLS may use college chalkboards to post announcements.

On 21 Sep 2005 at 12:57, Ethan P. Schulman wrote:

Tim:

My understanding is that you should be receiving shortly a response directly from Elise Traynum.

Ethan

– Original Message –

From: Tim Tracey [mailto:tjtracey@clsnet.org]
Sent: Wednesday, September 21, 2005 7:27 AM
To: Matt Schultz
Cc: Ethan P. Schulman; 'Steven H. Aden'
Subject: RE: CLS/Hastings – Following up

Matt:

Just wanted to follow up with you on CLS's request. Your email said that we should have a response by Tuesday at the latest. Were you able to determine whether CLS can reserve a room or access SIC folders, mass emails, the Hastings weekly, post signs, or use chalkboard announcements?

I appreciate your continuing consideration of our request.

– Tim

Timothy J. Tracey
8001 Braddock Road, Suite 300
Springfield, Virginia 22151
Tel: (703) 642-1070, ext. 3501
Fax: (703) 642-1075
Email: tjtracey@clsnet.org

– Original Message –

From: Matt Schultz [mailto:mschultz@howardrice.com]
Sent: Wednesday, September 14, 2005 5:03 PM
To: Tim Tracey
Cc: Ethan P. Schulman; Steven H. Aden;
Steve & Molly Aden
Subject: RE: CLS/Hastings – Following up

Dear Tim,

CLS's request is still being considered. We should have a response for you early next week (Tuesday at the latest). If you have any questions in the meantime, you should contact me, rather than Elise Traynum or anyone else at Hastings. We thank you for your patience, and apologize for the delay.

Best regards,

Matt Schultz

– Original Message –

From: Tim Tracey [mailto:tjtracey@clsnet.org]
Sent: Wednesday, September 14, 2005 1:57 PM
To: Matt Schultz
Cc: Ethan P. Schulman; 'Steven H. Aden';
'Steve & Molly Aden'
Subject: CLS/Hastings – Following up

Matt:

I just wanted to confirm our phone conversation from earlier today about CLS accessing certain channels of communication at the law school and reserving a room for an event. Steve sent the email below about two weeks ago. The bonfire referenced in his email has now passed. However, CLS has a guest speaker

coming to campus on Friday, so the group's request remains essentially the same. The group would like to reserve a room on campus to hold the event in and to advertise the event via email, chalkboard announcements, and SIC folders. The event is open to the general campus community.

You stated this afternoon that you would try to check in with Elise Traynum today or tomorrow and that if we didn't hear from you by tomorrow, we could follow up with Elise Traynum ourselves. I will wait until noon your time tomorrow to hear back from you. If I don't hear back by noon, I will plan to contact Elise directly.

Thanks for your help.

– Tim

Timothy J. Tracey
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Phone: (703) 642-1070 ext. 3501
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tjtracey@clsnet.org

Elise – Judy Chapman requested that we follow up on a request made by the organization formerly known as Hastings Christian Fellowship, now known as Christian Legal Society/Christian Fellowship, to have access to certain means of communicating to Hastings students regarding a bonfire the group is planning at ocean Beach. The group would like to promote the

event via campus e-mail, the online event calendar, flyers posted on campus, and chalkboards. Everyone would be welcome to come, of course.

Please respond at your earliest convenience, as I note that Ms. Chapman's response to Isaac Fong came much too late to assist the group with specific requests they had regarding events on 8/23 and 8/24/05. The string is provided below. Thank you.

Steven H. Aden, Esq.
Chief Litigation Counsel
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Supreme Court, U.S.
FILED
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No. 08-1371

In The
Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER
OF UNIVERSITY OF CALIFORNIA,
HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX
VOLUME II

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Petition For Writ Of Certiorari Filed May 5, 2009
Certiorari Granted December 7, 2009

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18a

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law, Plaintiff,	No. C 04 4484 JSW Action Filed: October 22, 2004 DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; SUPPORTING MEMORANDUM OF POINTS AND

v.

MARY KAY KANE, in her official capacity as Chancellor and Dean of the University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law; et al.,

Defendants.

AUTHORITIES AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed Oct. 21, 2005)

Date: December 2, 2005
Time: 9:00 a.m.
Dep't: Courtroom 2
Judge: Hon. Jeffery S. White

* * *

claims; "Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets").

B. Even If *Dale* Applied, CLS's "Expressive Association" Claim Fails Because CLS Has Not Shown That Admitting Interested Gay And Non-Christian Students Would Significantly Burden Its Message.

Even assuming that *Dale* applied in this very different context, CLS's claim still fails. Under *Dale*, the elements of an expressive association claim are

(1) whether the group engages in "expressive association" (530 U.S. at 648); (2) whether the governmental action at issue "affects *in a significant way* the group's ability to advocate public or private viewpoints" (*id.* (emphasis added)); and (3) whether the government interest at stake fails to justify the burden it imposes on the group's expressive association. *Id.* at 659. Failure to establish any one of these three elements is fatal to a group's claim. Here, Hastings does not dispute that CLS engages in "expressive association." *See* Mot. 10-11. However, CLS's heavy reliance on *Dale* is misplaced, and on the undisputed facts, it cannot establish either of the remaining elements.

The issue in *Dale* was whether the Boy Scouts had the right to prevent Dale, "an avowed homosexual and gay rights activist" (*Dale,* 530 U.S. at 644), from becoming an assistant scoutmaster. The Court found first that the Boy Scouts was engaged in expressive association, since its stated general mission was "'[t]o instill values in young people.'" *Id.* at 648-50. Next, it undertook to determine "whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints." *Id.* at 650. The Court found that the Boy Scouts viewed homosexual conduct as "not morally straight" (id. at 650-53), and that scoutmasters played an important role as role models and adult leaders who "inculcate [youth members] with the Boy Scouts' values – both expressly and by example." *Id.* at 649-50. Emphasizing

Dale's background as "the copresident of a gay and lesbian organization at college [who] remains a gay rights activist," the Court concluded that his "presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the

* * *

(citing *Lee v. City of Los Angeles,* 250 F.3d 668, 686 (9th Cir. 2001)). In response, CLS added a perfunctory allegation of discriminatory intent. FAC ¶10.4 ("Defendants intended to discriminate invidiously against religious student organizations, like HCF, and single out such groups for disparate treatment"); Mot. 20-21. Again, however, CLS cannot point to a shred of *evidence* to substantiate that allegation, and the undisputed record conclusively disproves it.[24] Thus, in addition to CLS, there are two other religious student organizations at Hastings, neither of which has asserted any right to discriminate on the basis of religion or sexual orientation or objected to complying with Hastings' Policies and Regulations, including the Policy on Nondiscrimination. JSOF ¶¶7, 16.

---

[24] CLS contends that evidence of intent "can be found in a statute's 'improper execution' just the same as it can be deduced from the circumstances surrounding a statute's passage" (Mot. 20), but it offers no such circumstances. To the contrary, it is undisputed that the Policy was originally enacted in 1990, and has been applied to all student groups. JSOF ¶¶16, 18.

CONCLUSION

For the foregoing reasons, the Court should grant the Hastings Defendants' motion for summary judgment, and should deny CLS's motion for summary judgment.

DATED: October 21, 2005.

Respectfully,

HOWARD RICE NEMEROVSKI
CANADY FALK & RABKIN
A Professional Corporation

By: /s/
ETHAN P. SCHULMAN

Attorneys for Hastings Defendants

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law,	No. C 04 4484 JSW Action Filed: October 22, 2004 DECLARATION OF ETHAN P. SCHULMAN IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff, v. **MARY KAY KANE, in her official capacity as Chancellor and Dean of the University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law; et al.,** Defendants.	(Filed Oct. 21, 2005) Date: December 2, 2005 Time: 9:00 a.m. Judge: Hon. Jeffery S. White

* * *

[Pleading Omitted And Select Exhibits Attached]

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law, Plaintiff, vs. MARY KAY KANE, in her official capacity as Chancellor and Dean of the University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law; et al., Defendants.	NO. C 04 4484 JSW

DEPOSITION OF

JUDY HANSEN CHAPMAN

Wednesday, July 6, 2005

(Filed Oct. 21, 2005)

Reported by:
Thomas A. Libatique, CSR
Certification No. 1504

* * *

[35] A. Did you want me to answer?

MR. SCHULMAN: You can go ahead and answer.

A. It is possible.

MR. TRACEY: If you could mark this next document as Exhibit 12.

(Document(s) more particularly described in the index marked for ident. Exhibit 12.)

MR. TRACEY: Q. Judy, I have handed you what has been marked as for purposes of identification as Exhibit 12. Do you recognize that?

MR. SCHULMAN: Do you have a copy for me, counsel?

MR. TRACEY: Q. Oh, I do. I'm sorry. I apologize. Let me make sure I got it. Let me pick back up on my question.

A. Sure.

Q. I'm handing you what has been marked for purposes of identification as Exhibit 12. Do you recognize that document?

A. It looks like Goals and Objectives for the LaRaza Student Group and it is dated 9/16/04 and it is an update of the one from 9, something, '03.

Q. More broadly outside of the first page is [36] this their bylaws for this past academic year?

A. Yes.

Q. Was LaRaza a registered student organization this past academic year?

A. Yes.

Q. So is it fair so say that sometime during this past academic year you reviewed these bylaws?

A. Yes.

Q. And in fact you approved these bylaws?

A. Yes.

Q. If you could flip to page 2 of the bylaws and at the top, I believe this is Article III, paragraph 2b –

A. I'm sorry, where is this?

Q. I'm just trying to identify the top of page 2. I believe it's part of Article III which deals with membership and it states, paragraph b, it states, "Policy membership encompasses students of Raza background who are studying at Hastings and who, 1, pay their dues on a timely basis. Timeliness shall be determined by the treasurer according to the financial situation of the individual. The treasurer shall submit a report to the secretary indicating who is in compliance with this provision, and 2, attend meetings regularly or [37] who actively participate in committee work. Attendance shall be taken by the secretary at all general meetings."

It is my understanding that membership in LaRaza is limited to students of Raza background, is that correct?

A. No.

Q. And why do you say no?

A. Associate membership consists of associate and policy standing. Associate members can be conferred upon the body from – upon non Raza, Raza non law students, non registered.

Q. Would you agree that policy membership is restricted to students of Raza background?

MR. SCHULMAN: Objection. Lack of foundation.

MR. TRACEY: Q. You can answer.

A. From reading this, yes.

Q. Paragraph 2 on page 2 at the top of the page there right under the portion we just read it says, "Voting rights are conferred upon policy members."

My understanding from reading this is that only persons of Raza background can vote in LaRaza.

[38] MR. SCHULMAN: Is that a question?

MR. TRACEY: Q. Is that correct?

MR. SCHULMAN: Objection. Lack of foundation. Objection as to form. Is the question whether

it is correct that that is your understanding from reading this?

MR. TRACEY: I apologize, I will reask the question.

MR. SCHULMAN: Okay.

A. That would be my understanding from reading this. In practice they don't differentiate.

MR. TRACEY: Q. Now, in reviewing the bylaws to determine whether they comply with the nondiscrimination Compliance Code, do you base that on a review of the bylaws themselves?

A. Primarily, yes.

Q. So in approving LaRaza as a registered student organization and certifying that they are in compliance with the Nondiscrimination Compliance Code, was that based on their bylaws?

A. In looking at the membership 1a, that Associate membership encompasses all students of Hastings college who are of Raza background and can be conferred upon non LaRaza and non law students [39] as an honorary gesture.

Q. So does it violate the – scratch that. Does it violate the Nondiscrimination Compliance Code to restrict voting rights to persons of a particular national origin?

MR. SCHULMAN: Objection. Calls for a legal conclusion.

A. I don't know.

MR. TRACEY: Q. But you would agree that these LaRaza bylaws restrict voting rights to persons of LaRaza background?

A. From reading this at this time, yes.

Q. And you certify these bylaws as in compliance with the Nondiscrimination Compliance Code?

A. That's correct.

Q. I'm hoping to direct your attention, I think it is Exhibit 5, Judy.

A. It is.

Q. If you could grab Exhibit 5 from your stack there. Hopefully they are in order, and that was previously marked as Exhibit 5. Do you recognize that document?

A. I believe this was the Christian Legal Society's, maybe four years ago – it is the old

* * *

[45] know, as much independence to the groups as we can.

Q. Judy, in looking at these bylaws –

A. Same ones?

Q. The same ones, Exhibit 5, if you will go to page 2 again and look under Article III, Section 1. It

says, "Membership in HCLS shall be open to all students, faculty, administration or staff at Hastings who willingly subscribe to the purposes and goals of HCLS as set forth in Article II."

Is it permissible for student organizations, for registered students organization to limit their membership to students who can support their group's purpose or mission?

A. The position as I understand it has been that they need to be open to all students so it would not be permissible, no.

Q. So student organizations have to be open even to students who may disagree with their purposes?

A. Yes.

Q. So would a – would the Democratic Caucus have to be open to republicans?

A. Yes.

Q. Would the Democratic Caucus have to allow [46] a republican to become a leader of their organization?

A. It is hypothetical. I don't know. It hasn't come up, but we would say membership in all organizations is open to all students.

Q. When you say – you said for membership. Does the policy of nondiscrimination apply to student organization leadership practices?

A. I have never dealt with that kind of delineation of the policy so I can't answer your question.

Q. When you review bylaws to see whether they comply with the Nondiscrimination Compliance Code do you look to see if their leadership practices comply with the nondiscrimination –

A. I have not looked at it from that point of view.

MR. TRACEY: If you can mark this as Exhibit 14.

(Document(s) more particularly described in the index marked for ident. Exhibit 14.)

A. Thank you.

MR. TRACEY: Q. Judy, I'm handing you what has been marked for purposes of identification as

* * *

EXHIBIT B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

- - oOo - -

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law,

Plaintiff,

vs.

MARY KAY KANE, in her official capacity as Chancellor and Dean of the University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law; et al.,

Defendants.

No. C 04 4484 JSW

DEPOSITION OF

DINA HADDAD

July 8, 2005

REPORTED BY: MONA M. RUSSO, CSR 8771

JOB #369162

* * *

[41] had been an adherent to one particular church or religion and another to another, that kind of thing?

A. Not like that, no.

Q. Did you learn whether any of the other regular active participants held what might be considered nonorthodox Christian beliefs?

A. They may have. I'm not sure.

Q. It didn't come up in discussion in a way that you could identify whether they did or they didn't?

A. I'm not sure what you mean by "nonorthodox Christian beliefs." Whether they believed that Jesus Christ is upheld, whether they held to the tenet of faith that we have become so familiar with, I'm sure that the majority believed those, that's central, or were interested in knowing or becoming familiar with such beliefs.

Q. And based on your own beliefs, you believed it was positive and beneficial to expose people who were interested in being exposed to those tenets?

A. Definitely.

Q. You believe that now, don't you?

A. I do.

Q. Were any of the regular active participants known to you or thought by you to be gay or lesbian students?

[42] A. Yes.

Q. How many of them?

A. One.

Q. Male or female?

A. Female.

Q. What was the basis for your belief that that participant in HCF's activities was lesbian?

A. The following year, her involvement with other groups and her attesting to her sexual orientation.

Q. In a public fashion?

A. Correct.

Q. The other groups with whom she became involved, did they include Outlaw?

A. It might be. I'm not 100 percent sure, but likely.

Q. So if I understand your testimony, you didn't learn until the following year that this participant in HCF's activities had that sexual orientation?

A. We had an idea.

Q. You had an idea? What was the basis for that idea?

A. Comments, things that were said.

Q. By her or by others?

A. By her.

Q. Did you view her participation as inconsistent [43] with the tenets and the faith that HCF was organized around?

A. No, not at all. It was a joy to have her.

Q. Did she have during that year 2003-4, to your knowledge, a regular partner? And by "partner," I mean a life partner who was of the same sex.

A. No, not that I know of.

Q. The comments that she made, did she make comments just about her personal orientation, or did she make any kind of comments about that orientation vis-a-vis the Christian faith?

A. That orientation vis-a-vis the Christian faith. When a discussion was brought up and we were speaking of HCF's position on the homosexual lifestyle, she had dissented and felt strongly that it wasn't – it might not have been Biblically centered.

Q. Was this at one of the Bible study sessions?

A. Yes.

Q. Was there a discussion of some portion of scripture or of text that people felt bore on this issue?

A. Yes. Actually, I'm not sure if – it wasn't – the discussion came out of another discussion. It wasn't the topic or the Bible study for that night. We had just fallen upon it for various reasons.

[44] Q. So it sounds like during the discussion there was a disagreement as to the scriptural basis or the Biblical basis for distinguishing – well, for – I'll use your terms – for a homosexual lifestyle; is that fair?

A. If I recall correctly, I believe the comments weren't so much based on scripture but how to deal with certain issues, how to deal with certain case law. It turned out to be a legal and religious discussion, and people were being very sensitive to how to address this topic, because it is a very sensitive topic, both in the Hastings community and in San Francisco in general.

Q. Did HCF as an organization have an articulated position on the issue?

A. Are you asking as HCF says this?

Q. In effect, yeah.

A. Each person, part of the group has a position and is able to say what they believe HCF stands for.

Q. Sure.

A. So there was never, you know, a banner that flew on a flag in the sky that said HCF says this.

Q. It was a sharing of views, right?

A. Correct.

Q. And the views can differ within the group?

A. Correct.

[45] Q. Did the student whom we've been talking about, the lesbian student who participated in HCF, did she take the position that homosexual activities were sinful or the opposite position?

A. I don't know any more about what her position was. That's all I know.

Q. Well, what you told me you know is that she dissented and felt strongly that criticism of what you call the homosexual lifestyle was not Biblically centered.

A. I believe if I can place – it's been a long time.

Q. I understand.

A. And it was an argument – not an argument. It was a discussion. Everyone was stating their different views.

Q. Do you feel like you learned things from her as you had these discussions?

A. Of course.

Q. Why don't we take a quick break. We've been going more than an hour or just about an hour.

MR. ADEN: Okay. That's great.

(Whereupon, a recess was taken.)

MR. SCHULMAN: Back on the record.

Q. Dina, we've been talking obviously about HCF

* * *

[124] Bible study would be a topic that was predesigned and a lesson that would be planned, and people would follow along with their Bibles and read the scripture along, and then we would lead it into discussion about the lesson or passage that we were studying. Afterwards we would take prayer requests, pray with one another, and spend some time in fellowship.

Q. A lot of this sounds very familiar to me from my own faith. Who would typically introduce the Bible topic through the lesson or passage, one of the leaders?

A. Correct.

Q. Did other attendees on occasion lead those discussions, or did they tend to be led mostly by the leaders?

A. The discussions were led by the leaders. We had worship led by attendees, prayer by various people who decided they felt they wanted to pray.

Q. One term that's not familiar to me in my faith is "fellowship."

What do you mean when you say "fellowship"?

A. To converse with one another, to enjoy conversation, share food.

Q. Socializing?

A. Socializing.

* * *

[127] A. No.

Q. Did it ever come to your attention that any gay or lesbian Hastings student was interested in joining the CLS chapter in any capacity last year?

A. No.

Q. Do you anticipate that being a likely event that might occur this year?

A. I don't know. We would more than love to have people come in.

Q. Was the fourth CLS member – I think you told me this, actually. It was a 2L, right?

A. Correct.

Q. Is that a person who you believe will be participating during this coming year?

A. Yes.

Q. As a leader?

A. No.

Q. I'm switching topics here.

Was there a registered student organization at Hastings last year entitled Students Raising Consciousness at Hastings that you know of?

A. I don't know.

Q. You never heard of it?

A. No.

Q. You mentioned some of the – or at least a

* * *

[153] was not affiliated with the national Christian Legal Society?

A. No.

Q. Okay. To your knowledge, during that decade, the 1990s, did the organization known as the Hastings Christian Legal Society exclude members on the basis of religion or sexual orientation?

A. Not that I know of.

Q. Have you done anything to ascertain what the answer to that is?

A. No, I haven't.

Q. So you don't know one way or the other?

A. That's correct.

Q. Do you know one way or the other whether any of the members or participants of the Hastings Christian Legal Society during the 1990s were either nonbelievers, adherents to other faiths, or gay or lesbian students at Hastings?

A. No, I do not know.

Q. Let me show you one more document, if I may. (Whereupon, Defendants' Exhibit 44 was marked for identification.)

MR. SCHULMAN: Q. You've just been handed a document that's been marked as Exhibit 44. It bears the heading "Hastings Registered Student Organizations

* * *

EXHIBIT C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

- - oOo - -

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law,

Plaintiff,

vs.

MARY KAY KANE, in her official capacity as Chancellor and Dean of the University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law; et al.,

Defendants.

No. C 04 4484 JSW

DEPOSITION OF

DAVID NAMMO

July 7, 2005

REPORTED BY: MONA M. RUSSO, CSR 8771

JOB #369161

* * *

[58] and we thought that he was right, and this led to a discussion, and then they eventually went to lunch.

Q. Are you aware of any other members that have been expelled in this manner, expelled because of their being non-Christian?

A. No.

Q. Are you aware of anyone being – trying to join CLS at any time and being told they can't join because they are non-Christian, besides the Washburn case?

A. No.

Q. What are the procedures set up right now that CLS has to determine whether people are adhering in their beliefs to the Statement of Faith?

A. There are no procedures set up.

Q. So is it safe to say that other than signing the Statement of Faith, there is no procedure to check to see whether people actually believe in the tenets set forth there?

A. Correct. We take them at their word.

Q. And there is no procedure or anything else to check to see that people are living in accordance with the tenets of the Statement of Faith?

A. No.

Q. Does that mean there are none or –

[59] A. There are no procedures. I'm sorry.

Q. Okay. So again, the only way to determine if someone is living in accordance with the Statement of Faith is that they sign it?

A. Yes.

Q. That's the only way?

A. If somebody calls me and says Joe Banatz is sleeping around on his wife, then we're going to call Joe Banatz. By the way, there's no member named Joe Banatz in the Christian Legal Society. He's John Smith.

Q. Okay. Have there ever been any such procedures previous to this?

A. Not that I know of. We're a ministry. People say, "Hey, we want to be a part of this." We have common beliefs. We want to glorify Christ in all that we do and practice the law, and we want to just be part of the fellowship and hold ourselves accountable for integrity and, you know, acknowledge a transcendent source of the law as given to Moses, you know, and conduct our lives and our practices

accordingly, and the Statement of Faith just lays out the basic Christian tenets, so this is a ministry.

Q. Now, are you aware of an organization called Hastings Christian Fellowship?

* * *

EXHIBIT E

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ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law, Plaintiff, *vs.* MARY KAY KANE, *et al.*, Defendants.	Civil Action No.: C 04 4484 JSW Action Filed: October 22, 2004 PLAINTIFF'S RESPONSES TO DEFENDANTS' FIRST SET OF INTERROGATORIES Judge: Hon. Jeffery S. White

* * *

sworn testimony either at a preliminary injunction hearing, in support of or in opposition to a motion for summary judgment, or at trial of this matter.

ANSWER:

In addition to the general objections noted above, Plaintiff objects to this interrogatory because it seeks information protected by the attorney work product doctrine. Subject to and without waiver of its objections, Plaintiff states that it has not yet determined which individuals, if any, it will call as witnesses at a preliminary injunction hearing, in support of or in opposition to a motion for summary judgment, or at trial of this matter.

INTERROGATORY NO. 2:

Identify, both by name and by office where applicable, each present or former member or officers of CLS-Hastings who is or was authorized to speak publicly on behalf of CLS-Hastings and describe the means by which such individuals have spoken for CLS-Hastings.

ANSWER:

In addition to the general objections noted above, Plaintiff objects to this interrogatory to the extent that it seeks information concerning each and every instance in which any member or officer of CLS-Hastings spoke on behalf of the chapter on the

ground that it is unduly burdensome and seeks information not within Plaintiff's knowledge, custody or control. Plaintiff further objects to this interrogatory because the phrase "authorized to speak publicly" is vague and ambiguous. Plaintiff also objects to this interrogatory because the term "member" is vague and ambiguous to the extent it is not clear whether Hastings intends the term to include only formal members of the national Christian Legal Society or whether it is also intended to include attendees of CLS-Hastings.

Plaintiff further objects to this interrogatory to the extent it seeks to compel Plaintiff to disclose the membership of CLS-Hastings in violation of its members' right to freedom of association. "Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs" creates "the likelihood of a substantial restraint upon the exercise by [Plaintiff's] members of their right to freedom of association." *National Ass'n for Advancement of Colored People v. Alabama*, 357 U.S. 449, 462 (1958); *see also Black Panther Party v. Smith*, 661 F.2d 1243, 1265-66 (D.C. Cir. 1981) (holding that a Plaintiff organization does not waive its members' rights of associational privacy by filing suit); *International Action Center v. United States of America*, 207 F.R.D. 1, 3 (D.D.C. 2002) (acknowledging that *Black Panther Party* remains good law and granting the plaintiff's motion for a protective order preventing discovery of, among other things, its lists of members, affiliates, or other associates with the organization). Accordingly,

Plaintiff will not provide the names and addresses for its present and former members.

Subject to and without waiver of its objections, Plaintiff states that CLS-Hastings does not "authorize" any member or officer to speak for it. Each member or officer is free to express his or her own views publicly or privately. However, all formal members and officers, through their words, actions, and lifestyle communicate a message to the Hastings community and the wider world about CLS-Hastings and the national Christian Legal Society. Dina Haddad and Isaac Fong are the current officers of CLS-Hastings.

INTERROGATORY NO. 3:

Identify each and every instance you contend CLS-Hastings has excluded a person from joining the organization or asked or forced any person to leave or resign from the organization, including, but not limited to, identifying the name of the person and describing in detail all facts surrounding the exclusion, request to leave or resignation.

ANSWER:

In addition to the general objections noted above, Plaintiff objects to this interrogatory to the extent that it seeks information concerning each and every instance CLS Hastings has excluded a person from joining the organization or asked or forced any person

to leave or resign from the organization that it is unduly burdensome and seeks information not within Plaintiff's knowledge, custody or control. Plaintiff further objects to this interrogatory because the terms "joining" and "resign" are vague and ambiguous. Subject to and without waiver of its general objections, Plaintiff states that it is aware of no such individual being excluded from or forced to resign membership in CLS-Hastings within the past year.

INTERROGATORY NO. 4:

* * *

EXHIBIT G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law, Plaintiff, vs. MARY KAY KANE, in her official capacity as Chancellor and Dean of the University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law; et al., Defendants.	NO. C 04 4484 JSW

DEPOSITION OF

MARY KAY KANE

Wednesday, July 6, 2005

Reported by:
Thomas A. Libatique, CSR
Certification No. 1504

* * *

[28] Q. You don't personally have a quarrel or a conflict or an issue with Christian Legal Society's viewpoint about human sexuality, do you?

A. I think they have a complete right to have whatever view that they want to on human sexuality and a right to express it.

Q. Sure, that's fair, but not to select members on the basis of that viewpoint and still be entitled to recognition?

A. Would you rephrase that?

Q. You said they have a right to possess and advocate that viewpoint?

A. Correct.

Q. I'm not trying to be argumentative, I'm trying to understand. Is it your position as dean that they do not have the right to be a registered student organization if they select members on the basis of that belief, on the basis of whether prospective members believe what the group believes about the nature of homosexuality?

A. It is my view that in order to be a registered student organization you have to allow all of our students to be members and full participants if they want to.

Somebody may not come to you initially with [29] all of your views but all of our organizations should be open to every member in the community.

Q. Sure.

A. But to the extent that they would not allow every member of our community, any member of our community who wanted to participate, then they should not be able to be a registered student organization.

Q. Now, would it surprise you if I told you that Christian Legal Society does not believe it discriminates on the basis of sexual orientation?

A. I don't know about surprise. I suppose it would.

Q. Are you aware of any definition of the term sexual orientation for purposes of policy 20.00 of the nondiscrimination policy?

A. No.

Q. You are not aware of any guidance either written or verbal from – strike that. The university, or rather the defendant's responses to the first set of interrogatories when we asked the question how the policy defines sexual orientation, Ms. Chapman said that it was – this is a paraphrase – defined in the usual and customary usage of the term. What is your understanding of

* * *

[48] Q. Obviously. Could you be a Mulsim [sic] and affirm and promote the purposes of the Christian Legal Society?

A. I don't know –

MR. SCHULMAN: Objection. Lack of foundation.

A. I don't know enough about the Muslim religion to be able to say.

MR. ADEN: Q. Could you be an atheist and affirm or promote the purposes of the Christian Legal Society?

MR. SCHULMAN: Lack of foundation. Calls for speculation.

MR. ADEN: Q. Sorry. Sorry, counsel. Did you understand my question?

A. Whether an atheist could decide to promote? It seems very inconsistent but I don't know what individuals could do.

Q. And then I will go to the second part of that question respecting sexual orientation at this time, why you believe it is unreasonable or arbitrary for Christian Legal Society to require that its members and leaders believe what the organization professes about human sexuality and conform their conduct accordingly?

[49] A. I don't think that it is arbitrary. If you want to informally come together, or outside of this college if you want to be in a group, that is your right to do so.

When the problem begins is becoming a registered student organization in which all of our students under our policies are to be included at their will in any and all activities without any discrimination, so it is arbitrary to take your independent beliefs, which you have a right to have and to foster, and within our educational community exclude others from participating if you want as a registered student organization.

Q. Is it fair to say it is the college's position that any student should be able to join or seek to lead an organization, any registered student organization?

A. Yes.

Q. Regardless of their religious beliefs, right?

A. Correct.

Q. Regardless of their political beliefs?

A. Correct.

Q. You have a Democratic Student Organization at Hastings, right?

* * *

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law,	No. C 04 4484 JSW Action Filed: October 22, 2004 DECLARATION OF JUDY HANSEN CHAPMAN IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff,

v.

MARY KAY KANE, in her official capacity as Chancellor and Dean of the University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law; et al.,

Defendants.

(Filed Oct. 21, 2005)

Date: December 2, 2005
Time: 9:00 a.m.
Judge: Hon. Jeffery S. White

I, Judy Hansen Chapman, declare as follows:

1. I am the Director of Student Services at the University of California at Hastings College of the Law ("Hastings").

2. I have been the Director of Student Services at Hastings since January of 1999. As Director, one of my responsibilities includes overseeing the registration and regulation of student organizations at Hastings.

3. I am familiar with the Policy on Nondiscrimination set forth in Section 20.00 of Hastings' Academic Regulations and Rules Applicable to Students ("Nondiscrimination Policy") and how it applies to student organizations wishing to register with Hastings. I am also familiar with the registration

system Hastings has in place to provide assistance to students wishing to create organizations among themselves for academic and/or social purposes. Such assistance includes financial support, a license to use Hastings' name and logos, and access to various law school facilities including classrooms, newsletters, etc.

4. Hastings provides assistance to students wishing to form organizations among themselves because student organizations provide Hastings students with opportunities to pursue academic and social interests outside of the classroom that further their education, contribute to developing leadership skills, and generally contribute to the Hastings community and experience.

5. Hastings interprets the Nondiscrimination Policy as requiring that student organizations wishing to register with Hastings allow any Hastings student to become a member and/or seek a leadership position in the organization. Hastings requires registered student organizations to be open to all students in this manner for several reasons. First, it is an efficient way of ensuring that student organizations are abiding by the Nondiscrimination Policy while not unduly interfering in groups' internal operations. Second, it is an efficient way of ensuring that the educational and social opportunities these organizations provide are available to all students. Third, it encourages tolerance, cooperation, and learning among students of different backgrounds and viewpoints.

6. Hastings requires student organizations that wish to register with Hastings to submit their bylaws to my office every year, which I then review in order to determine whether, among other things, they are open to all students in the manner described above. If a student organization's bylaws do not meet this requirement, I meet with the student groups' officers and determine whether they are operating the organization in conformity with Hastings' requirements and request that they change their bylaws so that they comply with the Nondiscrimination Policy.

7. Other than the Christian Legal Society during the 2004-2005 and 2005-2006 academic years, I am aware of no registered student organization at Hastings that has ever attempted to restrict its membership on the basis of a protected category listed in the Nondiscrimination Policy.

8. Simply because a student organization makes reference in its bylaws to interests or objectives of the organization does not violate the Nondiscrimination Policy. Student organizations' bylaws will sometimes make reference in their sections on membership to members' interests and state that any student who hold interests or goals similar to an organization are eligible to become members. I do not interpret such references to members' interests as an attempt to establish a test or criteria for membership in any way. Other than the Christian Legal Society during the 2004-2005 and 2005-2006 academic years, I am aware of no registered student organization at Hastings that has ever attempted to restrict its

membership based on either students' beliefs or agreement with the group's objectives. If I were to become aware that any group was doing so, I would inform the group that they were in violation of Hastings' Nondiscrimination Policy.

9. Students Raising Consciousness, Silenced Right, Motorcycle Riders Club, and Hastings ATLA are not registered student organizations at Hastings during the current 2005-06 academic year.

10. During the course of the instant litigation, it came to my attention over the summer of 2005 that the bylaws of the La Raza Student Group at Hastings used by the group during the 2004-2005 academic year could be interpreted as requiring that voting members of the group be of Hispanic descent. Interpreted in this manner, these bylaws would violate Hastings' requirement that student groups allow all Hastings students to become members. When I had previously reviewed La Raza's bylaws, I had interpreted these bylaws as allowing all students to join the organization and become voting members. When I spoke with La Raza's officers in the summer of 2005 concerning their membership requirements, they confirmed that this was the case and that any Hastings student may become a voting member of La Raza. La Raza registered during the 2005-2006 academic year with the understanding that it is in the process of revising these bylaws to, among other things, make it clear that all Hastings students may become voting members in the organization.

11. Attached as Exhibit A is a true and correct copy of a document titled "Statement Regarding La Raza Bylaws and Nondiscrimination Policy" filed by La Raza's Co-President as part of its registration for the current 2005-2006 academic year. The Statement was kept on file in Hastings' Office of Student Services as part of the office's ordinary course of business.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 20th day of October, 2005, at San Francisco, California.

/s/ Judy Hansen Chapman
JUDY HANSEN CHAPMAN

EXHIBIT A

Statement Regarding La Raza Bylaws and Nondiscrimination Policy

To Whom It May Concern:

La Raza Law Students is currently in the process of updating and amending its bylaws. We recently established a committee with the sole purpose of amending our bylaws so they conform to our goals and with the Hastings policies.

La Raza Law Students would like to let the Hastings staff, faculty and community to know that we at La Raza our committed to diversity in our

student population and faculty. Similarly La Raza is open for any Hastings students to join or even participate as a board member. La Raza Law Students will not allow any discrimination in any form. If you have any questions regarding our bylaws and non-discrimination policy, feel free to contact Daniel Luna at lunad@uchastings.edu.

Daniel Luna
JD Candidate 2007
La Raza Co-President
Lunad@uchastings.edu

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law, Plaintiff,	No. C 04 4484 JSW Action Filed: October 22, 2004 DECLARATION OF JESSICA DUNCAN IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Filed Oct. 21, 2005)

v.

MARY KAY KANE, in her official capacity as Chancellor and Dean of the University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law; et al.,

Defendants.

Date: December 2, 2005
Time: 9:00 a.m.
Judge:
Hon. Jeffrey S. White

I, Jessica Duncan, declare as follows:

1. I attended the University of California at Hastings, College of the Law ("Hastings") from the academic years of 2002-2003 through 2004-2005. I graduated from Hastings in the spring of 2005.

2. During the 2002-2002 [sic] and 2003-2004 academic years, I was a member of the Hastings Christian Fellowship ("HCF"). I attended a majority of events held by HCF during both years, and was the treasurer of HCF during the 2003-2004 academic year.

3. During these years, HCF accepted as a member any Hastings student who wished to attend meetings and/or events hosted by HCF. HCF did not have a formal or informal policy of any kind barring gay, lesbian, or bisexual persons from becoming members or officers. Nor did HCF condition membership

or officer positions on the basis of a person's religion or affirmation of a "Statement of Faith."

4. During the 2003-2004 academic year, HCF accepted as a member a student who was a lesbian. She attended numerous HCF events, including bible studies. She was always welcome as a member and fellow Christian.

5. HCF's officers changed the organization's name to Hastings Christian Legal Society ("HCLS") and adopted a different set of bylaws during the 2004-2005 academic year. They did not inform me or the other returning members of the group of these changes until a meeting at September 28, 2005. When they did, I and several other returning members strongly objected to these changes as unnecessary and contrary to the organization's purpose. When the organization's leaders refused to stop insisting on these changes, I and several other returning members left the group.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 19th day of October, 2005, at Irvine, California.

/s/ Jessica Duncan
JESSICA DUNCAN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law, Plaintiff, *vs.* MARY KAY KANE, *et al.*, Defendants.	Civil Action No.: C 04 4484 JSW Action Filed: October 22, 2004 SECOND DECLARATION OF STEVEN H. ADEN IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (Filed Nov. 7, 2005) Judge: Hon. Jeffrey S.White

SECOND DECLARATION OF STEVEN H. ADEN IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

* * *

[Pleading Omitted And Select Exhibits Attached]

EXHIBIT A

BYLAWS OF
CHRISTIAN LEGAL SOCIETY

An Illinois Not for Profit Corporation

(As amended through October 30, 2002)

ARTICLE 1 – PURPOSES

The purposes for which the corporation is organized are wholly religious and include the following:

To proclaim Jesus as Lord through all that we do in the field of law and other disciplines.

To provide a means of society, fellowship and nurture among Christian lawyers.

To encourage Christian lawyers to view law as ministry.

To clarify and promote the concept of the Christian lawyer and to help Christian lawyers integrate their faith with their professional lives.

To mobilize, at the national and local level, the resources needed to promote justice, religious liberty and reconciliation.

To encourage, disciple and aid Christian students in preparing for the legal profession.

To provide a forum for the discussion of problems relating to Christianity and the law.

To cooperate with bar associations and other organizations in asserting and maintaining high standards of legal ethics.

To encourage lawyers to furnish legal services to the poor and needy and grant special consideration to the legal needs of churches and other charitable organizations.

To engage in all other activities in which a religious corporation incorporated under the Illinois General Not For Profit Corporation Act, and exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1986, as they are from time to time amended, may lawfully engage.

ARTICLE 2 – STATEMENT OF FAITH

SECTION 1. STATEMENT. The corporation's statement of faith is as follows:

STATEMENT OF FAITH:

Trusting in Jesus Christ as my Savior, I believe in:

1. One God, eternally existent in three persons, Father, Son and Holy Spirit.

2. God the Father Almighty, Maker of heaven and earth.

3. The Deity of our Lord, Jesus Christ, God's only Son, conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.

4. The presence and power of the Holy Spirit in the work of regeneration.

5. The Bible as the inspired Word of God.

SECTION 2. ACKNOWLEDGMENT. All officers, directors, regular and student members and senior staff of the corporation shall acknowledge their acceptance of, and agreement with, the corporations [sic] statement of faith.

ARTICLE 3 – OFFICES

The corporation shall continuously maintain in the State of Illinois a registered office and a registered agent whose business office is identical with such registered office, and may have other offices within or without the state.

ARTICLE 4 – MEMBERS

SECTION 1. SELECTION. The members of the corporation shall consist of such persons as are selected in a manner determined by the board of directors from the applications of interested candidates.

SECTION 2. APPLICATIONS. Each candidate for membership shall submit to the corporation an application in a form approved by the board of directors of the corporation. However, no applicant shall be accepted as a member unless he or she affirmatively indicates in the application that he or she is trusting Jesus Christ as his or her personal Savior and accepts and agrees with the corporation's statement of faith.

SECTION 3. CLASSES OF MEMBERS. The members of the corporation shall be divided into

three classes: regular members, student members and associate members.

a. *Regular Members*. Regular members shall include all members who are members of the bar of any jurisdiction of the United States or who are law school graduates.

b. *Student Members*. Student members shall include all members who are enrolled in law schools or other higher educational institutions in the United States.

c. *Associate Members*. Associate members shall include all members of the corporation who are neither regular members nor student members.

SECTION 4. DUES. Members shall pay dues to the corporation in such amounts and in such manner as shall from time to time be determined by the board of directors.

SECTION 5. TERMINATION OF MEMBERSHIP. The membership of each member of the corporation shall terminate upon that member's death, resignation or expulsion. In addition, unless otherwise determined by the board of directors, each member's membership shall terminate because of his or her non-payment of dues on a date which is ninety days after the last date for which that member's dues were paid. Unless otherwise determined by the board of directors, members whose membership has terminated may renew their membership only by reapplication, except that members whose membership has

been terminated because of the non-payment of dues may reactivate their membership by the payment of current dues at any time within two years after the termination of their membership.

SECTION 6. SUSPENSION AND EXPULSION. Any member of the corporation may be suspended or expelled from membership with or without cause upon the affirmative vote of two-thirds (⅔) of the members of the board of directors present and voting at any meeting of the board of directors if, in the discretion of the board, as indicated by that vote, such suspension or expulsion would be in the best interests of the corporation.

SECTION 7. ANNUAL MEETING. An annual meeting of the members shall be held at such time as the board of directors may designate for the transaction of such business as may come before the meeting. If no such designation is made before the first day of November of any year, the annual meeting of members during that year shall be held on the second Friday of December. At each annual meeting of the members, the results of the election and appointment of directors shall be announced and the election and appointment will be deemed to take place at the time of that announcement.

SECTION 8. SPECIAL MEETINGS. Special meetings of the members may be called either by the president, the board of directors, or members having not less than one-fourth (¼) of all of the votes entitled

to be cast at such a meeting, for the purpose or purposes stated in the notice of the meeting.

SECTION 9. PLACE OF MEETINGS. The board of directors may designate any place as the place of meeting for any annual meeting or for any special meeting called by the board of directors. If no designation is made, or if a special meeting is otherwise called, the place of the meeting shall be the principal office of the corporation.

SECTION 10. NOTICE OF MEETINGS. Written notice stating the place, date and time of each meeting of the members and, in the case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered to each member of record entitled to vote at such meeting not less than five (5) nor more than sixty (60) days before the date of meeting, except in the case of a removal of one or more directors, when such notice shall be delivered to each member entitled to vote not less than twenty (20) nor more than sixty (60) days before the date of the meeting. Such notice shall be delivered either personally or by mail (by letter or in a publication of the corporation), by or at the direction of the president, or the secretary, or the officer or persons calling the meeting. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail, addressed to the member at his or her address as it appears on the records of the corporation, with postage thereon prepaid. When a meeting is adjourned to another time or place, notice need not be given of the adjourned meeting if the time and place

thereof are announced at the meeting at which the adjournment is taken.

SECTION 11. FIXING RECORD DATE. The date on which notice of a meeting of the members of the corporation is mailed (or otherwise delivered) shall be the record date for the determination of members entitled to vote, whether by mail or at that meeting or any adjournment thereof.

SECTION 12. INSPECTORS. At any meeting of members, the chairman of the meeting may, or upon the request of any members shall, appoint one or more persons as inspectors for such meeting. Such inspectors shall ascertain and report the number of votes represented at the meeting, based upon their determination of the validity and effect of proxies or mailed ballots; count all votes and report the results; and do such other acts as are proper to conduct the election and voting with impartiality and fairness to all the members. Each report of an inspector shall be in writing and signed by him or her or by a majority of them if there be more than one inspector acting at such meeting. If there is more than one inspector, the report of a majority shall be the report of the inspectors.

SECTION 13. VOTING. No members of the corporation shall have the right to vote except regular members who are in good standing and, except as required by other provisions of these bylaws, or the corporation's articles of incorporation, or law, such regular members shall have the right to vote only in

the election and removal of directors. Regular members in good standing are those regular members who are current in the payment of their dues and whose membership has not been terminated by death, resignation or otherwise. Each regular member entitled to vote shall have one vote.

SECTION 14. VOTING BY MAIL OR BY PROXY. Unless otherwise determined by the board of directors, the annual election of directors by the regular members of the corporation entitled to vote shall take place by mail. If it does, ballots shall be mailed (or otherwise delivered) to all regular members entitled to vote at least sixty (60) days before that annual meeting of the corporation and, to be valid, ballots must be completed, mailed (or otherwise delivered) to the corporation and received by a date specified in the ballot, which shall be not later than fourteen (14) days before the election. If the election of directors does not take place by mail, it shall take place at the annual meeting of members and each regular member entitled to vote at that meeting may vote in person or by proxy executed in writing by the member or his or her duly authorized attorney-in-fact. No proxy shall be valid after eleven (11) months from the date of its execution unless otherwise provided in the proxy.

SECTION 15. QUORUM AND MANNER OF ACTING. Thirty (30) members entitled to vote, present in person, voting by mail, or represented by proxy, shall constitute a quorum at any meeting of members, provided, however, that if less than thirty (30)

such members are present at such a meeting, a majority of such members present may adjourn the meeting without further notice. Except as otherwise provided in these bylaws, in the corporation's articles of incorporation, or by law, the vote of a majority of the votes entitled to be cast by the members present, voting by mail, or represented by proxy at a meeting at which a quorum is present, shall constitute the action of the members with respect to the matters voted upon.

ARTICLE 5 – BOARD OF DIRECTORS

SECTION 1. GENERAL POWERS. The property, ministry and other affairs of the corporation shall be managed by or under the direction of its board of directors.

SECTION 2. NUMBER AND QUALIFICATIONS. The board of directors of the corporation shall consist of twenty-four (24) members and, *ex officio*, the president, president-elect, secretary, treasurer and immediate past president of the corporation. If the executive director of the corporation is a regular member of the corporation, he or she shall also be an *ex officio* member of the board of directors. (The assumption by an elected director of an office which makes that director an *ex officio* member of the board shall be deemed to create a vacancy of the elected directorship previously held by that director, which vacancy shall be filled by the board of directors as provided in Section 5 of this Article V.) *Ex officio*

members of the board of directors shall have the same rights, privileges and responsibilities (including the right to vote) as other directors. All directors of the corporation must be regular members of the corporation. Directors may succeed themselves in office.

Directors are not eligible for reelection or reappointment to the Board for a period of one (1) year after they have completed nine (9) consecutive years of service on the Board unless they will serve *ex officio* as a result of their appointment as officers, except that directors as of May 1994 are eligible to serve for a period of six (6) years following the expiration of the terms of office they were serving at that time. A Director who is eligible for reelection or reappointment at the beginning of the term of office to which he or she is reelected or reappointed shall be entitled to complete the term of office.

SECTION 3. ELECTION AND APPOINTMENT. Six (6) members of the board of directors of the corporation shall be elected annually by the regular members of the corporation entitled to vote from a list of candidates selected by the board governance and nominating committee, provided, however, that members of the board of directors who have been elected by the regular members of the corporation or appointed to fill a vacancy in a seat the occupant of which is normally elected by the regular members of the corporation, may be renominated by the board governance and nominating committee and reelected by the board of directors and the number of members of the board of directors to be elected by the regular

members of the corporation shall be reduced accordingly. Two (2) members of the board of directors of the corporation shall be appointed annually by the board of directors from a list of candidates selected by the board governance and nominating committee. In addition to the qualifications of all other board members elected by the regular members of the corporation entitled to vote, the candidates to be appointed hereunder by the board of directors shall not have served on the board of directors of the corporation at any time within the two (2)-year period before their initial appointment pursuant to this Section 3.

SECTION 4. TENURE. Each director other than *ex officio* shall hold office until the third (3rd) annual meeting of members following his or her election or appointment and until his or her successor has been elected or appointed except that the director's term of office shall be terminated sooner upon the director's death, upon the director's resignation or removal from office, upon the termination of the director's regular membership in the corporation, or upon the director's failure to attend two (2) consecutive regular meetings of the board of directors. A director whose term of office is terminated by reason of his or her failure to attend meetings of the board shall be eligible to fill the vacancy created by his or her termination. The term of each *ex officio* member of the board shall terminate upon the termination of the office by virtue of which he or she is a member of the board of directors.

SECTION 5. VACANCIES. Any vacancy occurring in the board of directors and any directorship to be filled by reason of an increase in the number of directors may be filled by the board of directors. Any director appointed by the board of directors to fill a vacancy shall be appointed for the unexpired term of his or her predecessor in office.

SECTION 6. REGULAR MEETINGS. Regular meetings of the board of directors shall be held at such time and place as the board of directors shall, from time to time, determine, except that there shall be at least two meetings of the board during each of the corporation's fiscal years. One such meeting shall be designated by the board (and in the notice of the meeting) as the annual meeting of the board. At each regular meeting of the board of directors, the directors may consider all such business as may properly come before the meeting without prior notice of such business having been given.

SECTION 7. SPECIAL MEETINGS. Special meetings of the board of directors may be called by the president or the secretary of the corporation, and must be called by the secretary upon the request of one-third (1/3) of the entire board of directors. Such meetings shall be held at such places as are designated by the president.

SECTION 8. NOTICE. Notice of each regular meeting of the board of directors shall be given to all directors in writing at least thirty (30) days in advance of that meeting and notice of each special

meeting shall be given to all directors at least five (5) days in advance of that meeting. The notice of each such meeting shall include the date, place and time of the meeting. The designation of a regular meeting as the annual meeting of the board shall be included in the notice of that meeting. The determination of the board regarding the date, place and time of any regular meeting, and the designation of any such meeting as the board's annual meeting, as set forth in the minutes of the board, shall be sufficient notice if mailed to all board members at least thirty (30) days prior to that meeting.

SECTION 9. QUORUM. One-third (⅓) of the entire board of directors shall constitute a quorum, provided, however, that if less than one-third (⅓) of the entire board is present at a meeting, a majority of the directors present may adjourn the meeting at any time without further notice.

SECTION 10. MANNER OF ACTING. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by these bylaws, the corporation's articles of incorporation or applicable law. No director may act by proxy on any matter.

SECTION 11. PARTICIPATION BY TELEPHONE. Directors may participate in and act at any meeting of the board of directors through the use of a conference telephone or other communications equipment by means of which all persons participating in

the meeting can communicate with each other. Participation in such meeting shall constitute attendance and presence in person at the meeting of the person or persons so participating.

SECTION 12. INFORMAL ACTION BY DIRECTORS. The authority of the board of directors may be exercised without a meeting if a consent in writing, setting forth the action taken, is signed by all of the directors entitled to vote. The consent of each director shall be evidenced by a written approval which sets forth the action taken and bears that director's signature. All approvals evidencing the consent shall be delivered to the secretary to be filed in the corporate records. The action taken shall be effective when all the directors have approved the consent unless the consent specifies a different effective date. Any such consent signed by all the directors shall have the same effect as a unanimous vote.

SECTION 13. RESIGNATION AND REMOVAL OF DIRECTORS. A director may resign at any time by written notice to the board of directors, the president or the secretary of the corporation. A director may be removed by the members, with or without cause, by the affirmative vote of two-thirds (⅔) of the members present and voting at any regular or special meeting of the members if the notice of the meeting is delivered in accordance with Article IV, Section 10 of these bylaws to all members entitled to vote on removal of directors and states that the purpose of the meeting is to vote upon the removal of one or more directors named in the notice. Only the director

or directors named in the notice may be removed at that meeting.

SECTION 14. COMPENSATION. All directors shall serve without compensation for their services as members of the board of directors.

SECTION 15. DIRECTORS EMERITUS AND HONORARY DIRECTORS. The board of directors may at any time elect one or more former directors who are regular members of the corporation as directors emeritus, or spouses of former directors who are associate members of the corporation as honorary directors. A director emeritus or honorary director shall serve until removed by death, resignation, or majority vote of the board of directors; shall be entitled to participate but not vote at meetings of the board of directors; shall not be counted in determining whether or not a quorum exists for any meeting of the board of directors; may be a member of one or more standing committees of the corporation; shall be considered a member of the board of directors for the purpose of determining the composition of any committee of which he or she is a member; and may participate and vote at meetings of any committee of which he or she is a member.

ARTICLE 6 – COMMITTEES

SECTION 1. APPOINTMENT. The board of directors, by resolution adopted by a majority of the directors in office, may create one (1) or more committees and appoint directors or such other persons

as the board designates, to serve on the committee or committees. Each committee shall have two or more directors, a majority of its membership shall be directors, and all committee members shall serve at the pleasure of the board.

SECTION 2. AUTHORITY. To the extent specified by the board of directors or in these bylaws, each committee may exercise the authority of the board of directors; provided, however, that a committee may not: (1) adopt a plan for the distribution of the assets of the corporation, or for dissolution; (2) approve or recommend to members any act the Illinois General Not For Profit Corporation Act of 1986, as from time-to-time amended, requires to be approved by members; (3) fill vacancies on the board of directors or on any of its committees; (4) elect, appoint or remove any officer or director or member of any committee, or fix the compensation of any member of a committee; (5) adopt, amend, or repeal the bylaws or the articles of incorporation of the corporation; (6) adopt a plan of merger or adopt a plan of consolidation with another corporation, or authorize the sale, lease, exchange or mortgage of all or substantially all of the property or assets of the corporation; or (7) amend, alter, repeal or take action inconsistent with any resolution or action of the board of directors when the resolution or action of the board of directors provides by its terms that it shall not be amended, altered or repealed by action of a committee.

SECTION 3. PROCEDURES. Each committee may establish its own procedures for the conduct of

its business provided that those procedures are not inconsistent with the following:

a. *Meetings and Notice.* Subject to action by the board of directors, each committee by majority vote of its members shall determine the time and place of its meetings and the notice required therefore.

b. *Quorum.* Unless the appointment by the board of directors requires a greater number, a majority of any committee shall constitute a quorum, and a majority of committee members present and voting at a meeting at which a quorum is present is necessary for committee action.

c. *Unanimous Consent.* A committee may act by unanimous consent in writing without a meeting, provided, however, that the consent shall be evidenced by one or more written approvals, each of which sets forth the action taken and bears the signature of one or more committee members. All of the approvals evidencing the consent shall be delivered to the secretary of the corporation to be filed in the corporate records. The action taken shall be effective when all the committee members have approved the consent unless the consent specifies a different effective date.

d. *Telephone Meetings.* Committee members may participate in and act at any meeting of a committee through the use of a conference telephone or other communications equipment by means of which all persons participating in the meeting can

communicate with each other. Participation in such meeting shall constitute attendance and presence in person at the meeting of the person or persons so participating.

e. *Minutes.* Minutes of all meetings of the committee shall be prepared and provided to the secretary of the corporation for inclusion with the corporation's records.

SECTION 4. STANDING COMMITTEES. The standing committees of the board of directors shall be:

a. *Executive Committee.* The executive committee of the board of directors, serving at the pleasure of the board, shall consist of the president (who shall serve as its chairperson), president-elect, immediate past president, secretary, treasurer and executive director, who shall serve at the pleasure of the board. Subject to the limitations set forth in Section 2 of this Article 6, the executive committee shall have and exercise the full authority of the board of directors between meetings of the board.

b. *Board Governance and Nominating Committee.* The board governance and nominating committee shall consist of a chairperson and at least two (2) other directors of the corporation, all of whom shall be appointed by the board of directors and shall serve at the pleasure of the board. Each year the board governance and nominating committee shall nominate candidates from among the regular members of the corporation to fill each vacancy on the

board of directors which arises as a result of the expiration of the terms of office of the directors whose terms then expire. The list of nominated candidates eligible for election by the regular members of the corporation entitled to vote shall be sent or otherwise provided to all members of the corporation entitled to vote, prior to or concurrent with the ballots for the election of directors as provided in Article IV, Section 14. The list of nominated candidates eligible for appointment by the board of directors pursuant to Article V, Section 3 shall be sent to all directors of the corporation with the notice of the annual meeting of the board of directors. At least forty (40) days before each annual membership meeting, the board governance and nominating committee shall nominate candidates from among the regular members of the corporation to fill each vacancy on the board of directors which arises as a result of the expiration of the terms of office of the directors whose terms then expire, except that the board governance and nomination committee shall not be required to nominate candidates for the offices of executive director, assistant secretary and assistant treasurer and those officers need not be members of the corporation. The person nominated by the board governance and nominating committee to serve as officers may be, but need not be, directors of the corporation. The list of candidates nominated to serve as officers shall be sent to all directors of the corporation with the notice of the annual meeting of the board of directors.

In addition to the foregoing, the board governance and nominating committee shall be responsible for the orientation of new members of the corporation's board of directors and the training of the corporation's board of directors.

c. *Administration, Personnel and Finance Committee.* The administration, personnel and finance committee shall consist of a chairperson and at least two (2) other directors of the corporation, all of whom shall be appointed by the board of directors and shall serve at the pleasure of the board. This committee shall be responsible for overseeing the administrative, personnel and financial affairs of the corporation. The committee shall report and make recommendations with respect to such matters to the board of directors and executive committee. Unless the board appoints a separate audit committee, this committee (excluding any members of the committee who are employees or staff members of the corporation or who are related to employees or staff members of the corporation) shall serve as the audit committee.

d. *Membership Ministries Committee.* The membership ministries committee shall consist of at least three (3) persons, all of whom shall be appointed by the board of directors and shall serve at its pleasure. A majority of the membership of the committee, including the chairperson and at least one (1) other member, shall be directors of the corporation. Subject to the oversight and supervision of the executive committee, and in conjunction with the executive director, this committee shall be responsible for providing

guidance and direction to the membership ministries of the corporation between meetings of the board.

e. *Center for Law and Religious Freedom Committee.* The Center for Law and Religious Freedom committee shall consist of at least three (3) persons, all of whom shall be appointed by the board of directors and shall serve at its pleasure. A majority of the membership of the committee, including the chairperson and at least one (1) other member, shall be directors of the corporation. Subject to the oversight and supervision of the executive committee, and in conjunction with the executive director, this committee shall be responsible for providing guidance and direction to the corporation's Center for Law and Religious Freedom between meetings of the board.

f. *Public Ministries Committee.* The public ministries committee shall consist of at least three (3) persons, all of whom shall be appointed by the board of directors and shall serve at its pleasure. A majority of the membership of the committee, including the chairperson and at least one (1) other member, shall be directors of the corporation. This committee shall be responsible for overseeing the public ministries of the corporation (other than the activities of the Center for Law and Religious Freedom), including, but not limited to, the corporation's Christian conciliation and legal aid ministries. The committee shall report and make recommendations with respect to such matters to the board of directors and executive committee.

g. *Audit Committee.* The audit committee shall consist of at least three (3) persons, all of whom shall be appointed by the board of directors and shall serve at the pleasure of the board. A majority of the membership of the committee, including its chairperson, shall be directors of the corporation. No member of the audit committee shall be an employee or staff member of the corporation or related to any employee or staff member by blood or marriage. The committee shall: make recommendations to the board for the appointment of independent auditors; review, evaluate and (if applicable) oversee the implementation of, any recommendations made by the independent auditors about the corporation's internal accounting and management controls; review the corporation's annual financial statements with the independent auditors; assist the board in any responsibilities it might have with regard to financial accounting and reporting; advise the board with respect to any other financial or legal matters as the committee determines might be helpful to the board; and act as a liaison between the board and the corporation's independent auditors. Unless a separate audit committee is appointed by the board, the administration, personnel and finance committee (excluding any members of the committee who are employees or staff members of the corporation or who are related to employees or staff members of the corporation) shall serve as the audit committee.

h. *Development Committee.* The development committee shall consist of at least three (3)

persons, all of whom shall be appointed by the board of directors and shall serve at its pleasure. A majority of the membership of the committee, including the chairperson and at least one (1) other member, shall be directors of the corporation. This committee shall be responsible for overseeing the efforts of the corporation to raise funds through grants and contributions from the corporation's members, foundations and others. The committee shall report and make recommendations with respect to such matters to the board of directors and executive committee.

i. *Law Student Ministries Committee.* The law student ministries committee shall consist of at least three (3) persons, all of whom shall be appointed by the board of directors and shall serve at its pleasure. A majority of the membership of the committee, including the chairperson, shall be directors of the corporation. Subject to the oversight and supervision of the executive committee, and in conjunction with the executive director, this committee shall be responsible for providing guidance and direction to the law student ministries of the corporation between meetings of the board.

SECTION 5. EX OFFICIO MEMBER. The president of the corporation shall be an *ex officio* member of all standing committees of which he or she is not otherwise a designated member with the same rights (including the right to vote) as all other members of the committee.

SECTION 6. ADVISORY COMMITTEES. In addition to the committees of the board of directors which are the subject of Sections 1 through 5 of this Article VI, either the board of directors or the president may appoint advisory committees. Such committees may consist of any two (2) or more members of the corporation and may, but need not, include one (1) or more directors. Unless the board of directors or the president appoints a chairperson of an advisory committee, that committee may elect its own chairperson and, except insofar as they might be inconsistent with any rules or procedures established for the advisory committee by the board of directors or the president, each advisory committee may establish its own rules and procedures. Such committees shall act in an advisory capacity only and may not act on behalf of the corporation or bind it to any action but may make recommendations to the board of directors or the officers of the corporation with respect to such matters as are specified by the board.

ARTICLE 7 – OFFICERS

SECTION 1. NUMBER. The officers of the corporation shall be the president, the president-elect (who may also be referred to as the vice-president), the executive director, the treasurer, the secretary, and such assistant treasurers and secretaries as may be elected or appointed by the board of directors. Any two (2) or more offices may be held by the same person except the offices of president, president-elect and secretary.

SECTION 2. ELECTION. The officers of the corporation shall be elected at such annual meetings of the directors of the corporation as are necessary to fill vacancies as they arise as a result of the expiration of officers' terms of office, except that the office of president shall be filled by the president-elect. Such officers (other than the president) shall be elected from among a list of regular members nominated by the nominating committee, as provided in Article VI, Section 4b of these bylaws, except that candidates for the offices of executive director, assistant secretary and assistant treasurer need not be nominated by the nominating committee and need not be members of the corporation.

SECTION 3. TENURE. Each officer shall hold the office to which he or she is elected until the second (2nd) annual meeting of directors following his or her election and until his or her successor has been elected and qualified, unless he or she sooner resigns or is removed from office, except that the term of office of the president, president-elect, secretary and treasurer shall terminate sooner upon the termination of their membership in the corporation. All officers may succeed themselves in office except the president and president-elect.

SECTION 4. THE PRESIDENT. The president shall preside at all meetings of the members and of the board of directors, shall be the chairperson of the executive committee, and shall be an ex-officio member of all other standing committees. Between meetings of the board of directors and the executive

committee, the executive director shall report to the president and the president shall be the representative of the board in matters regarding the interpretation and implementation of policies established by the board.

SECTION 5. THE PRESIDENT-ELECT. The president-elect (who may also be referred to as the vice-president) shall assist the president in the discharge of his or her duties, as the president may direct, and shall perform such other duties as from time to time may be assigned to him or her by the president or by the board of directors. In the absence of the president, or in the event of the president's inability or refusal to act, the president-elect shall perform the duties of the president, and when so acting, shall have all of the powers of, and be subject to all of the restrictions upon, the president. The president-elect shall also perform such other duties as are appropriate to the office of president-elect or vice-president. Upon the termination of the president's term of office, upon its expiration or for any other reason, the president-elect shall become president of the corporation.

SECTION 6. THE EXECUTIVE DIRECTOR. The executive director shall be the chief executive officer of the corporation. Subject to the direction and control of the board of directors, and the president as the representative of that board, the executive director shall be in charge of the ministry and other activities and business of the corporation. He or she shall see that resolutions and directions of the board

of directors are carried into effect except in those instances in which that responsibility is specifically assigned to some other person by the board of directors. In general, the executive director shall discharge all duties incident to the office of the chief executive officer of the corporation and such other duties as may be prescribed by the board of directors from time to time. He or she shall be responsible for the administration, programs and funding of the corporation, including the spiritual leadership of the corporation and its staff; recruiting and training of staff members; planning, interpreting, implementing and evaluating programs; supervising all of the corporation's publications; raising the entire funding needed for the operations, programs and special needs of the corporation; and reporting regularly to the board of directors and the president. He or she may vote all securities which the corporation is entitled to vote except as, and to the extent that, such authority is vested in a different officer or agent of the corporation by the board of directors.

SECTION 7. THE TREASURER. The treasurer shall be the principal financial officer of the corporation. He or she shall review the receipt and disbursement of all moneys due to or belonging to the corporation and shall keep or cause to be kept regular and correct accounts. He or she shall assure that a financial report is submitted at each regular meeting of the board of directors and shall perform such other duties as are assigned to him or her by the board of directors or as are appropriate to the office.

SECTION 8. THE SECRETARY. The secretary shall record or cause to be recorded the minutes of all meetings of members and the board of directors and shall assure that all corporate minutes and other records are accurately and properly maintained. He or she shall also assure that all notices of meetings of members and the board of directors are given in accordance with these bylaws, or as required by law, and that a list of all members of the corporation is properly maintained. The secretary shall have the authority to certify the bylaws, resolutions of the members and board of directors and committees thereof, and other documents of the corporation as true and correct copies thereof, and shall perform all duties incident to the office of secretary and such other duties as from time to time may be assigned to him or her by the president or the board of directors.

SECTION 9. THE ASSISTANT TREASURERS AND ASSISTANT SECRETARIES. The assistant treasurers and assistant secretaries shall perform such duties as shall be assigned to them by the treasurer or the secretary, respectively, or by the executive director or the board of directors.

SECTION 10. REMOVAL. Any officer elected or appointed by the board of directors may be removed by the board whenever in its judgment the best interest of the corporation will be served thereby.

SECTION 11. VACANCIES. A vacancy in any office for any reason may be filled by the board of directors for the unexpired portion of the term.

ARTICLE 8 – CONTRACTS, LOANS, CHECKS AND DEPOSITS

SECTION 1. CONTRACTS. The board of directors may authorize any officer or officers, agent or agents, to enter into any contract or execute and deliver any instrument in the name of, and on behalf of, the corporation, and such authority may be general or confined to specific instances. When the execution of any contract or any other instrument has been authorized by the board of directors, or otherwise, without specification of the executing officer, the president or the president-elect or the executive director, either individually or with the secretary or any assistant secretary, may execute the same in the name of and on behalf of the corporation, and, if the corporation adopts a corporate seal, any such officer may affix that seal thereto.

SECTION 2. CHECKS, DRAFTS, ETC. All checks, drafts or other orders for the payment of money, and all notes or other evidences of indebtedness issued in the name of the corporation, shall be signed by such officer or officers or agent or agents of the corporation, and in such manner, as shall from time to time be determined by resolution of the board of directors.

SECTION 3. DEPOSITS. All funds of the corporation not otherwise employed shall be deposited from time to time to the credit of the corporation in such banks, trust companies or other depositories as the board of directors may select.

ARTICLE 9 – LIMITATIONS ON DEBT, LOANS, CORPORATE ACTIVITIES, USE OF INCOME AND ASSETS, AND DISSOLUTION

SECTION 1. DEBT. No debt shall be incurred by the corporation beyond the accounts payable incurred by it as a result of its ordinary operating expenses, and no evidence of indebtedness shall be issued in the name of the corporation, unless authorized by the board of directors.

SECTION 2. LOANS TO OFFICERS AND DIRECTORS. Except as provided in Article X, Section 5 of these bylaws, no loan shall be made by the corporation to a director or officer except that a loan may be made to a director or officer who is employed by the corporation if authorized by a majority of the non-employed directors and either: (a) the purpose of such loan is to provide financing for the principal residence of the employed director or officer upon receipt of adequate collateral consisting of marketable real estate or securities readily capable of valuation; or (b) the loan is otherwise in furtherance of the purposes of the corporation and in the ordinary course of its affairs.

SECTION 3. ACTIVITIES. The corporation is organized exclusively for religious purposes within the meaning of section 501(c)(3) of the Internal Revenue Code. Notwithstanding any other provisions of these bylaws, the corporation shall not carry on any activities not permitted to be carried on: (a) by a corporation exempt from federal income tax under

section 501(c)(3) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue Law); or (b) by a corporation, contributions to which are deductible under section 170(c)(2) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue Law).

SECTION 4. INUREMENT OF INCOME. The corporation shall not have or issue shares of stock and no dividends shall be paid to its members, directors or officers. No part of the net income of the corporation shall inure to the benefit of, or be distributable to, its members, directors, officers or other private persons, provided, however, that, except as otherwise provided in these bylaws, the corporation may pay reasonable compensation to its members, officers and directors for services rendered, and the corporation may indemnify its officers, directors, employees and agents in accordance with Article X of these bylaws.

SECTION 5. LEGISLATIVE AND POLITICAL ACTIVITIES. No substantial part of the activities of the corporation shall involve the carrying on of propaganda or otherwise attempting to influence legislation (unless, and then only to the extent, permitted by Section 501(h) of the Internal Revenue Code), and the corporation shall not participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office.

SECTION 6. DISSOLUTION. In the event of the dissolution of the corporation, its assets not required for the payment of its liabilities and obligations and not held upon condition requiring return, transfer or conveyance by reason of the corporation's dissolution, shall be transferred or conveyed to one (1) or more corporations, societies, or organizations engaged in activities substantially similar to those of the corporation, pursuant to a plan of distribution adopted as provided in the Illinois General Not-For-Profit Corporation Act, provided, however, that no distribution of the assets of the corporation shall be made to any organization if at the time of distribution that organization is not an organization which has been determined by the Commissioner of the Internal Revenue to be exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue Law). Any such assets not so disposed of shall be disposed of by the Court of Common Pleas of the county in which the principal office of the corporation is then located, exclusively for such purposes or to such organization or organizations, as said court shall determine, which are organized and operated exclusively for religious purposes.

ARTICLE 10 – INDEMNIFICATION OF OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS

SECTION 1. GENERAL. The corporation shall indemnify any person who was or is a party, or is

threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that such person is or was a director, officer, employee or agent of the corporation, or who is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by such person in connection with such action, suit or proceeding if such person acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent, shall not, or itself, create a presumption that the person did not act in good faith and in a manner which he or she reasonably believed to be in, or not opposed to, the best interests of the corporation or, with respect to any criminal action or proceeding, that the person had reasonable cause to believe that his or her conduct was unlawful.

SECTION 2. ACTION BY OR IN THE NAME OF THE CORPORATION. The corporation shall indemnify any person who was or is a party, or is

threatened to be made a party, to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that such person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection with the defense or settlement of such action or suit, if he or she acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the corporation, provided that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of his or her duty to the corporation, unless, and only to the extent that, the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability, but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the court shall deem proper.

SECTION 3. EXPENSES. To the extent that a director, officer, employee or agent of the corporation has been successful, on the merits or otherwise, in the defense of any action, suit or proceeding referred to in sections 1 and 2, or in defense of any claim, issue or matter therein, such person shall be indemnified

against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith.

SECTION 4. DETERMINATION THAT INDEMNITY IS PROPER. Any indemnification under Sections 1 and 2 of this Article X (unless ordered by a court) shall be made by the corporation only as authorized in the specific case, upon a determination that indemnification of the director, officer, employee or agent is proper in the circumstances because he or she has met the applicable standard of conduct set forth in Sections 1 and 2. Such determination shall be made (a) by the board of directors by a majority vote of a quorum consisting of directors who were not parties to such action, suit or proceeding, or (b) if such a quorum is not obtainable, or even if obtainable, if a quorum of disinterested directors so directs, by independent legal counsel in a written opinion.

SECTION 5. ADVANCE OF EXPENSES. Expenses incurred in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding, as authorized by the board of directors in the specific case, upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount, unless it shall ultimately be determined that he or she is entitled to be indemnified by the corporation as authorized in this article.

SECTION 6. INDEMNIFICATION NOT EXCLUSIVE. The indemnification provided by this Article shall not be deemed exclusive of any other rights to which those seeking indemnification may be entitled under any bylaw, agreement, vote of members or disinterested directors, or otherwise, both as to action in his or her official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a director, officer, employee or agent, and shall inure to the benefit of the heirs, executors and administrators of such person.

SECTION 7. INSURANCE. The corporation may purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or who is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against any liability asserted against such person and incurred by such person in any such capacity, or arising out of his or her status as such, whether or not the corporation would have the power to indemnify such person against such liability under the provisions of this Article X.

SECTION 8. MERGER, ETC. References to "the corporation" shall include, in addition to the surviving corporation, any merging corporation (including any corporation having merged with a merging corporation) absorbed in a merger which, if its separate existence had continued, would have had the

power and authority to indemnify its directors, officers, employees or agents, so that any person who was a director, officer, employee or agent of such merging corporation, or was serving at the request of such merging corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, shall stand in the same position under the provisions of this Article with respect to the surviving corporation as such person would have with respect to such merging corporation if its separate existence had continued.

SECTION 9. EMPLOYEE BENEFIT PLANS. For purposes of this Article, references to "other enterprises" shall include employee benefit plans; references to "fines" shall include any excise taxes assessed on a person with respect to an employee benefit plan; and references to "serving at the request of the corporation" shall include any service as a director, officer, employee or agent of the corporation which imposes duties on, or involves services by such director, officer, employee, or agent with respect to an employee benefit plan, its participants, or beneficiaries. A person who acted in good faith and in a manner he or she reasonably believed to be in the best interests of the participants and beneficiaries of an employee benefit plan shall be deemed to have acted in a manner "not opposed to the best interests of the corporation" as referred to in this Article.

SECTION 10. INTERPRETATION. The indemnification provided by this Article X is intended to be, and shall be construed to be, as extensive as possible under Section 108.75 of the Illinois General Not For Profit Corporation Act of 1986, as from time-to-time amended.

ARTICLE 11 – AFFILIATED ORGANIZATIONS

The members of the corporation, together with other concerned Christians, may begin local affiliated public ministries to help the corporation implement its ministry at the local level. Except as otherwise determined by the board of directors, any such ministry shall be affiliated with the Corporation through an affiliation agreement and the affairs of that organization shall be conducted in accordance with an administrative manual published by the corporation, the terms of which shall be established by the board of directors. Unless otherwise determined by the board, the affiliation agreement, among other things, shall provide for representation of some of the corporation's local members on the board of directors or governing board of the affiliate, agreement with the corporation's statement of faith and a commitment to work with the corporation to advance religious freedom, Biblical justice and reconciliation.

ARTICLE 12 – LOCAL CHAPTERS

SECTION 1. FORMATION AND AFFILIATION. Any three (3) or more regular members of the

corporation residing in any locality may form an attorney chapter of members of the corporation in that locality for the holding of regular meetings of not less than three (3) annually and for carrying out the purposes of the corporation. The members of the corporation desiring to form the local chapter shall apply for affiliation of that chapter by filing with the corporation an application containing the names and addresses of the members desiring to form the chapter and the secretary and each other officer of the chapter designated by them, all rules to be adopted by the chapter and such other information as is requested by the corporation. Affiliation of the attorney chapter shall take place upon the approval of its application by the corporation and its delivery to the corporation of an undertaking in a form designated by the corporation governing the chapter's use of the service marks "Christian Legal Society," "CLS" and such other marks as are owned by the corporation. In order to maintain its status as an affiliated chapter, the chapter membership at all times must include at least three (3) regular members of the corporation and all officers must be regular members of the corporation. While it may charge event or activity participants a reasonable event or activity fee for a particular chapter event or activity (e.g. a dinner or a conference etc.) and ought to provide an event or activity fee discount for CLS members, an affiliated attorney chapter may never charge or receive any form of membership dues, except the CLS chapter dues-sharing revenues sent to it by CLS pursuant to the CLS dues-sharing program. While attendance at

chapter events or activities shall be open to all who are invited by attorney chapter members, all attorney chapter members must be CLS members.

SECTION 2. REPORTS. Promptly after each attorney chapter is affiliated, it shall notify the corporation of the names and addresses of its members and provide the corporation with its mailing list (including e-mail addresses). Annually thereafter it shall file with the corporation a report containing the names and addresses of its secretary, other officers and members, a summary of its meetings and activities during the previous year, its updated mailing list, and such other information as is requested by the corporation. At the same time it shall file with the corporation specimens of literature, notices and other items published by it which identify it as an attorney chapter of the corporation or which otherwise use the marks owned by the corporation.

SECTION 3. REVOCATION OF RECOGNITION. The affiliation and recognition of any CLS chapter may be revoked by the corporation at any time for any reason.

SECTION 4. FORMS AND PROCEDURES. The application of a CLS chapter for recognition, the undertaking regarding its use of the marks owned by the corporation and the annual report to be filed by the CLS chapter shall be in a form designated by the board of directors of the corporation. The recognition and revocation of recognition of CLS chapters shall be determined by the board of directors of the

corporation or such committee or person as is designated by it, in that board's, committee's or person's sole discretion.

ARTICLE 13 – STUDENT CHAPTERS

SECTION 1. FORMATION AND RECOGNITION. Any three (3) or more student members of the corporation who are regularly attending any law school or other institution for higher education may form a student chapter of the corporation at that institution for the holding of regular meetings of not less than four (4) during each school year and for carrying out the purposes of the corporation. The student members of the corporation desiring to form the student chapter shall apply for recognition of that chapter by filing with the corporation an application containing the names and addresses of the student members desiring to form the chapter and the secretary and each other officer of the chapter designated by them, all rules to be adopted by the chapter and such other information as is requested by the corporation. Recognition of the student chapter shall take place upon the approval of its application by the corporation and its delivery to the corporation of an undertaking in a form designated by the corporation governing the chapter's use of the service marks "Christian Legal Society," "CLS" and such other marks as are owned by the corporation. In order to maintain its status as a recognized student chapter, the chapter membership at all times must include at least three (3) student members of the corporation

and all officers must be student members of the corporation. Whenever feasible, each student chapter shall have a regular member of the corporation approved by the corporation as an advisor.

SECTION 2. REPORTS. Each student chapter shall submit to the corporation any reports requested by the corporation. At least annually, the chapter shall file with the corporation specimens of literature, notices and other items published by it which identify it as a student chapter of the corporation or which otherwise use the marks owned by the corporation.

SECTION 3. REVOCATION OF RECOGNITION. The recognition of any student chapter may be revoked by the corporation at any time for any reason.

SECTION 4. FORMS AND PROCEDURES. The application of a student chapter for recognition, the undertaking regarding its use of the marks owned by the corporation and any reports to be filed by the student chapter shall be in a form designated by the board of directors of the corporation. The recognition and revocation of recognition of student chapters shall be determined by the board of directors of the corporation or such committee or person as is designated by it, in that board's, committee's or person's sole discretion.

ARTICLE 14 – FISCAL YEAR

The fiscal year of the corporation shall begin on the first day of January in each year and end on the last day of December.

ARTICLE 15 – BOOKS AND RECORDS

The corporation shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of its members, board of directors and committees having any of the authority of the board of directors. It shall also keep, at its registered office or principal office, a record giving the names and addresses of its members entitled to vote. All books and records of the corporation may be inspected by any member, or his or her agent or attorney, for any proper purpose at any reasonable time.

ARTICLE 16 – RULES OF ORDER

Except insofar as they are not consistent with the corporation's articles of incorporation, or these bylaws, or applicable law, all meetings of the members and the board of directors of the corporation shall be governed by the parliamentary procedures of *Robert's Rules of Order*, as from time to time revised.

ARTICLE 17 – AMENDMENTS

These bylaws may be altered, amended or repealed, or new bylaws adopted, by the board of

directors, but only after written notice containing the substance of any alteration, amendment, repeal or new bylaw has been given to each director at least thirty (30) days prior to the meeting at which such action is to be taken.

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law, Plaintiff, vs. MARY KAY KANE, in her official capacity as Chancellor and Dean of the University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law; et al., Defendants.	NO. C 04 4484 JSW

DEPOSITION OF

JUDY HANSEN CHAPMAN

Wednesday, July 6, 2005

Reported by:
Thomas A. Libatique, CSR
Certification No. 1504

* * *

[23] Q. But you are not currently aware of any changes? Is that a no?

A. I'm sorry. No, I'm not.

Q. What is the purpose of the registration form?

A. To, in a concise one page, would be to have the name, the purpose, the officers of an organization each year, and then an indication about who the contact person would be which is put on the website and to know what they plan to do in regard to any fiscal arrangements.

Q. Are you aware of any student groups on campus – let me strike that. This past academic year, are you aware that there were any groups, student groups on campus that were not registered?

A. I'm not quite sure as to your question.

Q. Are there any student organizations – let me back up. My understanding is, it is possible for a group of students – I'm having trouble formulating my question. I apologize. Judy, is there such a thing as an unregistered student organization?

A. Unregistered student organization, I think CLS would have been first based on the letter that Elise sent.

* * *

EXHIBIT C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law, Plaintiff, vs. MARY KAY KANE, in her official capacity as Chancellor and Dean of the University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law, et al., Defendants.	No. C 04 4484 JSW

DEPOSITION OF
DINA HADDAD

July 8, 2005

REPORTED BY:
MONA M. RUSSO, CSR 8771 JOB #369162

* * *

[85] of CLS?

A. I did.

Q. What was – describe that to me. I take it that each of the organizations sets up a booth and hands out materials. Is that generally the nature of it?

A. Yes.

Q. So there were several dozen student organizations, and each had a booth and were handing out materials to new students?

A. Correct.

Q. Where was it held?

A. On campus in the Law Cafe.

Q. I see. So a lot of people milling around, collecting materials and that kind of thing?

A. Correct.

Q. It's an opportunity to publicize the organization's existence and attract new members?

A. Correct.

Q. I see. Okay. And it was after that faire that you went to meet with Ms. Chapman?

A. Yes.

Q. By the way, before we get there, did you – who else was at the CLS booth, if anybody, other than you?

A. Other students that are part of CLS.

[86] Q. Including Isaac Fong?

A. Yes.

Q. Including Julie Chan?

A. Yes.

Q. And other members?

A. Yes.

Q. How many about?

A. We had about ten in and out that day.

Q. What was your impression of how you did?

Did you attract a lot of interest, hand out a lot of materials, that kind of thing?

A. I wasn't there all day.

Q. Oh. It's an all-day thing?

A. Yes.

Q. Wow.

A. From the morning to the afternoon.

Q. So how long were you there?

A. I was there for the morning portion.

Q. And during the morning, did you sense a lot of interest on the part of first-year students in the organization?

A. I'm not sure what "a lot of interest" would generally mean. We were there, we were present, just like all the other groups. The same interest other groups were receiving we were.

* * *

EXHIBIT D

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW
California's First Law School

Home > Students > Organizations

Student Organizations

2005-2006 Student Organizations

All student organizations may be contacted via regular mail at University of California, Hastings College of the Law, 200 McAllister St., San Francisco, CA 94102

American Bar Association/Law Student Division (ABA/LSD)

Contact: Dalia Khalili, Daliak33@yahoo.com

Purpose: To benefit the professional and personal lives of Hastings students, as well as contribute positively to the community.

American Constitution Society – Hastings Chapter (ACS)

Contact: Max Pritt, prittm@uchastings.edu

Purpose: To revitalize and transform the legal debate from our classrooms to our courtrooms. We seek to counter the dominant vision of American law today, a narrow conservative vision that lacks appropriate regard for the ways in which the law affects people's lives. We seek to restore the fundamental principles of human dignity, individual rights and liberties, genuine equality, and access to justice to their rightful – and traditionally central – place in American law.

Asian/Pacific American Law Student Association (A/PALSA)

Contact: Sean Tamura-Sato, tamurasa@uchastings.edu

Purpose: To provide academic, professional, and peer support to Asian/Pacific Americans and other minority students at Hastings. We provide networking opportunities, bring issues affecting the Asian American community to the campus, and promote cultural awareness and diversity.

Associated Students of the University of California Hastings College of the Law (ASUCH)

Contact: Brian Wang, wangbr@uchastings.edu

Purpose: To be the elected student government of UC Hastings and be responsible for representing the interests of all students. ASUCH allocates funding to student organizations, votes on resolutions to reflect student concerns, communicates with administration, coordinates social events and community service opportunities, and works actively to shape the future of our school.

Association of Communications, Sports & Entertainment Law (ACSEL)

Contact: Nick Jones, jonesn@uchastings.edu

Purpose: To provide students with opportunities: to learn more about the practice of law in the sports and/or entertainment industries; to make professional connections within these fields; to exchange ideas with other students who share similar interests and goals; and to enjoy the camaraderie that comes along with all this.

Association of Students for Kids (ASK)

Contact: shenhavd@uchastings.edu

Purpose: To educate and inform the UC Hastings student body and surrounding legal community about career and volunteer copportunities [sic] available to law students and attorneys in the areas of juvenile justice,

education, and child welfare through sponsorship of informational speakers, panels & community service projects.

Black Law Students Association (BLSA)

Contact: Kofi Acquaah-Arhin, kofiaa@gmail.com
Andrew Houston, Ahouston1us@yahoo.com

Purpose: To articulate and promote the professional needs and goals of Black law students; to foster and encourage professional competence; and bring about change within the legal system in order to make it responsive to the needs of the Black community.

Clara Foltz Feminist Association (CFFA)

Contact: Ariel Sosna, clara.foltz@gmail.com

Purpose: To raise awareness of feminist issues on campus; bring women attorneys to campus to talk with students re: careers; celebrate Hastings alumnae at Annual Reception.

Employment and Labor Law Students Association (ELLSA)

Contact: Lisa Schapira, schapira@uchastings.edu

Purpose: To provide a platform for academic and peer support, community service, networking with local and regional employment and labor attorneys, and a forum for discussion of ideas in the employment and labor sector.

Environmental Law Society (ELS)

Contact: Brad Daniels, danielsb@uchastings.edu

Purpose: To create a forum for all students to be involved in a range of environmental activities; encourage environmental awareness and activism among UCH students; influence campus policies relating to environmental responsibility; support students in pursuing careers in environmental law and making contacts with professionals in the field; and establish and maintain working relationships with other law schools, and local and national environmental groups.

General Assistance Advocacy Project (GAAP)

Contact: Bill Hart, bhart@gaap.org
Katie Weeks, katie.weeks@gmail.com

Purpose: To help homeless and marginally housed residents of San Francisco by helping them obtain the public benefits to which they are entitled.

Hastings Association of Muslim Law Students (HAMLS)

Contact: Sajid Khan, khans@uchastings.edu

Purpose: To promote a greater understanding of Muslims, Islam, Islamic Law & Islamic Culture and to help members network with one another.

The Hastings Business Law Journal (HBLJ)

Contact: Shoshana Isaac, eic@hastingsblj.org

Purpose: To publish a business law journal twice annually; to provide a forum for students interested in business law to network, socialize and learn skills useful for their future careers.

Hastings Chinese Law & Culture Society (HCLCS)

Contact: Jamie Wong, wongjam@uchastings.edu

Purpose: To create awareness and further understanding of Chinese law and culture within the Hastings community.

Hastings Communications and Entertainment Law Journal (COMM/ENT)

Contact: Miriam Shapira, MSShapira@aol.com

Purpose: To publish a law journal on contemporary issues in communications and entertainment law. We publish three volumes each year.

Hastings Constitutional Law Quarterly (CLQ)

Contact: Nina Paul, Pauln@uchastings.edu

Purpose: To publish an innovative and scholarly review on current issues relating to Constitutional Law.

Hastings Democratic Caucus (HDC)

Contact: Christiana Dominguez, hastingsdems@yahoo.com

Purpose: To increase student awareness of policy and political issues in San Francisco, the state and the nation by active participation in the campus community and the larger political community in which it makes its home.

Hastings Federalist Society

Contract: Isaac Fong, isaacf@ocf.berkeley.edu

Purpose: To foster critical debate on the application of conservative and libertarian principles to the law.

Hastings Golf Association (HGA)

Contact: Brian Lee, brianjaelee@yahoo.com

Purpose: To bring together students who are interested in golf – from beginners to advanced.

Hastings to Haiti Partnership (HHP)

Contact: Angie Perone, angieperone@yahoo.com

Purpose: To strengthen the rule of law in Haiti by facilitating the exchange of democratic ideas and legal doctrines between Haiti and American law students.

Hastings Health Law Organization (HHLO)

Contact: Simone Katz, simone@katzandco.com

Purpose: To inform interested students of current trends in the field of Health Law & Policy;

to provide info regarding careers in these areas; to sponsor forums for the discussion of vital issues regarding Health Care Law and Policies.

Hastings Independent (hastings-i)

Contact: Matt Foley, foleym@uchastings.edu

Purpose: To facilitate open communication among members of the Hastings community through an online periodic news magazine. (www.hastings-I.org)

Hastings Intellectual Property Organization (HIPO)

Contact: Anne Bradley, bradleya@uchastings.edu

Purpose: To promote the study of intellectual property law among the students of UC Hastings and to provide students with information on careers in the field.

Hastings International & Comparative Law Review (HICLR)

Contact: Jessica Fourneret, fourneret@yahoo.com
Kristin Cornuelle, ksc8@pacbell.net
hiclr@uchastings.edu

Purpose: To edit, publish, and market an annual volume of original legal research of current interest and utility in the area of international and comparative law.

Hastings International & Comparative Law Society (HICLS)

Contact: Sacha Steenhoek, steenhoe@uchastings.edu

Purpose: To encourage student interest in international law and comparative law and to provide information about careers in international law.

Hastings Intramural Basketball League

Contact: Brian O'Toole, otooleb@uchastings.edu

Purpose: To create and administer an intramural basketball program for the enjoyment, social development, and physical health of the UC Hastings student community.

Hastings Jewish Law Students Association (HJLSA)

Contact: Shoshana Isaac, HJLSA@uchastings.edu

Purpose: To promote understanding of Jewish culture and its relation to the legal community, to provide a forum for Jewish students to meet and network and represent student interests to Hastings administration.

Hastings Koinonia

Contact: Kam Cheung, cheungk@uchastings.edu

Purpose: To study the Bible, evaluate the evidence in support of the Bible's reliability, and discuss the Christian worldview and its

logical consequences with the students of UC Hastings College of the Law.

Hastings Law and Policy Review

Contact: Corey Friedman, info@hlpr.org

Purpose: To improve popular understanding of issues of law and policy. We pursue this goal by providing unbiased, accurate legal analysis of pending California legislation to journalists.

Hastings Law Journal (HLJ)

Contact: Christopher Lockard, eic@hastingslawjournal.org

Purpose: To publish an annual volume of legal scholarship of the highest quality and of the greatest legal scholars, judges, and practitioners.

Hastings Legal Vines

Contact: David Albagli, albaglid@uchastings.edu

Purpose: To promote the appreciation and enjoyment of wine, and to present at least one seminar/symposium on the intersection of wine and law.

Hastings Motorcycle Riders Club (HMRC)

Contact: Selby Lighthill, slighthill@gmail.com

Purpose: To create a group for any Hastings student who owns or rides a motorcycle (or scooter). We organize weekend rides, track days, workshops, clinics, corners and

straightaways. We also advocate for your rights as a motorcyclist.

Hastings OUTLAW

Contact: Ming Wong, mingw65@yahoo.com

Purpose: To promote a positive atmosphere at Hastings for lesbians, gay men, bisexuals, transgendered, and queer students. The objective of the organization is to educate the community at large about the issues and concerns specific to lesbians, gay men, bisexuals, transgendered, and queer persons in order to alleviate and eradicate homophobia, transphobia, racism, sexism, and other affronts to the dignity of individual human beings.

Hastings OWLS

Contact: Robin McCall, legalrobin@yahoo.com

Purpose: To flock together to improve life at Hastings and to land the better job after Hastings. Far from the solitary creatures portrayed in legend, these owls also like to party.

Hastings for Race & Poverty Law

Contact: Eric Casher, cashere@uchastings.edu

Purpose: To support the Hastings Race and Poverty Law Journal in creating forums for legal discourse on issues of race, poverty, social justice, and the law in the form of educational panels and symposia.

Hastings Race & Poverty Law Journal (HRPLJ)

Contact: Eric Casher, hrplj@uchastings.edu

Purpose: To promote and inspire discourse in the legal community regarding issues of race, poverty, social justice and the law. This journal is committed to addressing disparities in the legal system. We will create an avenue for compelling dialogue on the subject of the growing marginalization of racial minorities and the economically disadvantaged.

Hastings Republicans

Contact: Robert Bartlett, bartlett@uchastings.edu

Purpose: To advance Republican Party principles with sensitivity to the issues and demands particular to law students. Hastings Republicans shall create a forum in which members may explore current social, legal, and public policy concerns.

Hastings Soccer Club

Contact: Louis Phan, phanl@uchastings.edu

Purpose: To give Hastings students an opportunity to play soccer in a friendly environment and to get some exercise as well.

Hastings West-Northwest Journal of Environmental Law and Policy

Contact: Chelsea Pailes Morse, pailesc@uchastings.edu

Purpose: To publish a regionally specific environmental law & policy journal dedicated to an integrated forum for dialogue on law, policy, and thought, celebrating the unique environment of the Northwest.

Hastings Women's Law Journal (HWLJ)

Contact: Eileen Bissen, Eileen_bissen@yahoo.com

Purpose: To promote scholarship while recognizing the unique concerns of communities who have traditionally been denied a voice. WLJ enhances the school's academic diversity and contributes to scholarly thought by publishing two issues a year and hosting an annual symposium. We strongly believe that the law is a solution for the ills of the human condition, not merely a means of gaining and preserving privilege and position.

Hui Ikepono: Hastings Hawaii Club

Contact: Mariel Kusano, kusanom@uchastings.edu
Kimi Kam, kamk@uchastings.edu
hui_ikepono@yahoo.com

Purpose: To promote education about Hawaiian culture, support students seeking employment opportunities in Hawaii, and create a social and professional network of students, faculty, alumni, and community

members that are interested in the Hawaiian islands.

Internet Technology & Venture Group

Contact: Heidi Shortz, shortz@mac.com

Purpose: To promote professional & social development for members. We intend to foster a greater understanding of the Internet, technology, and venture capital and its application of the law.

Korean American Law Students Association (KALSA)

Contact: Sue J. Kim, kimsuej@uchastings.edu
Austin Yang, yanga@uchastings.edu

Purpose: To provide a platform for academic and peer support, community service, networking with local and regional bar association and a celebration of cultural identity and heritage.

La Raza Law Students Association

Contact: Xochitl Marquez, marquezx@uchastings.edu
Daniel Luna, lunad@uchastings.edu

Purpose: To create a safe space where Latina/o students can forge a vibrant community by fostering political involvement, social awareness, cultural celebration, professional growth and academic excellence. Through these efforts, we also aim to bridge the resources and skills acquired as law students with the needs of the diverse Latina/o communities at large.

Law Students for Choice

Contact: Mags Aleks, aleksm@uchastings.edu

Purpose: To educate, organize, and support pro-choice law students to ensure tha [sic] a new generation of lawyers will be prepared to sucessfully [sic] defend and expand reproductive rights.

Middle Eastern Law Students Association (MELSA)

Contact: Roxanne Moin, rmoinuch@yahoo.com

Purpose: To provide a support system for all Middle Eastern students, to explore and celebrate the diverse cultures of the Middle East and to provide a forum for discussion of legal issues pertaining to the Middle East.

The National Lawyers Guild – Hastings (NLG – Hastings)

Contact: Evan Kuluk, kuluke@uchastings.edu

Purpose: To promote lawyering in accordance with the mission that human rights be held more valuable than property interests.

Native American Law Students Association (NALSA)

Contact: Vianey Ramirez, ramirezv©uchastings.edu
Ellen Lauck, laucke@uchastings.edu

Purpose: To recruit Native Americans, establish a supportive resource for members, participate in cultural and community activities and to explore and learn of legal issues

related to Native Americans and the indegenous [sic] around the world.

Parents at Hastings

Contact: Robin Krutzsch, krutzsch@uchastings.edu

Purpose: To provide a network of parental and academic support, set up weekend fun for parents and kids and pool resources to ease the pressure and any problems student parents may encounter.

Phi Alpha Delta International Law Fraternity, Temple Chapter (PAD)

Contact: Dria Fearn, fearna@uchastings.edu

Purpose: To provide service to the student, the school, the profession, and the community through programs that encourage academic and professional success, while also creating opportunities to develop interpersonal relationships.

Pilipino American Law Society

Contact: Rodney Pizarro, pizarror@uchastings.edu

Purpose: To address Pilipino-American community-specific legal and social issues, as well as to help recruit more Pilipino-Americans into the legal profession. We welcome all individuals, regardless of ethnic background, who are interested in Pilipino-American issues.

South Asian Law Students Association (SALSA)

Contact: Ashar Ahmed or Nina Paul, salsa@uchastings.edu

Purpose: To promote South Asian student issues within the Hastings community, the San Francisco Bay Area, and the U.S.

Third Year Class Council, Class of 2006

Contact: Amanda Bruss, Leigh8701@yahoo.com

Purpose: To represent the interests of the class of 2006, obtaining funding for and planning a third year class party and other commencement events.

UC Hastings Poker Club

Contact: Derek Deavenport, derekcheck@hotmail.com

Purpose: To provide a community for people to play poker.

UC Hastings "Tenderloins" Ultimate Club

Contact: Merlyn Goeschl, goeschlm@uchastings.edu

Purpose: To promote ultimate frisbee, the "spirit of the game" that it embodies, healthy competition, fun and camaraderie through co-ed participation in ultimate frisbee.

Vietnamese American Law Society (VALS)

Contact: Nancy Pham, phamn@uchastings.edu

Purpose: To celebrate Vietnamese culture and provide a social network for whomever is interested.

EXHIBIT E

ETHAN P. SCHULMAN (No. 112466)
MATTHEW R. SCHULTZ (No. 220641)
HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A Professional Corporation
Three Embarcadero Center, 7th Floor
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ELISE K. TRAYNUM (No. 127965)
General Counsel and Secretary to the Board
HASTINGS COLLEGE OF THE LAW
UNIVERSITY OF CALIFORNIA
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Attorneys for Defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, a/k/a HASTINGS CHRISTIAN FELLOWSHIP, a student organization at University of California, Hastings College of the Law, Plaintiff,	No. C 04 4484 JSW Action Filed: October 22, 2004 DEFENDANTS' RESPONSE TO PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS

v.

MARY KAY KANE, in her official capacity as chancellor and Dean of the University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law; *et al.*,

Defendants.

PROPOUNDING PARTY:	Plaintiff CHRISTIAN LEGAL SOCIETY
RESPONDING PARTY:	Defendants Mary Kay Kane, Chancellor and Dean of the University of California, Hastings College of the Law; et al.
SET NO.:	ONE

Defendants Mary Kay Kane, Chancellor and Dean of the University of California, Hastings College of the Law ("Hastings"); Judy Chapman, Director of Student Services for Hastings; and Maureen E. Corcoran, Eugene L. Freeland, Carin T. Fujisaki, John T. Knox, Jan Lewenhaupt, James E. Mahoney, Brian D. Monaghan, Bruce L. Simon, John K. Smith, and Tony West, Board of Directors of Hastings (collectively, "Defendants") hereby respond to Plaintiff's First Set of Requests for Production of

Documents in accordance with Federal Rule of Civil Procedure 34 and the Local Rules of the Northern District Court of California, as follows:

GENERAL OBJECTIONS

Defendants respond to each of Plaintiff's Requests for Production of Documents subject to the following General Objections, which each specific response below incorporates by reference.

1. Defendants have not completed the investigation, collection of information, and discovery relating to this litigation. The following responses are based on, and thus limited by, the information currently known and/or discovered in the course of preparing these responses. Accordingly, Defendants reserve the right to amend and/or supplement these responses upon further discovery and to produce at trial and in pretrial motions and proceedings, and/or to refer to, any additional evidence, facts, documents, or information – whether consistent or inconsistent with these responses – that they or their counsel have not yet discovered, or whose relevance they have not yet discerned.

2. Defendants object to the production of documents protected by the attorney-client privilege, the work product doctrine, the right of privacy, or any other privilege according to law. Defendants' inadvertent production of any privileged documents is not to be deemed a waiver of privilege, and Defendants expressly reserve the right to object to

the introduction or other use of any privileged document that may be inadvertently produced. Pursuant to this objection, Defendants will withhold privileged documents from production. Following completion of its production, Defendants will provide an appropriate log of documents withheld on the basis of privilege, with the exception of documents created after this action was filed that are withheld on the basis of the attorney work product or attorney-client privilege. Defendants reserve the right to redact from otherwise responsive and non-privileged documents portions thereof that contain information that is irrelevant, nonresponsive, or privileged.

3. Defendants object to the definition of the terms "relating to," "relates to," "referring to," and "refers to" as overbroad, vague, ambiguous and unduly burdensome and will interpret the terms to mean referencing, embodying, constituting, mentioning, discussing or describing.

4. As used herein, the phrases "relating to" or "related to" or "relates" and any variation thereof shall mean: referring to, commenting on, about, discussing, describing, mentioning, analyzing and/or constituting the given subject matter.

5. As used herein, an objection that a Request is "overbroad" shall include an objection that the Request is not relevant to the subject matter involved in the pending action, is not reasonably calculated to lead to the discovery of admissible evidence, and/or fails to describe the documents requested with reasonable particularity.

6. As used herein, an objection of "unduly burdensome" shall include an objection that the Request is so oppressive as to be unduly burdensome in the context of this litigation.

7. Defendants' responses and production are made expressly subject to, and without waiver of, any objections to the competency, relevancy, or admissibility as evidence of any of the documents referred to or produced hereby.

8. Defendants' production of any given document is not an admission or acknowledgement that such document is authentic or relevant to the subject matter of this action. Defendants' production of any document will not prejudice their right to contend at trial or at any other subsequent juncture in these proceedings that such document is irrelevant, immaterial or otherwise inadmissible. Production does not constitute a waiver of any claims or positions advanced by Defendants at any time during the pendency of these proceedings.

9. Defendants object to the Requests – including but not limited to the Definitions and Instructions set forth in the Request – to the extent they purport to impose requirements that are different from, or in addition to, those imposed by Federal Rule of Civil Procedure 34(a) or other applicable rule or statute. In responding to the Requests, Defendants will comply with their obligations under the Rules.

10. Defendants object to Plaintiff's repeated reference to itself as Hastings Christian Fellowship

or "HCF" in the Requests below on the grounds that Plaintiff and HCF are not the same entity. By responding the Plaintiff's Requests, Defendants are not admitting in any way that Defendants and HCF are the same entity.

Subject to and without waiving each of the foregoing General Objections, Defendants respond to the specific document Requests as follows:

RESPONSE TO DOCUMENTS REQUESTED TO BE PRODUCED

REQUEST NO. 1:

Each and every document identified in your responses to Plaintiffs First Set of Interrogatories to Defendants.

RESPONSE TO REQUEST NO. 1:

Defendants incorporate into this Response each of the General Objections set forth above, as if fully set forth herein. Subject to and without waiving any objections, Defendants will produce responsive non-privileged documents identified in Defendants' responses to Plaintiff's First Set of Interrogatories to Defendants.

REQUEST NO. 2:

Each and every document relied upon or consulted in preparing your responses to

* * *

EXHIBIT F

Bylaws of the Clara Foltz Feminist Association
Date: September 17, 1999

Article I Clara Foltz Feminist Association

This Hastings College of the Law organization shall hereby be known as the Clara Foltz Feminist Association.

Article II Purpose

See attached *Mission Statement*

Article III Membership

Any student, faculty, staff and alumna(e) of Hastings College of the Law may be a member of this organization. No membership fees or dues are required for membership.

Article V: Officers – Executive Board

The Executive Board provides guidance, direction and management of the organization. The Executive Board is comprised of six members who voluntarily commit themselves to play a leadership role for one academic year.

During the spring semester of each year, members will hold elections for four of the six Board Positions by majority vote at a meeting with a quorum in attendance. In the Fall, additional representation from the first year class will be solicited, and two

Board Members elected by majority vote at a meeting with a quorum in attendance.

The Executive Board shall delegate among itself the responsibilities entailed in leading the organization including, but not limited to:

> administrative: meeting organization and facilitation, recording and making available minutes of meetings, committee coordination, acting as a liaison with Hastings College of the Law;
>
> financial: budget formation and ASUCH budget requests, maintenance of organization's bank account(s), reporting financial status to the organization's membership and to appropriate officials at Hastings
>
> event coordination: determining sponsored events, working with co-sponsor organizations, soliciting speakers and/or other participants, facility reservation, publicity;
>
> fundraising: developing and implementing fundraising strategies.

Article VI Meetings

Meetings of the organization shall be held throughout the academic year at times and places designated and publicized by the Executive Board. Special meetings may be called by request from five members of the organization. A minimum of two days' notice shall be given to members before a meeting is convened.

Meetings shall be run by rules deemed appropriate and efficient for a particular meeting by the Executive Board or a majority of those in attendance. The format of any meeting of the organization must allow every member the opportunity to participate and be heard.

Article VII Amendment of Bylaws

These bylaws may be amended at any meeting of the organization by vote of the majority in attendance.

Mission Statement of the
Clara Foltz Feminist Association

In recognition of Clara Foltz, the Clara Foltz Feminist Association at Hastings College of the Law is committed to honoring the strengths and diversity of women and maintaining a feminist voice on campus.

The Clara Foltz Feminist Association strives to ensure equity and fairness for female students at Hastings.

Recognizing the challenges many women face as they enter a traditionally male dominated profession, the Clara Foltz Feminist Association commits to:

- raising feminist issues to the forefront within the Hastings community and the larger legal community;

- serving as a bridge in the development of mentoring relationships among women;

– supporting women of color, lesbian and bisexual women, disabled women, and immigrant women, acknowledging the unique challenges they often face within the legal community and elsewhere;

– serving as a liaison between students and administrators at Hastings for issues of concern to women;

– recognizing and celebrating the contributions of women to the law;

– addressing and contributing to feminist issues locally and nationally;

– and providing an informal network, social support, and encouragement for women in the law.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHRISTIAN LEAGUE [sic] SOCIETY OF UNIVERSITY OF CALIFORNIA,	)	CASE NO. C-04-4488 JSW
PLAINTIFF,	)	DECEMBER 2, 2005
VERSUS	)	SAN FRANCISCO, CALIFORNIA
MARY KAY KANE,	)	
DEFENDANT.	)	

BEFORE THE HONORABLE JEFFREY S. WHITE

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:	CHRISTIAN LEGAL SOCIETY
FOR PLAINTIFF:	BY: STEVEN H. ADEN, ESQ.. -AND- TIMOTHY J. TRACEY, ESQ.. 8001 BRADDOCK RD. STE 300 SPRINGFIELD, VIRGINIA 22151
FOR HASTINGS DEFENDANTS:	HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN BY: ETHAN R. SCHULMAN ESQ THREE EMBARCADERO CENTER 7TH FLOOR SAN FRANCISCO, CALIFORNIA 94111
FOR DEFENDANT HASTINGS OUTLAW:	HELLER EHRMAN LLP BY: CHRISTOPHER F. STOLL, ESQ.. 333 BUSH STREET SAN FRANCISCO, CA. 94104

FOR INTERVENOR HASTINGS: HELLER EHRMAN
BY: BRIAN D. MC DONALD, ESQ..
333 BUSH STREET
SAN FRANCISCO, CALIFORNIA 94104

REPORTED BY: JUANITA GONZALEZ, CSR NO. 3003

* * *

[8] ON THAT, THAT'S WHEN THE STATE HAS A RIGHT TO COME IN. NOT SAYING YOUR ORGANIZATION IS ANYTHING LIKE THESE FOLKS.

MR. ADEN: THAT'S CONDUCT.

THE COURT: IT'S THE "EXCLUDE" PART I'M CONCERNED ABOUT.

MR. ADEN: THAT IS CONDUCT. IT FALLS UNDER THE O'BRIEN TEST, BURNING A DRAFT CARD. THIS IS PURE, FIRST AMENDMENT SPEECH, AND THE DISTINCTION, AGAIN, I DRAW AGAIN WITH MR. SHULMAN'S [sic] REMARKS IS WE ARE TALKING ABOUT NON-INVIDIOUS DISCRIMINATION. YOU CAN CALL IT A BAD WORD, BUT IT IS NOT EVEN DISCRIMINATION WHEN A RELIGIOUS ORGANIZATION LIKE A CHRISTIAN CLUB SELECTS MEMBERS AND LEADERS WIIO FELLOW ADIIERENTS. IT'S FIRST CORE PROTECTED FIRST AMENDMENT SPEECH.

SECONDLY, YOUR HONOR, ON THAT POINT – AND I DON'T WANT TO DIGRESS TOO FAR OF YOUR QUESTIONS.

THE COURT: MY TRAIN OF THOUGHT GETS EASILY DERAILED AS WELL. MAYBE THAT'S WHY IT'S HARD TO SEPARATE THESE QUESTIONS OUT. BUT IT'S NOT A QUESTION OF SAYING – THE UNIVERSITY SAYING "YOU CAN'T EXCLUDE WHOEVER YOU WANT". THEY'RE SAYING, "IF YOU ARE GOING TO EXCLUDE SUCH PEOPLE BASED UPON THEIR STATUS AND YOU WANT TO USE OUR LIMITED PUBLIC FORUM, WE HAVE A RIGHT TO PLACE APPROPRIATE RESTRICTIONS ON YOU". SO I DON'T WANT TO GET YOU OFF TRACK AS FAR AS – BECAUSE IT'S MY QUESTION YOU'RE ANSWERING, BUT YOU ALMOST RAISE A SORT OF A STRAW ARGUMENT THAT SAYS THEY'RE SAYING TO YOU, "YOU CAN'T DO SUCH AND SUCH". [9] THEY'RE SAYING, "IF YOU DO SUCH AND SUCH, THEN WE HAVE A RIGHT TO DETERMINE AS A PUBLIC INSTITUTION WHETHER YOU CAN USE OUR FACILITIES AND BE ENDORSED BY US".

MR. ADEN: I SEE. MY POINT IS, BEFORE YOU COME TO HASTINGS' ACTIONS AGAINST CLS, I WOULD LIKE TO ESTABLISH THAT WHAT CLS IS DOING IS COURT PROTECTED FIRST AMENDMENT SPEECH; AND THE REASON I WANT TO ESTABLISH THAT IS BECAUSE IT'S A PREDICATE TO SEVERAL OF

OUR CLAIMS; A PREDICATE TO THE VIEWPOINT DISCRIMINATION CLAIM, IT'S A PREDICATE TO THE FREE EXERCISE CLAIM, IT'S A PREDICATE TO THE UNCONSTITUTIONAL CLAIM. WE HAVE TO ESTABLISH TO THE COURT'S SATISFACTION THAT WE ARE NOT INVIDIOUS DISCRIMINATORS FOR ARBITRARY OR CAPRICIOUS REASONS EXCLUDING STUDENTS SIMPLY BECAUSE WE DON'T LIKE THEM. THAT IS NOT THE CASE, AND I THINK YOUR HONOR APPRECIATES THAT FACT. WE ACTUALLY WELCOME ANY STUDENT, REGARDLESS OF THEIR RELIGIOUS BELIEFS OR SEXUAL ORIENTATION, TO MEETINGS, TO ACTIVITIES. THAT MIGHT BE CONSTITUTED A SMALL M MEMBER CATEGORY, LOTS OF CLUBS HAVE MEMBERS, BUT DON'T HAVE A FORMAL MEMBER ROLL. ON THE OTHER HAND, CLS HAS A FORMAL MEMBER ROLL MAINTAINED BY THE NATIONAL CLS, AND THE CRITERIA FOR ENTRANCE INTO THAT FORMAL MEMBER ROLL INCLUDE ADHERENCE TO A STATEMENT OF FAITH AND A SIGNATURE VERIFYING THAT, BECAUSE WE WANT TO REMAIN AN EXPRESSIVE ASSOCIATION WITH DISCREET, EVANGELICAL CHRISTIAN BELIEFS, AND THAT'S THE ONLY WAY TO DO IT.

THE COURT: ALL RIGHT.

* * *

[15] PROTECTED FIRST AMENDMENT SPEECH. I THINK IT WAS THE PHYSICIST – YOU HAVE A QUESTION?

THE COURT: I HAVE LOTS OF QUESTIONS, BUT –

MR. ADEN: I APPRECIATE YOUR TIME. GO ON TO NUMBER TWO, IF YOU WOULD LIKE, YOUR HONOR.

THE COURT: THIS QUESTION IS HOPEFULLY A LITTLE EASIER. WHETHER OR NOT YOU ANY OTHER GROUPS HAVE OR SEEK TO EXCLUDE MEMBERS OR OFFICERS BASED ON ANY CHARACTERISTICS COVERED BY THE NON-DISCRIMINATION POLICY. WHAT'S THE EVIDENCE IN THE RECORD?

MR. ADEN: IT'S IMPORTANT TO UNDERSTAND WHAT HASTINGS' POLICY IS. ACCORDING TO PARAGRAPH 18 OF THE STIPULATED FACTS, HASTINGS REQUIRES – AND I'LL QUOTE FROM PARAGRAPH 18 – "HASTINGS REQUIRES THAT REGISTERED STUDENT ORGANIZATIONS ALLOW ANY STUDENT TO PARTICIPATE, BECOME A MEMBER OR SEEK LEADERSHIP POSITIONS IN THE ORGANIZATION REGARDLESS OF THEIR STATUS OR BELIEFS. THUS, FOR EXAMPLE, THE HASTINGS DEMOCRATIC CAUCUS CANNOT BAR STUDENTS HOLDING REPUBLICAN POLITICAL BELIEFS FROM BECOMING MEMBERS OR

SEEKING LEADERSHIP POLICIES IN THE ORGANIZATION".

YOUR HONOR, HASTINGS DOES NOT HAVE A NON-DISCRIMINATION POLICY. IT HAS A NON-ASSOCIATION POLICY. IT HAS ABOLISHED EXPRESSIVE ASSOCIATION IN THE NAME OF DIVERSITY. IT HAS PROHIBITED EVERY REGISTERED STUDENT ORGANIZATION FROM MAKING MEMBER SELECTIONS BASED ON BELIEFS.

THE COURT: BUT PLEASE ANSWER MY QUESTION, WHICH IS: [16] IS THERE ANY GROUP ON CAMPUS THAT IS, ACCORDING TO THE RECORD OF THIS CASE, THAT SEEK TO EXCLUDE MEMBERS OR OFFICERS BASED ON THE CHARACTERISTICS COVERED BY THE NON-DISCRIMINATION POLICY?

MR. ADEN: NOT THAT I AM AWARE OF. BUT THERE ARE GROUPS THAT IN THEIR CORPORATE DOCUMENTS, SAME AS CLS' CONSTITUTION – AND THEIR CONSTITUTION HAS SAID THEY WILL MAKE SELECTIONS BASED ON BELIEF, CONTRARY TO HASTINGS POLICY. SO ON THE FACE OF THEIR CONSTITUTIONS THEY ARE IN VIOLATION OF THE POLICY. NOTHING HAS BEEN DONE. THEY HAVE BEEN GIVEN AN EXEMPTION. THOSE INCLUDE –

THE COURT: YOU MENTIONED LA RAZA.

MR. ADEN: THEY FIXED THAT ONE. I'M NOT TALKING ABOUT LA RAZA, BECAUSE THEY FIXED IT.

I'M TALKING ABOUT OUTLAW, WHICH RESERVES THE RIGHT TO SELECT LEADERS WHO AGREE WITH THE ORGANIZATION'S PURPOSES WHICH, OF COURSE, INCLUDE FIGHTING DISCRIMINATION AGAINST HOMOSEXUALS.

THE COURT: DOES IT EXCLUDE PEOPLE – FOR EXAMPLE, DOES IT SAY – AND THIS WOULD BE QUITE CLEAR – IS THERE ANY EVIDENCE THAT OUTLAW SAYS THAT IF A STRAIGHT PERSON, NON-HOMOSEXUAL PERSON, SOUGHT MEMBERSHIP OR OFFICER STATUS, THAT THEY WOULD BE EXCLUDED?

MR. ADEN: NO. I AM SURE OUTLAW – NOT SURE – BUT I WOULDN'T BE SURPRISED IF THEY HAVE STRAIGHT MEMBERS. MY POINT IS THAT'S NOT THE POLICY. THE POLICY IS THAT OUTLAW MAY NOT SELECT MEMBERS BASED ON WHAT THEY BELIEVE ABOUT HOMOSEXUALITY,

* * *

[27] OPEN ENDED ONE NON-ENDORSMENT [sic] OR THE ENDORSEMENT? IT SOUNDS LIKE THE UNIVERSITY IS ASKING THE COURT TO MAKE A DISTINCTION BETWEEN THE TWO, BECAUSE IT WAS AT FIRST – YOU WOULD AGREE, I ASSUME,

THAT IF THE UNIVERSITY SAID "WE INTERPRET OUR RULES TO SAY CLS YOU CAN'T EVEN – YOU'RE BARRED FROM CAMPUS COMPLETELY".

MR. SCHULMAN: LET ME DRAW A DISTINCTION HERE THAT'S NOT SHARPLY DRAWN IN THE BRIEFS; AND THAT IS A DISTINCTION AMONG THE DIFFERENT COMPONENTS OF THIS FORUM AND THAT COUNSEL HAS REFERRED TO. THERE ARE PHYSICAL COMPONENTS, USE OF CLASSROOM FACILITIES WHEN THEY'RE AVAILABLE FOR MEETINGS, USE OF LISTS, PRESENCE ON WEBSITES AND THE LIKE, TELE ACCESS TO NEWSLETTERS. THERE IS ALSO A FINANCIAL COMPONENT THAT COUNSEL REFERRED TO. THESE GROUPS ARE FUNDED BY MANDATORY STUDENT ACTIVITY FEES. THE POSITION THAT HASTINGS TOOK IN AN ATTEMPT TO BE ACCOMMODATING HERE IN THIS LITIGATION WAS TO SAY TO THIS GROUP, "LOOK, WE'RE NOT GOING TO FUND YOU, WE'RE NOT GOING TO PAY YOU DOLLARS THAT HAVE BEEN COLLECTED FROM STUDENTS IN THE FORM OF MANDATORY FEES TO SUBSIDIZE YOUR ACTIVITIES WHEN YOU ARE TELLING US THAT YOU RESERVE THE RIGHT TO DISCRIMINATE IN YOUR MEMBERSHIP POLICIES – " AND I CAN'T HELP BUT ADD, "WE'RE NOT GOING TO PUT OURSELVES IN A POSITION OF COLLECTING MANDATORY FEES FROM STUDENTS

AND THEN TELL GROUPS OF THOSE STUDENTS THEY'RE NOT EVEN ELIGIBLE TO JOIN THE GROUPS THAT WE'RE USING THOSE FEES TO FUND".

HOWEVER, AS I SAY, IN AN ATTEMPT TO BE ACCOMMODATING, HASTINGS DID SAY, "IF YOU WANT TO USE UNIVERSITY FACILITIES, IF [28] YOU WANT TO USE CLASSROOMS, THERE IS FLEXIBILITY IN THAT REGARD. HASTINGS ALLOWS COMMUNITY GROUPS TO SOME DEGREE TO USE ITS FACILITIES, SOMETIMES ON A PAY BASIS, I UNDERSTAND, IF THEY'RE AVAILABLE AFTER PRIORITY IS GIVEN TO REGISTERED ORGANIZATIONS". WE OFFERED THAT. THEY DECLINED IT. FOR THE LAST TWO YEARS THEY'VE BEEN MEETING EITHER OFF CAMPUS OR DORMITORIES OR APARTMENT OF THEIR MEMBERS. BUT IN PRACTICE, HASTINGS DID DRAW THAT LINE.

THE COURT: ANALYTICALLY, THEY'RE TWO DIFFERENT FORA. YOU SAY DON'T PUT TITLES ON IT, BUT WE HAVE TO LOOK AT THE PLACE AND ENVIRONMENT IN WHICH THE PLAINTIFF SEEKS TO PRACTICE ITS ACTIVITIES.

MR. SCHULMAN: I GUESS I WOULD SAY I HAVEN'T SPENT MUCH TIME – I GUESS I WOULD SAY ANALYTICALLY THEY ARE TWO DIFFERENT COMPONENTS OF THE SAME FORUM. THE FORUM IS THE PANOPLY, AS

COUNSEL PUT IT, OF BENEFITS THAT ARE MADE AVAILABLE TO REGISTERED STUDENT ORGANIZATIONS, INCLUDING FINANCIAL AND INCLUDING PHYSICAL FACILITIES AND COMMUNICATIONS CHANNELS. HASTINGS, IN AN EFFORT TO ACCOMMODATE THE ORGANIZATION HERE, SAID THAT IT WOULD EFFECTIVELY NOT INSIST AS TO ONE GROUP THAT THE GROUP COMPLY WITH THE POLICY, BUT THAT IT WOULD AS TO THE DOLLARS. BUT AS A PRACTICAL MATTER –

THE COURT: COULD HASTINGS UNDER THEORY SAY TO CLS, "YOUR PRESENCE – " I DON'T KNOW IF HASTINGS OWNS THE PROPERTY, BUT I ASSUME THEY DO. IF YOU CHOSE TO SAY, "WE WILL NOT ALLOW [29] GROUPS WHO IN THEIR PRACTICES – " AND WHATEVER – "VIOLATE OUR DISCRIMINATION". COULD HASTINGS DO THAT?

MR. SCHULMAN: YES. AND THE ONLY EXCEPTION I WILL GIVE THE COURT IS THE POLICIES AND REGULATIONS CONTAIN ONE PROVISION THAT SAYS TO THE EXTENT THAT THERE ARE PUBLIC AREAS ON CAMPUS THAT ARE OPEN TO THE PUBLIC GENERALLY, THAT ARE TRADITIONAL PUBLIC FORUM, ANYBODY CAN USE THEM – COMMUNITY GROUPS OR WHOEVER – AND THE REGULATIONS GO ON AND DESIGNATE WHAT THEY ARE. THEY ARE EFFECTIVELY THE STREET IN FRONTS OF THE LAW SCHOOL AND IMMEDIATE OUTSIDE

PERIMETER OF THE CAMPUS. BUT WITH THAT ONE EXCEPTION, WHERE THERE IS A TRADITIONAL PUBLIC FORUM, YES, HASTINGS COULD PROPERLY EXCLUDE A STUDENT ORGANIZATION FROM ALL OF THE BENEFITS THAT FLOW FROM PARTICIPATION IN THIS LIMITED PUBLIC FORUM WITHIN THE LAW SCHOOL.

THE COURT: I THINK WE'LL TAKE A BREAK.

MR. ADEN: YOUR HONOR, I APPRECIATE COUNSEL'S CANDOR, BECAUSE COUNSEL HAS, OF COURSE, JUST GRANTED ONE OF OUR POINTS, WHICH IS THAT CLS IS AN UNREGISTERED STUDENT ORGANIZATION ONLY EXISTS AT ALL AT HASTINGS BY THE GRACE OF HASTINGS COLLEGE OF LAW. IT COULD REFUSE ACCESS TO MEETING ROOMS. IT COULD REFUSE ACCESS TO THE FEW BULLETIN BOARDS. IT STILL GIVES IT. IT COULD TELL THEM, "YOU MAY NOT MAKE ANY ANNOUNCEMENTS ON THE BLACK BOARD WITH CHALK AND STIFEL [sic] THE VOICE COMPLETELY. WHY? BECAUSE IT DOESN'T LIKE CALS'S [sic] SPEECH AS EXEMPLIFIED BY ITS MEMBERSHIP SELECTION CRITERIA.

* * *

[35] EDUCATIONAL, SOCIAL, CULTURAL, RELIGIOUS, POLITICAL AND OTHER FORUMS? IS IT REASONABLE FOR AN EDUCATIONAL

INSTITUTION TO SAY AS A CONDITION TO FUNDING THOSE ORGANIZATIONS, GIVING THEM FACILITIES, GIVING THEM ACCESS TO CHANNELS OF COMMUNICATION – YOU HAVE TO OPEN YOUR DOORS TO ANY STUDENT WHO IS INTERESTED IN PARTICIPATING IN YOUR GROUP. THE ANSWER TO THAT QUESTION, WE SUBMIT, IS SELF-EVIDENT. THAT'S REALLY THE ONLY QUESTION HERE. AND CERTAINLY JUST AS REASONABLE FOR HASTINGS TO PLACE THAT CONDITION ON PARTICIPATION HERE AS IT WAS FOR THE STATE OF CONNECTICUT TO PLACE THE CONDITIONS THAT IT PLACED ON ACCESS TO THE CHARITABLE CAMPAIGN INVOLVING WYMAN.

MR. ADEN: IF, AS COUNSEL SAYS, THIS IS REALLY THE ONLY QUESTION HERE, I WOULD LIKE THE OPPORTUNITY TO SLIGHTLY REPHRASE THE QUESTION, IF I MAY. I THINK THE QUESTION IS WHETHER A PUBLIC UNIVERSITY CAN CONDITION ACCESS TO A QUINTESSENTIAL MARKETPLACE OF IDEAS DESIGNED FOR GROUP EXPRESSION OF A DIVERSE NUMBER OF VIEWPOINTS ON GIVING UP THE GROUPS'S RIGHT OF ASSOCIATION, ITS RIGHT TO SELECT MEMBERS ON THE BASIS OF SHARED BELIEFS. IS IT REASONABLE FOR A UNIVERSITY TO SAY TO THE REPUBLICANS, "YOU CAN BE A STUDENT GROUP AND ADVANCE REPUBLICAN CAUSES. YOU JUST CAN'T REQUIRE YOUR MEMBERS TO BE

REPUBLICANS". IS IT REASONABLE FOR IT TO SAY, "RELIGIOUS BELIEFS ARE WELCOME AS HASTINGS STIPULATED. THE FORUM INCLUDES DIVERSITY OF RELIGIOUS VIEWS, BUT YOU HAVE TO GIVE UP YOUR RIGHT TO DEFINE A MEMBERSHIP IN RELIGIOUS TERMS". I SUBMIT THAT IS PATENTLY [36] UNREASONABLE, IT'S CONSTITUTIONAL FOLLY TO CONDITION ACCESS TO A FORUM OF ANY KIND FOR GROUP EXPRESSION ON ADVOCATING THE GROUP'S RIGHT TO DEFINE ITSELF BY A SHARED BELIEF.

THE COURT: IF THE GOAL THAT THE PUBLIC INSTITUTION IS TRYING TO FOSTER IS THE GOAL TO DETER OR EVEN PRECLUDE DISCRIMINATION BASED UPON PROTECTIVE STATUS, ISN'T THAT AN APPROPRIATE EXERCISE OF STATE POWER?

MR. ADEN: IT CAN BE IN CERTAIN CONTEXTS. BUT, YOUR HONOR, THE NINTH CIRCUIT HAS BEEN PARTICULARLY SOLICITOUS OF INDIVIDUAL AND GROUP SPEECH, EVEN THE SPEECH THAT ALL OF US HATE, AS THE SUPREME COURT HAS REMINDED US, THE FIRST AMENDMENT PROTECTS THAT KIND OF SPEECH. THE CONCERN THAT I WOULD HAVE IS IN A PUBLIC FORUM THAT'S DEDICATED TO THE DISSEMINATION OF A WIDE VARIETY OF IDEAS, WHENEVER THE UNIVERSITY SAYS TO A PARTICULAR GROUP, "WE DON'T LIKE YOUR VIEWS – " WHETHER IT'S THE CHRISTIAN

LEGAL SOCIETY OR THE COLLEGE REPUBLICANS OR THE ARYAN NATIONS OR THE KK [sic] – "YOU AREN'T ALLOWED TO USE OUR FACILITIES," WE ALL RECOGNIZE THAT THAT IS UNCONSTITUTIONAL, I HOPE.

THE COURT: BUT THEY DON'T SAY THAT. THE POLICY DOESN'T SAY ANYBODY WHO BELIEVES THAT HOMOSEXUALITY IS BAD CAN'T COME ON THIS CAMPUS. THEY'RE SAYING ANYBODY WHO EXCLUDES GAYS OR PEOPLE WHO DON'T BELIEVE IN CHRISTIANITY, WHATEVER, THAT'S WHAT OUR POLICY COVERS, NOT THE EXPRESSION, THE HOLDING OF OR EXPRESSION OF THE BELIEF. IT'S MANIFESTING THAT BELIEF IN CERTAIN ACTS THAT THE UNIVERSITY BELIEVES ARE ILLEGAL AND [37] INAPPROPRIATE.

MR. ADEN: YES, YOUR HONOR, AND THERE IS NO CONSTITUTIONAL DISTINCTION BETWEEN SINGLING OUT AN INDIVIDUAL FOR THE INDIVIDUAL'S PROTECTED BELIEFS AND SINGLING A GROUP FOR THE GROUP'S PROTECTIVE BELIEFS. THE GROUPS DEFINES ITSELF, BY HOW IT COLLECTS ITS MEMBERS. WE HAVE CITED A NUMBER OF CASES THAT HAVE REPUDIATED THAT OF VIEW IN THE CONTEXT OF NON-DISCRIMINATION POLICIES. FOR EXAMPLE, THERE WAS A CASE IN THE FIFTH CIRCUIT AND I BELIEVE ANOTHER ONE IN THE NORTHERN DISTRICT OF OHIO INVOLVING AN ORGANIZATION EXCLUDED

FROM PUBLIC FORA BECAUSE THEY, OF COURSE, SEGREGATE CERTAIN OF THEIR SERVICES BY GENDER BECAUSE OF THEIR RELIGIOUS BELIEFS. THE COURT RULED FOR THE ISLAMIC ASSOCIATION, IN THIS CASE CLS' INDIVIDUAL RELIGIOUS VIEWS ARE APPARENTLY NOT BEING ATTACKED, BUT ITS RIGHT TO ORGANIZE, ITS RIGHTS TO DEFINE ITS PURPOSES AND ITS MISSION AROUND MEMBERSHIP CRITERIA IS. AND IT'S BECAUSE THE UNIVERSITY DISAGREES WITH CLS' POSITION ON HOMOSEXUALITY.

I'LL SAY THIS BRIEFLY. I KNOW TIME IS PRECIOUS. I WANT TO MAKE IT CRYSTAL CLEAR THAT CLS DOES NOT EXCLUDE ANYONE BASED ON SEXUAL ORIENTATION PER SE. WE HAVE A STATEMENT OF FAITH WHICH HAS BEEN DEFINED BY THE ORGANIZATION TO RENDER ANYONE INELIGIBLE WHO ENGAGES IN ANY FORM OF EXTRAMARITAL SEXUAL CONDUCT. IT WAS NEVER ABOUT HOMOSEXUALITY FOR US. HASTINGS MADE IT ABOUT HOMOSEXUALITY. HOMOSEXUALITY WAS MERELY ONE EXAMPLE OF DIFFERENT KINDS OF EXTRAMARITAL CONDUCT THAT WOULD [38] EXCLUDE SOMEONE FROM MEMBERSHIP.

THE COURT: BUT YOUR CHARTER EXCLUDES PEOPLE WHO DON'T BELIEVE IN THE TRINITY.

MR. ADEN: YES, YOUR HONOR.

THE COURT SO IS THAT PURELY – A MUSLIM AND A JEW WOULD BE EXCLUDED TO BE MEMBERS OR OFFICERS IN CLS, RIGHT?

MR. ADEN: YES. BUT I AM TALKING AT THIS PARTICULAR POINT ABOUT SOMETHING THAT MIGHT BE CONSTRUED TO BE PART OF THE SEXUAL ORIENTATION DEFINITION; AND THE REASON I'M MAKING THE DISTINCTION IS HASTINGS HAS SINGLED OUT HOMOSEXUAL CONDUCT. WE HAVEN'T. HASTINGS DIDN'T SAY TO US, "DOESN'T YOUR POLICY BANNING EXTRAMARITAL CONDUCT DISCRIMINATE ON THE BASIS OF MARITAL STATUS?" WHICH IT COULD, ARGUABLY, BECAUSE WE DO NOT CONTEMPLATE EXTRAMARITAL CONDUCT BETWEEN UNMARRIED PERSONS. NO; IT DIDN'T SAY THAT. IT SINGLED OUT HOMOSEXUAL CONDUCT FOR PROTECTION OVER HETEROSEXUAL SEXUAL CONDUCT. I SUBMIT IF THE UNIVERSITY WANTS TO SINGLE OUT HOMOSEXUAL CONDUCT FOR PROTECTION OVER HETEROSEXUAL SEXUAL CONDUCT, THAT IT VIOLATES THE RULE OF EQUAL PROTECTION. IT CAN'T PREFER ONE FORM OF SEXUAL CONDUCT OVER ANOTHER. THAT'S EXACTLY WHAT ITS [sic] DONE BY SINGLING OUT HOMOSEXUAL CONDUCT, SAYING IF SEXUAL ORIENTATION MEANS CONDUCT AND YOU WANT TO EXCLUDE PERSONS WHO ENGAGE IN

HOMOSEXUAL CONDUCT, THAT IS NOT A PROTECTED EXCLUSION.

THE COURT: YOU'RE BASICALLY UNDER THE CLS CHARTER HOMOSEXUALS ARE WELCOME AS LONG THEY DON'T ENGAGE IN ANY [39] HOMOSEXUAL ACTS AND THEY DISAVOW WHO THEY ARE?

MR. ADEN: THE TERM "SEXUAL ORIENTATION" – A PERSON WHO SAYS, "I HAVE AN AFFINITY TOWARD MEMBERS OF MY SAME GENDER, BUT I HAVE A RELIGIOUS BELIEF THAT THAT AFFINITY IS SINFUL AND I WISH TO DIALOG [sic] AND PRAY WITH OTHERS ABOUT HOW TO COME OUT OF THAT AFFINITY," THAT PERSON WOULD CERTAINLY BE WELCOME AS A MEMBER. THAT'S THE DISTINCTION WE DRAW. IT'S ABOUT RELIGIOUS BELIEFS REGARDING SEXUAL AFFINITY AND SEXUAL CONDUCT, NOT ABOUT SEXUAL ORIENTATION ITSELF.

MR. SCHULMAN: I CAN'T LEAVE UNCHALLENGED IN THE MOST CORDIAL AND PROFESSIONAL WAY, SOME OF THE STATEMENTS THAT COUNSEL JUST MADE. THIS CASE HAS ALWAYS BE [sic] ABOUT HOMOSEXUALITY. HASTINGS DIDN'T MAKE IT ABOUT HOMOSEXUALITY. FROM THE VERY FIRST PLEADING IN THIS CASE, THE COMPLAINT, CLS ALLEGED, QUOTE, "A PERON WHO ENGAGES IN HOMOSEXUAL CONDUCT WOULD NOT BE PERMITTED TO BECOME A MEMBER OR SERVE AS AN

OFFICER OF THE CHAPTER". PARAGRAPH 3.8 OF THE AMENDED COMPLAINT. THE IDENTICAL ALLEGATION WAS IN THE ORIGINAL COMPLAINT.

SECOND, WHY IS SEXUAL ORIENTATION SPECIFIED AS A PROHIBITED GROUND FOR DISCRIMINATION IN HASTINGS' POLICY ON NON-DISCRIMINATION? NOT BECAUSE THE BOARD OF DIRECTORS OF HASTINGS SOMEHOW DISCRIMINATES BETWEEN HOMOSEXUALS AND HETEROSEXUALS, BUT BECAUSE DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION IS PROHIBITED BY CALIFORNIA STATE LAW, BY LOCAL LAW IN THE CITY AND COUNTY OF SAN FRANCISCO.

* * *

[48] DISPARATE TREATMENT BETWEEN CLS AND OTHER GROUPS. THAT DISPARATE TREATMENT RAISES A PRESUMPTION OF DISCRIMINATORY INTENT UNDER WELL SET EQUAL PROTECTION CASE LAW AND THAT PRESUMPTION HAS NOT TO BEEN REBUTTED. THEY HAVE NOT PROVIDED ANY COMPELLING OR SUBSTANTIAL REASON FOR SINGLING OUT CLS AND ALLOWING OTHER GROUPS TO SELECT THEIR MEMBERS BASED ON POLITICAL BELIEFS AND OTHER BELIEFS, BUT NOT ALLOWING CLS TO SELECT BASED ON RELIGIOUS BELIEFS.

SECOND, RELIGION IS DIFFERENT, YOUR HONOR, AS A PROTECTED STATUS. WHITE INDIVIDUALS CAN CERTAINLY FURTHER THE PURPOSES OF THE BLACK LAW STUDENTS ASSOCIATION. STRAIGHT INDIVIDUALS CAN CERTAINLY FURTHER THE POSITION AND PURPOSES OF GAY AND LESBIAN STUDENT ORGANIZATIONS. BUT CLS BELIEVES, AND I THINK IT IT'S FAIRLY SELF-EVIDENT, THAT A MUSLIM CANNOT LEAD AND FURTHER THE PURPOSES OF A CHRISTIAN ORGANIZATION, BECAUSE A MUSLIM DOESN'T BELIEVE WHAT THAT ORGANIZATION BELIEVES. RELIGION IS THE ONLY STATUS THE CONSTITUTES BELIEF. FOR THAT REASON IT'S VERY, VERY DIFFERENT.

THE COURT: ALL RIGHT. WE ALREADY ADDRESS THE – I UNDERSTAND YOUR POSITION WITH RESPECT TO THIS ASSERTED DISCRIMINATORY APPLICATION OF THE POLICY, AND IT'S WELL ARGUED IN THE BRIEF.

MR. SCHULMAN: I WOULD SAY ONE THING BRIEFLY.

CLS' POSITION IS THAT NO AVOWED GAY OR LESBIAN STUDENT CAN ADVANCE IT'S [sic] PURPOSES. NO AVOWED NON-CHRISTIAN – OR PUT IT [49] THE OTHER WAY – NO STUDENT WHO DOES NOT AFFIRMATIVELY SHARE ITS RELIGIOUS TENENTS [sic] CAN ADVANCE ITS PURPOSES. AND THAT'S JUST CLEARLY NOT

TRUE IN TERMS OF THE RECORD AND IN TERMS OF REALITY. THE RECORD IS THAT THE PREDECESSOR STUDENT ORGANIZATIONS THAT COUNSEL REFERRED TO EARLIER, DIDN'T FEEL ANY NEED TO EXCLUDE STUDENTS ON THE BASIS OF EITHER RELIGION OR SEXUAL ORIENTATION. THE RECORD IS, THEY ADMITTED AT LEAST ONE STUDENT WHO IS KNOWN TO BE LESBIAN AND AT LEAST A COUPLE OF STUDENTS WHO HELD WHAT THEY CHARACTERIZED AS NON-ORTHODOX CHRISTIAN BELIEFS. I TOOK THE DEPOSITION OF ONE THE CLS CHAPTER OFFICERS WHO'S IN THE COURTROOM TODAY AND I ASKED HER ABOUT THE PARTICIPATION OF THE LESBIAN IN ONE OF THE PREDECESSOR ORGANIZATIONS, AND I SAID – YOU KNOW – SORT OF ON A HUMAN LEVEL – "DID HER PARTICIPATION AS A MEMBER IN THAT GROUP, DID YOU VIEW – I'M NOW QUOTING, BECAUSE I FOUND THE PAGE.

"DID YOU VIEW HER PARTICIPATION AS INCONSISTENT WITH THE TENANTS [sic] AND THE FAITH THAT HASTINGS CHRISTIAN FELLOWSHIP WAS ORGANIZED AROUND?

ANSWER: NO, NOT AT ALL. IT WAS A JOY TO HAVE HER."

AND I ASKED A FOLLOW-UP QUESTION, WHICH WAS:

"WELL, DID YOU FEEL LIKE YOU LEARNED SOMETHING FROM THE VIEWPOINTS THAT SHE EXPRESSED IN THE DISCUSSION?"

SHE TOLD ME THERE WERE DISCUSSIONS ABOUT WHETHER HCS' POSITION ON, QUOTE, "THE HOMOSEXUAL LIFE-STYLE".

SHE SAID, "IT WAS BIBLICALLY CENTERED, THE DIFFERENT [50] VIEWS WERE EXPRESSED WITHIN THE GROUP AS TO BOTH THE RELIGIOUS AND THE LEGAL ISSUES INVOLVED, INCLUDING BY THIS MEMBER," AND SHE SAID, "YES, OF COURSE I LEARNED THINGS FROM HER".

SO WHEN WE GET BACK TO THE LARGER QUESTION HERE, IS IT REASONABLE FOR AE [sic] PUBLIC EDUCATIONAL INSTITUTION TO REQUIRE AL [sic] INTERESTED STUDENTS, STUDENTS WHO MAY BRING DIFFERENT VIEWPOINTS, DIFFERENT LIFE EXPERIENCES, BUT WHO IN THE FIRST INSTANCE ARE DRAWN TO A PARTICULAR GOAL OR OBJECTIVE OF THE ORGANIZATION. OF COURSE, IT IS. AND IT IS THROUGH IN THE MOUTHS OF THE OFFICERS, THE VERY CHAPTER ITSELF.

MR. ADEN: VERY BRIEFLY, YOUR HONOR.

THAT STUDENT WHO WAS A PROFESSED LESBIAN WAS NOT A MEMBER WITHIN THE

MEANING OF THE PLAINTIFF'S CONSTITUTIONAL BY-LAWS. AND COUNSEL USES THE TERM IN THE WAY THAT THE PREDECESSOR ORGANIZATION MAY HAVE MEANING A PARTICIPANT. MOST CLUBS SAY, "WE HAVE PARTICIPANTS, THEY ARE MEMBERS." CLS SAYS, WE HAVE PARTICIPANTS, ATTENDEES; THEY'RE ALL WELCOME TO HEAR THE EXPRESSIVE MESSAGE OF CLS WHICH IS ENCAPSULATED IN A STATEMENT OF FAITH. IT WAS CERTAINLY A JOY TO HAVE THAT STUDENT. I MEAN THAT SINCERELY. IT'S A JOY TO HAVE ANYONE PRESENT, BECAUSE CHRISTIAN LEAGUE [sic] SOCIETY BELIEVES AND TEACHES ALL INDIVIDUAL [sic] ARE WORTHY OF EQUAL RESPECT REGARDLESS OF THEIR BELIEFS OR LIFE-STYLE, BECAUSE WE ARE ALL CREATED BY THE SAME HEAVENLY FATHER. BUT THE POINT IS NOT THAT THAT STUDENT CHANGED THE CONTENTS OF THE ORGANIZATION'S EXPRESSION BY HER PARTICIPATION. [51] SHE DID NOT. SHE SIMPLY EXCHANGED VIEWS. THEY LEARNED FROM EACH OTHER AS STUDENTS IN ANY CLUB SHOULD. THEY RESPECT ONE ANOTHER. BUT THE CONTENTS AND EXPRESSION OF CLS AT HASTINGS WAS NOT CHANGED IN ANY WAY NOR COULD IT HAVE BEEN.

THE COURT: ANYTHING FURTHER?

MR. SCHULMAN: YOUR HONOR, THE COURT HAS TAKEN A LOT OF TIME. A COUPLE

OF CONCLUDING REMARKS. I SUSPECT COUNSEL WILL, TOO.

THE COURT: BRIEFLY, BECAUSE I THINK WE COVERED EVERYTHING EXTENSIVELY.

I'LL START WITH PLAINTIFFS. CLOSING REMARKS UNDER THE GUIDELINES.

MR. ADEN: YES, YOUR HONOR.

THE COURT: I WANT TO SAY THAT THE CASE IS WELL BRIEFED ON BOTH SIDES AND I THINK THE BRIEFING IS EXCELLENT AND YOUR ORAL ARGUMENT IS HELPFUL. SO HELPFUL, I WILL DIRECT THE PARTIES TO ORDER A TRANSCRIPT, BECAUSE THINGS HAVE BEEN DISCUSSED WHICH I THINK ELUCIDATE ON THE PARTIES' POSITION AND I WOULD LIKE – THOUGH I TAKE GOOD NOTES – BE GOOD FOR BOTH IMPORTANT PARTIES TO ORDER THE TRANSCRIPT.

MR. ADEN: THANK YOU, YOUR HONOR. IF I COULD HAVE A COUPLE OF SECONDS TO SEE WHAT'S LEFT OF MY OUTLINE.

I THINK I SAID IT ALL. THANK YOU VERY MUCH.

MR. SCHULMAN: I'LL TRY AND MAKE IT BRIEF. AS COUNSEL SAID EARLIER, IN SOME

WAYS THIS IS ONE OF THESE CASES WHERE HOW

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, a/k/a HASTINGS CHRISTIAN FELLOWSHIP,

Plaintiff,

v.

MARY KAY KANE, et al.,

Defendants. /

No. C 04-04484 JSW

ORDER DENYING PLAINTIFF'S MOTION TO AMEND OR ALTER JUDGMENT

(Filed May 19, 2006)

This matter comes before the Court upon consideration of the motion of plaintiff Christian Legal Society Chapter of University of California, Hastings College of the Law, a/k/a Hastings Christian Fellowship ("CLS") to alter or amend the judgment entered in this case based on the Court's order on the parties' cross-motions for summary judgment. Having considered the parties' pleadings, the record in this case, and relevant legal authority, the Court finds this matter suitable for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b).

CLS moves to amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). "A district court has considerable discretion when considering a motion to amend a judgment under Rule 59(e)." *Turner v.*

Burlington Northern Santa Fe Railroad, 338 F.3d 1058, 1063 (9th Cir. 2003). While "Rule 59(e) permits a district court to reconsider and amend a previous order, the rule offers an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (internal quotations omitted). CLS moves to alter or amend the judgment on the ground that such amendment is necessary to correct a manifest error of law or fact on which the judgment is based. *See id.* Specifically, CLS asks the Court to amend its order on the parties' cross-motions for summary judgment to delete the word "admittedly" from the sentence on the second page of its order, which reads:

> This case concerns whether a religious student organization may compel a public university law school to fund its activities and to allow the group to use the school's name and facilities even though the organization admittedly discriminates in the selection of its members and officers on the basis of religion and sexual orientation.

(Docket No. 124 at 2.)

CLS contends that it never admitted to discriminating on the basis of sexual orientation. However, CLS's original and amended complaint are replete with allegations that: (1) CLS seeks to discriminate in the selection of its members and officers on the basis of religion and sexual orientation; (2) CLS seeks an exemption to Hastings' Nondiscrimination Policy

requiring it not to discriminate on the basis of religion and sexual orientation; and (3) Hastings' refusal to grant an exemption and allow CLS to discriminate on the basis of religion and sexual orientation violates CLS's constitutional rights. (*See* Compl., ¶¶ 4.2, 4.9, 4.12, 5.2, 6.2, 7.2, 9.2, 10.2; Amended Compl., ¶¶ 4.2, 4.9, 4.12, 5.2, 6.2, 7.2, 9.2.)[1] These allegations are binding on CLS as judicial admissions. *See American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) ("Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who

---

[1] CLS made the following allegations in its complaint:

> 4.2. [CLS] maintained, consistent with a Biblically orthodox faith, that it would still consider religion and sexual orientation in the selection of its officers and members.
>
> . . .
>
> 4.9. [CLS] objects to the Policy on Nondiscrimination that requires HCF to open its membership and officer positions to all students regardless of religion and sexual orientation.
>
> . . .
>
> 4.12. By enacting and enforcing the Policy on Nondiscrimination forbidding [CLS] to discriminate on the basis of religion or sexual orientation, refusing to recognize [CLS]'s constitutional right to an exemption from said policy . . . Hastings has engaged in discrimination against [CLS]. . . .

CLS alleges the language quoted above from paragraph 4.12 or substantially similar language in paragraphs 5.2, 6.2, 7.2, 9.2, and 10.2 of its complaint as well. CLS continued to proffer the same allegations in its amended complaint.

made them. . . . A statement in a complaint . . . is a judicial admission.").

Moreover, on April 12, 2005, this Court issued an order denying in part and granting in part Defendants' motion to dismiss. In that order, the Court noted that CLS "informed Defendants that it would consider religion and sexual orientation in the selection of its officers and members" and that CLS "admitted to Defendants that it would not abide by the nondiscrimination policy and that it intended to exclude members and officers based on their religion and sexual orientation." (*See* Docket No. 31 at 2, 9.) CLS did not object to the Court's characterization of its allegations in that order.

Even if CLS could change its position and distance itself from its binding admissions at this late stage in the litigation by arguing that it only seeks to discriminate based on "homosexual conduct" rather than sexual orientation, as the Court noted in its order on the parties' cross motions for summary judgment, this is a distinction without a difference. (Docket No. 124 at 11 n.2 (citing *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) (rejecting attempt to distinguish statute discriminating against "homosexual conduct" from one discriminating on the basis of sexual orientation: "While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the State] sodomy law is targeted at more than conduct. It is instead directed toward gay

persons as a class."); *see also Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005) (finding "no appreciable difference between an individual . . . being persecuted for being a homosexual and being persecuted for engaging in homosexual acts").)

The Court thus concludes that CLS fails to demonstrate the Court made a "manifest error of . . . fact" in its order on the parties' cross-motions for summary judgment. *Turner*, 338 F.3d at 1063. Accordingly, the Court DENIES CLS's motion to alter or amend judgment.

IT IS SO ORDERED.

Dated: May 19, 2006 /s/ Jeffrey S. White
JEFFREY S. WHITE
UNITED STATES
DISTRICT JUDGE

PETITIONER'S BRIEF

No. 08-1371

In the Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, PETITIONER

v.

LEO P. MARTINEZ, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Constitution permits a public university law school to exclude a religious student organization from a forum for speech solely because the group requires its officers and voting members to share its core religious commitments.

PARTIES TO THE PROCEEDINGS

Petitioner is the Christian Legal Society Chapter at the University of California, Hastings College of the Law.

Respondents are Leo Martinez, Acting Chancellor and Dean of the University of California, Hastings College of the Law; Jacqueline Ortega, the Director of Student Services; and Donald Bradley, Tina Combs, Maureen Corcoran, Marci Dragun, Carin T. Fujusaki, Thomas Gede, Claes H. Lewenhaupt, James E. Mahoney, Brian D. Monaghan, and Bruce L. Simon, the Board of Directors of the University of California, Hastings College of the Law, in their official capacities.

Intervenor-Respondent is Hastings Outlaw, a student organization at the University of California, Hastings College of the Law.

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OPINIONS BELOW

The opinion of the Ninth Circuit is unreported and reprinted at Pet. App. 1a-3a. The opinion of the district court is unreported and reprinted at Pet. App. 4a-70a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND UNIVERSITY REGULATIONS

The text of the First and Fourteenth Amendments to the United States Constitution is set forth at Pet. App. 71a

The Excerpts of Policies and Regulations Applying to College Activities, Organizations and Students adopted by the Board of Directors, University of California, as modified by Hastings College of the Law, are set forth at Pet. App. 72a-98a. Specifically, the campus regulations governing registered campus organizations are at Pet. App. 82a-87a, and those governing facilities use are at Pet. App. 78a-81a. The Nondiscrimination Policy is at Pet. App. 88a.

INTRODUCTION

This case involves a public law school's exclusion of a group of religious law students from a forum for speech. This group, the Christian Legal Society, welcomes all members of the university community to participate in its activities, but was excluded from the forum because it requires its officers and voting members—who speak on its behalf, vote on its policies and programs, and lead its Bible studies—to share and abide by the group's core beliefs.

Our submission to this Court is straightforward: All noncommercial expressive associations, regardless of their beliefs, have a constitutionally protected right to control the content of their speech by excluding those who do not share their essential purposes and beliefs from voting and leadership roles. For Hastings College of the Law to force the Christian Legal Society chapter to admit nonadherents into its leadership and voting ranks—on pain of exclusion from an otherwise open speech forum—violates Petitioner's rights of speech, expressive association, and free exercise of religion.

STATEMENT OF THE CASE

A. Registered student organizations at Hastings

The University of California-Hastings College of the Law ("Hastings" or "College") is a public law school in San Francisco. As is common at institutions of higher education, Hastings encourages a broad array of student organizations to meet, express their views, and conduct activities on campus. The University of California has charged the College administration with the responsibility "to ensure an ongoing opportunity for the expression of a variety of view-

points," and it has specified that this responsibility must be discharged "in accordance with the highest standards of * * * freedom of expression." Pet. App. 82a, 74a. To effectuate that purpose, Hastings annually grants "Registered Student Organization" ("RSO") status to a broad range of student groups reflecting many different interests and viewpoints. *Id.* at 82a-87a. In the 2004-2005 academic year, when this case arose, Hastings recognized approximately 60 RSOs. J.A. 236 (listing 2004-2005 groups), 407 (listing 2005-2006 groups).

RSOs at Hastings have formed around interests as diverse as politics, religion, culture, race, ethnicity, and human sexuality—not to mention lighter topics such as food, drink, sports, and recreation. Some RSOs are specific to Hastings; others, such as the American Constitution Society and the Federalist Society, are local chapters of national organizations. Some RSOs address legal subjects, such as environmental law or intellectual property; others engage the wider world of ideas. Some publish journals, such as the Women's Law Journal and the Race and Poverty Law Journal; others hold debates or organize around athletic and recreational pursuits.

Many RSOs at Hastings give students the opportunity to advocate their views on contentious topics. Law Students for Choice and the Silenced Right–National Alliance Pro-Life Group reflect opposing sides in the abortion controversy. The Hastings Democratic Caucus sits across the aisle from the Hastings Republicans. The National Lawyers Guild, Amnesty International, Hastings Student Animal Legal Defense Fund, and Phi Alpha Delta address a range of public issues. The views of other RSOs, such as the Hastings Association of Muslim Law Students,

Hastings Jewish Law Students Association, and Hastings Koinonia, are grounded in their religious faiths. Many RSOs organize around ethnic or racial identities: La Raza Law Students Association; Hastings Chinese Law & Culture Society; Black Law Students Association; and Asian/Pacific American Law Student Association, to name just a few. Still others —including Intervenor-Respondent Outlaw, as well as the Clara Foltz Feminist Association and Students Raising Consciousness at Hastings—focus on sexuality and gender.

RSOs are entitled to meet in university rooms, to apply for funding to support various group activities, and to access multiple channels for communicating with students and faculty—including posting on designated bulletin boards, sending mass emails to the student body, distributing material through the Student Information Center, appearing on published lists of student organizations, and participating in the annual Student Organizations Fair. *Id.* at 85a, 7a (comprehensively listing the incidents of RSO status).

Although it provides resources and facilities to all of these groups, Hastings makes clear that it "neither sponsor[s] nor endorse[s]" the views of any RSO, and it insists that RSOs inform third parties that they are not "sponsored" by the institution. *Id.* 83a, 85a-86a; J.A. 219.

Only one group has ever been denied the right to participate in the forum: Petitioner Christian Legal Society. Opp. 4; J.A. 233, 403.

B. The Christian Legal Society

Founded in 1961, the Christian Legal Society ("CLS") is a nationwide association of lawyers, law

students, law professors, and judges who share a common faith and seek to honor Jesus Christ in the legal profession. CLS provides opportunities for fellowship, as well as moral and spiritual guidance, for Christian lawyers; encourages and mentors Christian law students; promotes justice, religious liberty, and biblical conflict resolution; and encourages lawyers to furnish legal services to the poor. J.A. 65, 358. CLS presumably is familiar to this Court through the participation of its Center for Law and Religious Freedom in dozens of cases as counsel or amicus curiae.

The national Christian Legal Society maintains attorney and law student chapters across the country. Student chapters, such as that at Hastings, invite speakers to give public lectures addressing how to integrate Christian faith with legal practice (J.A. 302-303, 229), organize transportation to worship services (J.A. 229), and host occasional dinners (*ibid.*). The signature activities of the chapters are weekly Bible studies, which, in addition to discussion of the text, usually include prayer and other forms of worship. J.A. 230-231.

CLS welcomes all Hastings students—regardless of "race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation" (Pet. App. 88a) —to attend and participate in its meetings and other activities. *Id.* 12a-13a; J.A. 227, 231, 280. However, to be officers or voting members of CLS—and to lead its Bible studies—students must affirm their commitment to the group's core beliefs by signing the national CLS Statement of Faith and pledging to live their lives accordingly. J.A. 118; Pet. App. 11a-13a.

The CLS Statement of Faith provides:

> Trusting in Jesus Christ as my Savior, I believe in:
>
> One God, eternally existent in three persons, Father, Son and Holy Spirit.
>
> God, the Father Almighty, Maker of heaven and earth.
>
> The Deity of our Lord, Jesus Christ, God's only Son, conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
>
> The presence and power of the Holy Spirit in the work of regeneration.
>
> The Bible as the inspired Word of God.

Pet. App. 100a-101a.

The chapter's constitution also sets forth guiding principles for the chapter and those who publicly associate with it. "Officers must exemplify the highest standards of morality as set forth in Scripture" in order "that their profession of Christian faith is credible." *Id.* at 102a-103a. Officers also must "abstain[] from 'acts of the sinful nature,' including those in *Galatians* 5:19-21; *Exodus* 20; *Matthew* 15:19; *Romans* 1:27; 1 *Corinthians* 6:9-10." *Ibid.*[1]

To confirm its position amid contemporary religious controversies regarding sexuality, national CLS

---

[1] These passages list types of conduct and attitudes from which Christians are to refrain, including: adultery, murder, theft, false testimony, idolatry, and envy (*Exodus* 20); slander, hatred, discord, jealousy, anger, selfish ambition, dissensions, factions, drunkenness, and greed (*Matthew* 15:19; 1 *Corinthians* 6:9-10; *Galatians* 5:19-21).

adopted a resolution in March 2004, which explains: "In view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership." J.A. 146. The resolution applies to "all acts of sexual conduct outside of God's design for marriage between one man and one woman, which acts include fornication, adultery, and homosexual conduct." *Ibid.*

This policy applies to heterosexual as well as homosexual conduct. Nationwide, CLS has only once had to expel a member for beliefs inconsistent with the Statement of Faith, and it is unaware of any homosexual person being expelled from any chapter. J.A. 232.

Voting members are entitled to vote on chapter policies and programs, as well as amendments to the chapter constitution, to participate in choosing the group's officers, and to stand for election to those officer positions. Most importantly, voting members share the responsibility of teaching CLS's weekly Bible studies—which are its most frequent and essential activities, and are conducted by its voting members on a rotating basis. Pet. App. 100a, 102a; J.A. 118, 229-231.

C. Hastings' denial of access to CLS

Prior to 2002, Hastings recognized a Christian student group that called itself "Hastings Christian Legal Society" but was not formally affiliated with national CLS. This group required that voting members and officers affirm its statement of faith, which was patterned on that of the national organization.

J.A. 222-223, 143-144, 258-259. From 2002 to 2004, Hastings had a registered Christian student group called "Hastings Christian Fellowship." That group, which had no requirements for its officers or voting members (J.A. 272), also had no formal affiliation with the national CLS organization. J.A. 143-144, 223-225. During the 2003-2004 academic year, approximately five to seven students participated in the Hastings Christian Fellowship. One of these students was openly lesbian, and two held beliefs inconsistent with what CLS considers to be orthodox Christianity. J.A. 224; Pet. App. 10a.

At the outset of the 2004-2005 academic year, leaders of Hastings Christian Fellowship decided to affiliate officially with the national Christian Legal Society, and thus to adopt its national membership policies. J.A. 225. Around that time, the chapter vice president[2] inquired of the Hastings Director of Student Services, Judy Chapman, about the process for registering CLS as a student organization. Chapman handed the CLS vice president a copy of Hastings' "Policy on Nondiscrimination" and cautioned her that national organizations such as Christian Legal Society often have membership policies unacceptable to Hastings. J.A. 130-131.

1. Hastings' written Nondiscrimination Policy

Hastings' "Policy on Nondiscrimination" (hereinafter "Nondiscrimination Policy" or "Policy") states as follows:

---

[2] The client has requested that we not unnecessarily use individual names in this brief because of concerns about possible retaliation

> The College is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, College-owned student residence facilities and programs sponsored by the College, are governed by this policy of nondiscrimination. The College's policy on nondiscrimination is to comply fully with applicable law.
>
> The University of California, Hastings College of the Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admissions, access and treatment in Hastings-sponsored programs and activities.

Pet. App. 88a.

The Policy comprises two paragraphs. The first, which is applicable to "[a]ll groups," forbids only "legally impermissible, arbitrary or unreasonable discriminatory practices," in accordance with the College's commitment to "comply fully with applicable law." It is undisputed that no "law" prohibits a student group such as CLS from confining its voting membership or leadership to those who profess and follow its religious creed. The second paragraph, by its terms, applies only to Hastings itself and to "Hastings-sponsored programs and activities." As we have noted, Hastings emphatically does not regard RSOs as "Hastings-sponsored." *Id.* 83a, 85a-86a; J.A. 219. Thus, it is not self-evident why the Policy, by its terms, would apply to or proscribes CLS's membership requirements.

Moreover, as is apparent from the list of prohibited types of discrimination, the only forbidden category that restricts a group's ability to be selective in terms of its members' *beliefs* or *viewpoints* is the *religious* nondiscrimination requirement. Similarly, the only one even arguably related to *behavior* is the sexual orientation nondiscrimination requirement. Although on its face the sexual *orientation* nondiscrimination requirement might appear to apply only to an individual's sexual inclinations or identity, Hastings has interpreted it to forbid discrimination on the basis of conduct as well, making homosexual conduct the only type of behavior addressed by the Nondiscrimination Policy.

2. Hastings' decision to exclude CLS

Shortly after speaking with Chapman and receiving a copy of the Policy, the chapter vice president applied to the Office of Student Services for travel funds to cover a portion of the costs for her and the chapter president to attend Christian Legal Society's 2004 annual conference. Chapman granted the students $250 for this purpose. J.A. 130, 227.

The vice president submitted CLS's registration materials, including the chapter's constitution, to the Office of Student Services. Although CLS does not believe that its moral stance against non-marital sexual conduct is discrimination based on "sexual orientation," the students chose not to include a pledge against sexual orientation discrimination in the group's constitution because they understood that Hastings interprets its Nondiscrimination Policy as forbidding a rule against nonmarital sexual conduct, and would understand any pledge in that light.

Chapman "informed the students that CLS's bylaws were not compliant with the religion and sexual orientation provisions of the Nondiscrimination Policy and that they would need to be amended in order for CLS to become a registered student organization at Hastings." *Id.* at 228.

National CLS wrote Chapman a letter pointing out that all students are welcome to attend and participate in CLS's meetings, and explaining CLS's religious principles and the application of those principles to the subject of human sexuality. *Id.* at 280, 284, 288. By letter, Hastings' counsel responded that "to be one of our student-recognized organizations, CLS must open its membership to all students irrespective of their religious beliefs or sexual orientation." *Id.* at 294, 228-229. In subsequent interrogatories, the College reiterated that its denial of recognition to CLS was based on those two specific grounds. *Id.* at 157-159.

3. The effect of Hastings' decision on CLS

As a result of Hastings' decision, CLS has no right to meet on campus for any official purpose, to use the ordinary communications channels at the College, or to enjoy any of the other rights accorded to RSOs. Pet. App. 39a, 85a; J.A. 300.

During the pendency of this litigation, Hastings has offered to allow the CLS chapter to use meeting rooms and audio-visual equipment as a matter of sufferance (J.A. 218-219, 232-233) on the same terms as *outside* community groups (*Id.* at 442-444). The chapter has no legal right to meet on the premises of the law school, however, and the College reserves the authority to charge a fee and to revoke the privilege

of meeting at any time. Pet. App. 79a; J.A. 443-444. As the district court observed, "[i]t is undisputed that CLS is being denied * * * access to particular areas of the campus and some avenues of communicating with its members and other students." Pet. App. 39a.

The district court found that "despite Hastings' refusal to grant CLS recognized status, the group continued to meet and hold activities throughout the 2004-05 academic year." *Id.* at 47a-48a. With one exception (a lecture held in a lounge area), those activities were either off campus or confined to students' dorm rooms. J.A. 442.

CLS has also been denied access to the customary means by which student organizations communicate with the student body, such as the annual Student Organizations Fair, the law school newsletter, bulletin boards, mailboxes, or weekly email announcements of activities. Pet. App. 45a; J.A. 216-219, 233. They can use only classroom chalkboards to make announcements—a privilege not reserved to RSOs. J.A. 300. They cannot identify themselves as the "Hastings" chapter. J.A. 233. And they are denied the right to apply for funds collected from student activity fees. *Id.* at 217. Indeed, after Hastings rejected CLS's registration, Chapman revoked the $250 previously granted for travel. *Id.* at 229, 295.

4. Hastings' treatment of other student organizations

As the record shows, other groups at Hastings are permitted to maintain their identity, cohesion, and message by limiting their leadership and membership to students who share their core beliefs. Intervenor-Respondent Outlaw, for example, reserves the right to remove any officer who "work[s] against the spirit

of the organization's goals and objectives." Pet. App. 138a. Similarly, the bylaws of Silenced Right, a pro-life advocacy group, state that "[s]o long as individuals are committed to the goals set out by the leadership, they are welcome to participate and vote in Silenced Right elections." *Id.* at 143a.

Under the constitution of the Hastings chapter of the Association of Trial Lawyers of America ("ATLA"), all members must "adhere to the objectives of the Student Chapter as well as the mission of [national] ATLA." *Id.* at 110a. Students may be members of the Hastings Democratic Caucus ("HDC") only "so long as they do not exhibit a consistent disregard and lack of respect for the objective of the organization as stated in [HDC's bylaws]." *Id.* at 118a. The sole objective identified in those bylaws is the group's ideological commitment "to advance Democratic party principles." *Id.* at 117a. All of these groups were accepted as RSOs. As Hastings acknowledged in its answer to CLS's complaint, "the Policy on Nondiscrimination permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." J.A. 93.

The record further indicates that Hastings' Policy was not applied where it would interfere with the identity and message of a student group. For example, the La Raza bylaws restrict "policy" membership to students "of Raza background" (meaning persons of Latino or Mexican descent) who timely pay their dues and regularly attend meetings. *Id.* at 192. Only "policy" members have the right to vote. *Ibid.* La Raza also has a category of "associate" members that "encompasses all [Hastings] students * * * who are of Raza background." *Ibid.* "Associate membership can

be conferred by the body upon a non-Raza and non-law students as an honorary gesture." *Ibid.* While recognizing that the La Raza bylaws "restrict voting rights to persons of La Raza background," Director Chapman certified those bylaws as "in compliance with the Nondiscrimination Compliance Code," in the same year in which she refused registration to CLS. *Id.* at 319.

D. The instant litigation

Having reached an impasse with the law school's administration, CLS filed this § 1983 suit in district court against relevant Hastings officers and administrators (hereinafter "Hastings" or "Respondents"). CLS challenged Hastings' denial of recognition as a violation of its expressive association, free speech, free exercise, and equal protection rights.

1. Hastings' subsequent change in its description of its Policy

During discovery, Hastings officials changed their description of the College's Nondiscrimination Policy. In its answer and interrogatory responses, Hastings had stated that its Policy "permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." *Id.* at 93. Under deposition questioning regarding the Policy, however, Dean Kane put forward her "view that in order to be a registered student organization you have to allow *all* of our students to be members and full participants if they want to." *Id.* at 343 (emphasis added).

Under this restatement of the Policy, registered student groups are prohibited not just from discriminating on the basis of the listed categories, but on any basis. In other words, they must accept "all comers."

As the Dean explained: a Republican has a right to become a member of the Democratic Club; the Clara Foltz Feminist Association has no right to refuse membership to chauvinists; and the pro-life group may not refuse membership to students with pro-choice views. *Id.* at 221 (Joint Stip. ¶ 18) (citing Kane Dep.). In her deposition, Director Chapman testified to similar effect. *Id.* at 320. The record does not reveal any instance in which this version of the Policy has ever been enforced.

2. Proceedings below

Intervenor-Respondent Outlaw, a registered student group whose self-described objective is "to alleviate and eradicate homophobia, transphobia, racism, sexism, and other affronts to the dignity of individual human beings," sought leave to intervene. Pet. App. 136a. In support of intervention, Outlaw asserted two interests: its members "would be excluded from membership in CLS," and its members objected to their student activity fees supporting CLS. Hastings Outlaw's Reply Br. re Mot. to Intervene, at 1, 2, 6. The court granted intervention. J.A. 98, 100 n.1.

On cross-motions for summary judgment, the district court ruled in favor of Respondents. The court held that denying recognition to CLS had "no significant impact" on the ability of the CLS students to express themselves. Pet. App. 59a. This conclusion was based primarily on subsidiary judgments that (1) "despite Hastings' refusal to grant CLS recognized status," the group continued to meet without recognition and "CLS's efforts at recruiting members and attendees were not hampered" (*id.* at 47a, 48a); and (2) "CLS has not demonstrated that its ability to express its views would be significantly impaired" by

"requiring CLS to admit gay, lesbian, and non-Christian students" (*id.* at 54a). Even assuming that enforcement of the policy had a significant impact, however, the court held that "Hastings has a compelling interest in prohibiting discrimination on its campus." *Id.* at 61a.

The CLS students appealed to the Ninth Circuit, which affirmed in a two-sentence opinion, citing *Truth* v. *Kent School District*, 542 F.3d 634 (9th Cir. 2008). Pet. App. 2a-3a. In *Truth*, the court had ruled that a public high school could deny recognition to a Christian student group that imposed religious requirements even on non-voting members who merely attended the group's meetings. The panel in *Truth* explicitly "limit[ed] [the] analysis to the general membership restrictions" and distinguished cases such as *Hsu* v. *Roslyn Union Free School District*, 85 F.3d 839 (2d Cir. 1996), in which a group's religious criteria were applied to voting members and leaders. 542 F.3d at 644, 647. The Ninth Circuit did not explain why the rule of *Truth* should apply to a case such as this one, which involves membership criteria limited to voting members and officers.

Instead, the Ninth Circuit's analysis turned on the understanding that "all groups must accept all comers as voting members even if those individuals disagree with the mission of the group." Pet. App. 2a. Applying a lesser standard of scrutiny, the court held that Hastings' denial of recognition of CLS was "viewpoint neutral and reasonable," although it did not say why. *Ibid.* The court also did not analyze whether Hastings' refusal to accept CLS's registration infringed its right of expressive association.

In every case outside of the Ninth Circuit where public universities have denied recognition to religious groups based on the rationales asserted here, either the courts have ruled for the religious student group or the university has settled or mooted the case by revoking its unconstitutional policy.[3]

This Court granted certiorari.

SUMMARY OF ARGUMENT

Recognizing that universities are "peculiarly the marketplace of ideas," this Court has long held that a public university's "denial of recognition" to a student group that seeks to participate in a campus speech forum is a "form of prior restraint"—and thus presumptively unconstitutional. *Healy* v. *James*, 408

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[3] *Christian Legal Soc'y Chapter at So. Ill. Univ.* v. *Walker*, 453 F.3d 853 (7th Cir. 2006); *Beta Upsilon Chi* v. *Machen*, 586 F.3d 908 (11th Cir. 2009) (University of Florida); *Alpha Iota Omega Christian Fraternity* v. *Moser*, No. 04-765, 2006 WL 1286186, at *3 (M.D.N.C. May 4, 2006) (University of North Carolina); *Univ. of Wis.-Madison Roman Catholic Found.* v. *Walsh*, No. 06-649, 2007 WL 1056772, at *4 (W.D. Wis. Apr. 4, 2007); *Christian Legal Soc'y* v. *Holbrook*, No. C2-04-197 (S.D. Ohio) (Ohio State); *Christian Legal Soc'y Chapter at Ariz. State Univ.* v. *Crow*, No. 04-2572 (D. Ariz.); *CLS at the Univ. of Toledo* v. *Johnson*, 3:05-cv-7126 (N.D. Ohio); *Intervarsity Multi-Ethnic Campus Fellowship* v. *Rutgers*, No. 02-06145 (D.N.J.); *Beta Upsilon Chi* v. *Adams*, No. 3:06-cv-00104 (M.D. Ga.) (University of Georgia); *Christian Legal Soc'y Chapter of Washburn Univ. Sch. of Law* v. *Farley*, No. 04-4120 (D. Kan.); *Maranatha Christian Fellowship* v. *Regents of the Bd. of the Univ. of Minn. Sys.*, No. 03-5618 (D. Minn.); *DisciplеMakers* v. *Spanier*, No. 04-2229 (M.D. Pa.) (Penn State); *Cordova* v. *Laliberte*, No. 08-543 (D. Idaho) (Boise State); *Intervarsity Christian Fellowship UW-Superior* v. *Walsh*, 06-0562 (W.D. Wis.). See also Ga. Op. Att'y Gen., No. 97-32 (Dec. 12, 1997) (ruling that Georgia Tech could not deny recognition to ReJOYce in Jesus because of its faith standards for voting members and officers).

U.S. 169, 180, 184 (1972) (quotation omitted). The First Amendment protects "the right of individuals to associate to further their personal beliefs," and the "denial of official recognition * * * to college organizations burdens or abridges that associational right." *Id.* at 181. Otherwise-eligible student organizations may be denied recognition only if the university surmounts a "heavy burden" to "justify its decision of rejection." *Id.* at 184. See also *Widmar* v. *Vincent*, 454 U.S. 263, 268-270 (1981) (applying *Healy* to religious clubs); *Rosenberger* v. *Rector of the University of Virginia*, 515 U.S. 819, 834 (1995) (applying *Widmar* to financial benefits extended as part of a speech forum).

This "right of individuals to associate to further their beliefs" (*Healy*, 408 U.S. at 181) includes the right of these associations to control their own message and identity—by requiring that those holding positions affecting the group's formation and communication of views share its core beliefs. *Democratic Party of U.S.* v. *Wisconsin* ex rel. *La Follette*, 450 U.S. 107 (1981); *Roberts* v. *U.S. Jaycees*, 468 U.S. 609 (1984); *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995); *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640 (2000). Because a group's leaders define and shape the group's message, the right to select leaders is an essential element of its right to speak.

Hastings' exclusion of CLS from the forum for speech violates both of these related principles. Indeed, Hastings points to CLS's exercise of its freedom of association as the sole reason for denying the group its free speech right to equal participation in the forum. Even if done on a neutral basis, it would not be permissible for a governmental entity to penalize a

voluntary expressive association for the exercise of its rights by excluding it from an otherwise wide-open forum for speech. But this exclusion is not imposed neutrally, and its viewpoint-discriminatory character renders it all the more clearly unconstitutional. As written and enforced, the Policy targets solely those groups whose beliefs are based on "religion" or that disapprove of a particular kind of sexual behavior. Groups committed to other viewpoints are free to select their leaders from among members who support their purposes and core beliefs.

The right that CLS is asserting, however, is by no means limited to religious groups. The speech and expressive association rights of all groups are at risk if a public university may require unpopular student groups to admit as leaders and voting members those who disagree with their core beliefs and viewpoints. As Justice O'Connor once observed, "the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts*, 468 U.S. at 633 (concurring opinion). Hastings' Policy is a threat to every group that seeks to form and define its own voice.

Respondents' justification for denying recognition to CLS has vacillated between two dramatically different accounts of its Nondiscrimination Policy. Under one version, put forward during depositions (the "all-comers policy"), every registered student group must admit every student who wishes to participate in, vote on, and even lead the group, even if that student's views are divergent from or antithetical to the group's stated purposes and beliefs. This all-comers

rule is vastly overbroad and manifestly unreasonable in light of the purpose of the forum.

Under a second version of the Policy—one based on the Policy's written terms—student groups are generally free to set and enforce limits on membership and leadership; they are forbidden only to discriminate on the basis of a finite list of forbidden categories, of which only one (religion) is based on opinion or beliefs and only one (sexual orientation) is arguably based on conduct. This rule is explicitly viewpoint discriminatory: A political or cultural group can insist that its leaders support its purposes and beliefs; a religious group cannot. Neither version of the Policy provides constitutional justification for denying CLS's freedom of speech, association, or religion under the circumstances of this case.

In Section I, we explain the nature of the constitutional rights involved (freedom of speech within a public forum, freedom of expressive association, and free exercise of religion) and show that Hastings' denial of recognition to CLS is a severe burden on each. We also show that the written Policy discriminates against religious and morally traditional viewpoints. In Section II, we address Hastings' two alternative justifications for its actions and show that neither passes muster under the applicable standard of review. Finally, in Section III we demonstrate that these principles apply to cases involving the denial of generally available public benefits.

ARGUMENT

I. Hastings' Policy Severely Burdens The Freedoms Of Speech, Association, And Religion.

A. Freedom of speech

In *Healy*, a public university created a forum for speech similar to that in this case, but excluded the local chapter of Students for a Democratic Society (SDS), largely because of fear that the group would use violent or disruptive tactics. Analogizing the exclusion to a "prior restraint," this Court held that a public university may not exclude an otherwise-eligible group from a speech forum unless the university can bear the "heavy burden" of justifying the exclusion. 408 U.S. at 184. In a long line of decisions since *Healy*, this Court has consistently required public schools and universities to recognize disfavored student organizations, including religious groups.

In *Widmar*, the Court held that a public university that operates a "public forum" for "registered student groups" may not "close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion." 454 U.S. at 265 & n.5. "[D]enial to particular groups of use of campus facilities for meetings and other appropriate purposes must be subjected to the level of scrutiny appropriate to any form of prior restraint." *Id.* at 268 n.5 (quotation and brackets omitted).

Excluding religious groups from the forum was neither "necessary to serve a compelling state interest" nor "narrowly drawn to achieve that end." *Id.* at 270. The university's argument that the exclusion was neutral because *all* groups were subject to the same prohibition on engaging in "worship or religious

teaching" did not fool the Court, which recognized the university's policy as a blatant form of content- and viewpoint-based discrimination.

In a similar vein, *Rosenberger*, 515 U.S. at 829, 834, held that a public university must grant a student newspaper that advocates a religious perspective equal access to a "limited public forum" that "expends funds to encourage a diversity of views from private speakers." Although "money is scarce," the "State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum." *Id.* at 829 (quotation omitted), 835. Moreover, "viewpoint discrimination[] * * * is presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* at 830. See also *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-394 (1993); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 106-107 (2001).

1. Hastings has established a classic public university forum for group speech, entitling all viewpoints to participate.

It is undisputed that Hastings has created a forum in which a broad and diverse range of ideas and opinions may be expressed. Under official University policy, Hastings must "ensure an ongoing opportunity for the expression of a variety of viewpoints," and it must carry out this duty "in accordance with the highest standards of * * * freedom of expression." Pet. App. 82a, 74a. Strong constitutional protection is warranted to ensure equal participation in this forum.

Registered student groups at Hastings are entitled to all of the speech, association, and free exercise rights of private organizations. They do not speak for the College, but only for themselves. Indeed, Hastings requires each RSO to inform the public "that it is *not* College-sponsored." *Id.* at 86a (emphasis added). Thus, as in *Widmar*, this is not a case involving the College's control of its own expression: It "does not * * * endorse or promote any of the particular ideas aired" in the forum, or "confer any imprimatur of state approval on" RSOs. 454 U.S. at 272 n.10, 274.

In 2004, when this dispute arose, more than 60 student groups had qualified as RSOs. Further, "[i]t is the avowed purpose of [Hastings] to provide a forum in which students can exchange ideas." *Id.* at 272 n.10. In the history of the forum, there has been one and only one exclusion—CLS.

2. Hastings' denial of recognition imposes a severe burden on CLS's speech.

The ability to participate in a campus forum on equal terms with other groups is the very lifeblood of a student organization. As this Court has explained, a student group needs recognition and its attendant benefits "to remain a viable entity in a campus community in which new students enter on a regular basis." *Healy*, 408 U.S. at 181. Indeed, under this Court's decisions, a university's denial of recognition itself—quite apart from the loss of specific benefits—substantially burdens a group's expression, and is treated as equivalent to a "prior restraint." *Widmar*, 454 U.S. at 268 & n.5, 270 n.7; *Healy*, 408 U.S. at 184; see also *Rosenberger*, 515 U.S. at 835.

Noting that CLS continued to meet in dorm rooms, private homes, and churches, the district court concluded that "Hastings' denial of official recognition was not a substantial impediment to CLS's ability to meet and communicate as a group." Pet. App. 13a, 47a-48a, 49a. But as this Court held in *Healy*, "[a] group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the [university's] action * * *." 408 U.S. at 183 (quotation omitted). The fact that a group "may meet as a group off campus," "distribute written material off campus," and "meet together informally on campus—as individuals, but not as [an official group]"—will not save a public university's actions in denying the group recognition. *Id.* at 182-183; a.

Similarly, in *Widmar* and *Mergens*, this Court required official recognition of the religious groups despite the fact that they could have continued to meet near from campus. *Id.* at 288 (White, J., dissenting); *Board of Education* v. *Mergens*, 496 U.S. 226, 247 (1990). The ability of these groups to engage in expression elsewhere, through channels open to non-student members of the public, did not satisfy the First Amendment. As the Court put it in *Schneider* v. *New Jersey*, 308 U.S. 147, 163 (1939), "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

In any event, this Court has made clear that the free speech right in the context of a public forum is a right of *equal* access; no group may be "disfavored" on constitutionally illegitimate grounds. *Rosenberger*, 515 U.S. at 528-529; *Lamb's Chapel*, 508 U.S. at 394; *Mergens*, 496 U.S. at 248; *Widmar*, 454 U.S. at 268

n5. If a right-wing law school recognized the Federalist Society but not the American Constitution Society (ACS), that act would not escape scrutiny merely because ACS did pretty well without recognition.

To be sure, the College here has offered to allow CLS to meet on campus, at least during the pendency of this litigation. But Hastings made clear to the students that this privilege—to use rooms, if available, on the same basis as the general public—may be revoked at any time. See *supra* at 11-12. It is an indulgence, not a right.

Moreover, even apart from recognition and meeting space, CLS has been denied access to mass email, bulletin boards, and other ordinary media by which campus groups communicate with students. As *Healy* stressed, "denial of access to the customary media for communicating" with students and others "cannot be viewed as insubstantial." 408 U.S. at 181-182. Numerous courts have likewise recognized that denial of these incidents of registered status, even with access to meeting space, is a constitutional infringement under *Healy*. *E.g.*, *Christian Legal Soc'y* v. *Walker*, 453 F.3d 853, 864 (7th Cir. 2006); *Child Evangelism Fellowship of N.J.* v. *Stafford Township School Dist.*, 386 F.3d 514 (3d Cir. 2004) (Alito, J.); *Gay Student Servs.* v. *Tex. A&M Univ.*, 737 F.2d 1317, 1327 (5th Cir. 1984); *Gay Activists Alliance* v. *Bd. of Regents of Univ. of Okla.*, 638 P.2d 1116 (Okla. 1981); *Gay Lib* v. *Univ. of Mo.*, 558 F.2d 848 (8th Cir. 1977); *Gay Alliance of Students* v. *Matthews*, 544 F.2d 162, 164-165 (4th Cir. 1976); *Gay Students Org. of Univ. of N.H.* v. *Bonner*, 509 F.2d 652, 659-660 (1st Cir. 1974).

Respondents must surmount a "heavy burden" to justify exclusion of an otherwise-eligible student

group from participation in a public university speech forum. *Healy*, 408 U.S. at 184. All limitations must be "reasonable in light of the purpose served by the forum," and any limitation that is viewpoint discriminatory can be justified only if it is the least restrictive means of achieving a compelling governmental purpose. *Rosenberger*, 515 U.S. at 829; *Widmar*, 454 U.S. at 270 & n.7 (citing *Healy*, 408 U.S. at 184).

B. Freedom of expressive association

Implicit in the First Amendment freedoms of speech, assembly, and petition is the freedom to gather together to express ideas—what this Court terms a "right of expressive association." *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006) (hereinafter *FAIR*); *Roberts*, 468 U.S. at 622. As Representative Theodore Sedgwick said during the debates in the First Congress over what became our First Amendment: "If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called into question * * * ." 1 ANNALS OF CONG. 731 (Joseph Gales ed., 1789) [Aug. 15, 1789].

Interference with the right of expressive association may "take many forms" (*Dale*, 530 U.S. at 648), including "impos[ing] penalties or withhold[ing] benefits from individuals because of their membership in a disfavored group" and "interfer[ing] with the internal organization or affairs of the group" (*Roberts*, 468 U.S. at 622-623). Hastings' Policy does both.

1. Private expressive associations have a right to exclude those who do not share the group's beliefs.

"There can be no clearer example of an intrusion into the internal structure or affairs of an association" than forcing it to relinquish control to those who do not share its message. *Roberts*, 468 U.S. at 623; see also *FAIR*, 547 U.S. at 69 (laws that permit outsiders to become "members" of the "expressive association" touch the core of the First Amendment). Such intrusions "impair the ability of the original members to express only those views that brought them together." *Id.* at 623; see also *New York Club Ass'n* v. *City of New York*, 487 U.S. 1, 13 (1988); *Hurley*, *supra*. "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 791 (1978).

Groups express their views through their leaders. Just as "the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice," *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring), forcing a group to offer leadership roles to outsiders entails the distortion or destruction of that voice. *Dale*, 530 U.S. at 654. And for religious groups, "[d]etermining that certain activities are in furtherance of an organization's religious mission, and that *only those committed to that mission should conduct them*, is * * * a means by which a religious community defines itself." *Corp. of Presiding Bishop* v. *Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) (emphasis added).

The bylaws of other student organizations at Hastings powerfully illustrate the importance of being able to confine leadership positions to those who share the group's beliefs. The student chapter of the Association of Trial Lawyers of America, for example, requires all members to "adhere to the objectives of the Student Chapter as well as the mission of [national] ATLA." Pet. App. 110a. The pro-life group states that "[s]o long as individuals are committed to the goals set out by the leadership, they are welcome to participate and vote in Silenced Right elections." Pet. App. 143a. And even the bylaws of Intervenor-Respondent Outlaw reserve the right to remove any officer that "work[s] against the spirit of the organization's goals and objectives." Pet. App. 138a. We cite these examples not to complain about "exclusion," but because they corroborate common sense: Expressive associations of all sorts perceive the same need as CLS to protect their identity and message.

The example Dean Kane invoked during her deposition—allowing a Republican the right to lead the Hastings Democratic Caucus—aptly illustrates the impact of the College's Policy on the ability of an expressive association to define and communicate its positions. If the Democratic Caucus sent its members out to spread its views to the public, Republican participants would be able to sabotage the enterprise and wreak havoc on the group's chosen message. If numerous enough, the Republican *agents provocateurs* could muster a majority vote to invite Karl Rove to be the Caucus's keynote speaker. The de-

structive effect on speech and association is manifest.[4]

The government has no right to insist that the Democratic Caucus, or CLS, allow random students, including those critical of the group's views, to lead its discussion groups, speak publicly in its name, or vote on its speakers and policies. If the right of association means anything, it "presupposes the freedom to identify the people who constitute the association and to limit the association to those people." *Democratic Party*, 450 U.S. at 108.

2. Freedom of association is particularly important to small or unpopular groups.

All expressive groups have, and benefit from, the freedoms we invoke here on behalf of CLS. After all, "[i]f the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect." *FAIR*, 547 U.S. at 68.

Although the freedom of expressive association is potentially valuable to everyone, it is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppres-

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[4] This scenario is not speculative. In April 1993, members of the College Republicans at the University of Nebraska hijacked the Young Democrats' election process. Note, *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations*, 118 HARV. L. REV. 2882, 2885 & n.20 (2005). They showed up at the Young Democrats' election meeting and, outnumbering the Young Democrats, elected themselves as the new officers of the group. *Ibid.* For numerous examples of similar incidents, see the amicus brief of the Foundation for Individual Rights in Education (FIRE).

sion by the majority." *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 622). Large and broadly accepted groups can generally defend their identity through sheer force of numbers and informal means of control. But smaller groups—and those whose views are contrary to the reigning zeitgeist—are far more vulnerable to takeover or harassment by students empowered to obstruct and even change the group's unpopular stance. See *supra* note 4.

Which groups find themselves in that unenviable position varies with time and place. In an earlier era, public universities frequently attempted to bar gay rights groups from recognized student organization status on account of their supposed encouragement of what was then illegal behavior. The courts made short shrift of those policies. See, *e.g.*, *Gay & Lesbian Student Ass'n* v. *Gohn*, 850 F.2d 361, 366 (8th Cir. 1988); see also *supra* at 25 (collecting cases). The shoe is now on the other foot in much of academia. The question here is whether groups such as CLS will receive comparable First Amendment protection.

3. Hastings' Nondiscrimination Policy severely burdens CLS's ability to control and present its message.

If non-Christians could walk in and insist on taking a turn leading one of CLS's weekly studies of the Bible—a book whose interpretation is not free from controversy—those meetings would cease to be an expression of CLS's beliefs, and "the group as it currently identifies itself [would] cease to exist." *Walker*, 453 F.3d at 863. It would be no less devastating to allow Hastings students with religious views that CLS regards as heterodox to vote on its policies and programs or determine its officers, or to allow stu-

dents hostile to CLS to represent the group at the Organizations Fair. As the Second Circuit has observed, a religious group's faith requirements are a "legitimate self-definitional goal." "[J]ust as a secular club may protect its character by restricting eligibility for leadership to those who show themselves committed to the cause," CLS "may protect [its] ability to hold Christian Bible meetings by including the leadership provision in [its] constitution." *Hsu*, 85 F.3d at 861 & n.20.

The district court rejected CLS's constitutional claims below in large part because it speculated that "requiring CLS to admit gay, lesbian, and non-Christian students" would not "significantly impair[]" the group's "ability to express its views." Pet. App. 54a. If this is a finding of fact, it is clearly erroneous. But more fundamentally, this statement is based on an error of law—on a misunderstanding of what counts as a burden on an expressive organization's ability to express its views, and a misunderstanding of the judicial role in assessing the needs and practices of a religious organization.

Giving nonadherents the right to an equal role in running the organization renders CLS's ability to survive and control its message dependent on how other students will choose to respond. Either no outsiders will join CLS, in which case the College's Policy is essentially symbolic and does not serve any concrete legitimate purpose, or the opposite: Heterodox or hostile students will join and seek to assume leadership positions, in which case CLS's message will be distorted, and quite possibly sabotaged. See *Hsu*, 85 F.3d at 861 (describing as reasonable the "concern that the Club risked facing non-Christian

leadership and might be taken over by students inimical to the Club's purpose") (quotation omitted).

Contrary to the district court, this Court has recognized the importance to religious groups of the right to organize around shared beliefs. Worship, prayer, the singing of hymns and spiritual songs, and religious reflection are communal activities, acts of common faith among co-believers. As Justice Brennan explained in his concurring opinion in *Amos*: "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community." 483 U.S. at 342. That community "represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals." *Ibid.* Religious groups, in other words, are not simply debating societies (unless they choose to be). And the very freedom to insist that its leaders share its beliefs is the "means by which a religious community defines itself." *Ibid.* To require a religious group like CLS to admit nonbelievers is a severe burden on its freedom of religious association.

The same is true of requiring CLS to accept leaders who do not follow its moral teachings. Actions speak louder than words, and there are few developments more corrosive to a religious group than to discover that a leader is violating its precepts on the side. "CLS's beliefs about sexual morality are among its defining values; forcing it to accept as members those who engage in or approve of homosexual conduct would cause the group as it currently identifies itself to cease to exist." *Walker*, 453 F.3d at 863. Even if CLS could somehow ensure that nonbelievers did not explicitly stray too far from the group's orthodox message, the group is entitled to insist that its leaders "teach * * * by example." *Dale*, 530 U.S. at

655. And common sense teaches that many would think CLS hypocritical if it claimed to stand for its views on extramarital sex while its voting members and officers were unrepentantly engaged in it.

Respondents may argue that even if nonadherents join the CLS chapter, they likely would not be chosen for leadership positions and thus would not greatly affect the group's direction or message. This overlooks practical realities. First, many leadership and speaking roles, such as conducting Bible studies and representing the group at the Organizations Fair, are rotated among the voting membership. If nonadherents must be allowed to vote and lead, they will have a right to serve in these roles. Members of Outlaw could join CLS and lead Bible studies on why the Bible is a hate-filled and homophobic book, and a Muslim discussion leader could turn the conversation toward the Prophet Mohammed.[5] For CLS to respond by taking away the right of every voting member to lead Bible studies would change the structure and practices of the organization in important ways.

Second, as we have noted, a group as small and controversial on some campuses as CLS is vulnerable to sabotage or takeover by a relative handful of hostile fellow students, who need only show up at a meeting *en masse* and exercise their rights to join and vote.

Third, the requirement of nondiscrimination applies not just *ex ante*, to prevent CLS from initially excluding nonadherents, but to its subsequent deci-

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[5] At Washburn University, CLS's recognition was revoked after a Mormon student sought to lead the chapter's Bible study. *Christian Legal Soc'y Chapter of Washburn Univ. Sch. of Law* v. *Farley*, No. 04-4120 (D. Kan. Sept. 16, 2004).

sions. Presumably it would be impermissible under the Policy for CLS to systematically deny leadership positions to non-Christians, after they had joined. And Hastings has asserted that investigations into such decisions would be constitutionally permissible. J.A. 30-32.[6]

Finally, even if there were doubt about the need for CLS to insist that its voting members adhere to the Statement of Faith, courts must give "deference to an association's assertions regarding the nature of its expression * * * [and its] view of what would impair its expression." *Dale*, 530 U.S. at 653. The district court erred in thinking it knows better than the group what rules the group needs to maintain its identity.

4. CLS's membership rule is entitled to constitutional protection as speech rather than conduct.

To justify employing a less exacting standard of review, the district court characterized CLS's enforcement of membership criteria as "conduct" rather than expression of "CLS's philosophies or beliefs." Pet. App. 44a. That approach is inconsistent with this Court's cases. See *Hurley*, 515 U.S. at 572-573 (applying strict scrutiny in forced-inclusion cases); *Roberts*, 468 U.S. at 624 (same); *Democratic Party*, 450 U.S. at 108 (same).

CLS's leadership and voting membership requirements are not "impermissible conduct" in the

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[6] At Ohio State, litigation commenced when members of Outlaw discovered that they could not expect to serve as leaders, even if they joined. *Christian Legal Soc'y* v. *Holbrook*, No. C2-04-197 (S.D. Ohio).

sense that the term is used in *Healy*. 408 U.S. at 189. They do not "pose[] a substantial threat of material disruption," "interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." *Ibid*. Rather, membership rules are the means by which an expressive association defines itself, establishes its identity, and controls the content of its speech. The rights of expression and association thus "overlap and blend; to limit the right of association places an impermissible restraint on the right of expression." *Citizens Against Rent Control/Coalition for Fair Housing* v. *City of Berkeley*, 454 U.S. 290, 300 (1981). Indeed, where one of the central purposes of a noncommercial expressive association is the communication of a moral teaching, its choice of who will formulate and articulate that message is treated as the functional equivalent of speech itself. *E.g.*, *Dale*, 530 U.S. at 647-648, 659.

A special feature of this case makes it particularly clear that application of the College's interpretation of the sexual orientation prohibition to CLS is an infringement on the rights of *belief*. In accordance with traditional Christian teaching, the CLS chapter does not exclude all those who engage in what they regard as immoral conduct, sexual or otherwise: The CLS membership policy excludes only those who do so "unrepentantly," which is religion-speak for those who do not regard the conduct as wrong or sinful and resolve to cease acting in that manner.[7] Thus, far from excluding people on the basis of orientation, the CLS Statement of Faith excludes them on the basis of

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[7] CLS does not exclude persons simply for having sinned, or it would have no members at all. See *Romans* 3:23 ("For all have sinned and fall short of the glory of God.").

a conjunction of conduct and the *belief* that the conduct is not wrong. CLS's conviction about nonmarital sex may be anathema to the Hastings authorities, but it is a constitutionally protected belief, and a government body like Hastings has no right to penalize anyone for adhering to it.

C. Hastings' Policy deprives CLS of rights based on the group's viewpoint.

As this Court's cases make clear, the most "egregious" of all First Amendment violations is for the state to discriminate among speakers on the basis of their viewpoint or opinion. *Texas* v. *Johnson*, 491 U.S. 397, 416-417 (1989); *Rosenberger*, 515 U.S. at 830; *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 391-392 (1992). Hastings' written Policy does just that. Such viewpoint discrimination warrants the most exacting possible level of constitutional scrutiny, and has never been upheld by this Court.

1. The "religion" provision of the Nondiscrimination Policy is viewpoint-discriminatory.

Hastings' written Policy forbids those to whom it applies to discriminate on the basis of a familiar list of protected categories: race, color, religion, national origin, ancestry, disability, sex or sexual orientation.[8] The salient fact about this list is that the only forbidden ground that is based on belief or opinion is *religion*.

The prohibition on religious discrimination is untroubling, indeed commendable, as applied to gov-

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[8] This entire controversy would have been averted if the Policy had been applied only according to its terms—to the College itself and "Hastings-sponsored" activities. See *supra* at 9.

ernmental institutions, businesses, and even nonreligious clubs. But when applied to groups that are organized around shared religious beliefs, this prohibition is unfair, counterproductive, disabling, and unconstitutional.

Of all the various opinion-based organizations at Hastings, religious groups are the only ones stripped of their right to control their message by controlling their leadership.[9] Hastings' written Policy does not tell the environmentalist club to let climate change skeptics conduct its discussion groups. Nor does it tell Respondent Outlaw to let supporters of Proposition 8 take a turn at its podium. As Hastings once admitted, "the Policy on Nondiscrimination permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." J.A. 93.

In contrast, Hastings insists that atheists (for example) or those who understand Christianity differently from CLS must be allowed to lead CLS Bible studies, vote on CLS activities and policies, and represent CLS in the law school community. Under the written Policy, only religious groups are denied the freedom to select leaders based on their beliefs.

The College's Policy is therefore u .constitutional for precisely the same reason the discriminatory policies in *Widmar*, *Lamb's Chapel*, *Good News Club*, and *Rosenberger* were unconstitutional: It places groups organized on the basis of a religious viewpoint at a disadvantage compared to other groups. As in *Rosenberger*: "By the very terms of the [Policy], the

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[9] The argument here applies only to Hastings' written Policy. We address the broader "all-comers" variant of the Policy below.

University * * * selects for disfavored treatment those student [groups] with religious * * * viewpoints." 515 U.S. at 831.

Indeed, Hastings' written Policy is but a thinly veiled recapitulation of the discriminatory policies struck down by this Court in those cases. It is as if the University of Virginia in *Rosenberger* had allowed *Wide Awake* to participate in the student media forum, but only if the publication permitted non-Christian students to flood its pages with their own writings—while allowing every other publication to maintain a consistent point of view. Or as if the University of Missouri–Kansas City in *Widmar* had allowed Cornerstone to meet on campus, but only if it allowed random students to lead the group in worship and Bible study—while permitting every other student group to insist that those who lead their meetings share their core views. The First Amendment does not allow governmental institutions to deny this associational freedom to religious groups, while protecting the rights of everyone else. See Elena Kagan, *The Changing Faces of First Amendment Neutrality:* R.A.V. v. St. Paul, Rust v. Sullivan, *and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 64, 67 (Viewpoint-based "selective subsidization" is "more troublesome than a complete absence of public funding," and warrants a "strong presumption of unconstitutionality * * * rebuttable only upon a showing of great need and near-perfect fit.").

It is no answer to say that the written Policy is neutral in that it imposes the same restriction on all groups, and thus does not discriminate based on religion. Essentially the same argument was rejected in *Widmar* and *Rosenberger*. By singling out "religion" as the only ideational ground on which a group

may not constitute itself, the written Policy necessarily (not incidentally) disfavors religious groups.

2. The "sexual orientation" provision, as interpreted, is also viewpoint-discriminatory.

Much the same analysis applies to Hastings' conclusion that CLS violated its Policy against sexual orientation discrimination. As the CLS students explained to the College at the time, CLS actually has no policy excluding anyone on the basis of the person's sexual "orientation." Instead, CLS adheres to the belief—unfashionable at Hastings, but still common among major religious denominations and much of society at large—that Christians should remain chaste until married and then be faithfully monogamous. This is not discrimination based on "orientation"; it is a moral conduct rule, and it applies across the board to both heterosexuals and homosexuals. *Walker*, 453 F.3d at 860 ("CLS's membership policies are thus based on belief and behavior rather than status"). But Hastings has made it clear that it interprets "orientation" as comprising conduct and that it views moral standards based on marital status as discriminatory, thus making it impossible for the CLS students to include the nondiscrimination pledge in their chapter's constitution.

Just as religion is the written Policy's only forbidden ground that is based on belief or opinion, sexual "orientation," as Respondents interpret it, is the only forbidden ground based on *conduct*. Under the written Policy, every other student group is permitted to insist that its leaders conduct themselves in accordance with the group's stated beliefs—that they practice what they preach. The animal rights group need

not permit hunters to seize the group's microphone; the pro-life group need not make an abortion provider its Social Chair.

For Hastings to apply its interpretation of the written Policy to a religious group with a moral conviction opposed to nonmarital sex, without imposing restrictions on the rights of other groups to exclude students based on behavior relevant to their beliefs, "selects for disfavored treatment" those whose beliefs differ from the College on this disputed question. *Rosenberger*, 515 U.S. at 831. That is unconstitutional.

D. When applied to religious groups, Hastings' Policy violates free exercise rights as well.

Hastings' Policy not only infringes CLS's freedoms of speech and association, but also its right to the free exercise of religion.

It is well established that discrimination against religious groups or viewpoints violates free exercise rights. *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 545 (1993). It is also well-established that this rule applies to the denial of benefits in the context of a forum for speech. *Locke* v. *Davey*, 540 U.S. 712, 720 n.3 (2004). Thus, to the extent that the Policy disfavors religious groups, as such, by denying them the right that other opinion-based groups enjoy—the right to confine their leadership to students who share their viewpoint—the Policy violates the principle of *Lukumi*.

Moreover, even if the Policy were construed as nondiscriminatory, it would still violate CLS's right of religious association. As the Court recognized in *Employment Division* v. *Smith*, that right—rooted in

both the Free Exercise Clause and the Speech Clause—protects "assembling with others" for religious purposes. 494 U.S. 872, 882, 877 (1990); see *Amos*, 483 U.S. at 338 (religious organizations' Title VII exemption from religious nondiscrimination law permissibly lifts a regulation that "burdens the exercise of religion."). The right of religious association includes the "right to organize voluntary religious associations" (*Watson* v. *Jones*, 80 U.S. 679, 728 (1871)), to choose the leaders of those associations (*Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976)), and to require "conformity of the members of the [association] to the standard of morals required of them" (*Watson*, 80 U.S. at 733).

Hastings' Policy infringes precisely these rights. The resulting burden on religion is subject to strict and generally fatal scrutiny, particularly where, as here, "a challenge on freedom of association grounds [is] reinforced by Free Exercise Clause concerns." *Smith*, 494 U.S. at 882 (citing *Roberts*, 468 U.S. at 622).

II. Hastings' Nondiscrimination Policy Does Not Justify Denial Of The CLS Students' First Amendment Rights.

Respondents have put forward two different descriptions of their Nondiscrimination Policy. In discussions with the students when they were denied recognition, the Director of Student Services explained that the denial was predicated on CLS's discrimination based on religion and supposed discrimination based on sexual orientation. In their Answer to the Complaint and in their responses to interrogatories, Respondents reiterated these two grounds for denial of recognition. Respondents' explanations are

consistent with the list of forbidden grounds for discrimination in the written Nondiscrimination Policy provided to the students when they sought to register. This written Policy forbids discrimination based on religion and sexual orientation, but allows RSOs to have membership and leadership criteria based on any other form of belief and behavior.

Later, in the midst of discovery, Respondents put forward a different account of their Policy, under which RSOs must "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs." J.A. 221 (Joint Stip. No. 18) (citing Kane Dep.). Neither the written Policy nor the all-comers variant constitutionally justifies excluding CLS from the forum, interfering with its freedom of association, or violating its right to free exercise of religion.

A. Hastings' written policy serves no legitimate, let alone compelling, purpose as applied to religious student groups.

1. Hastings has no interest in preventing religious groups from favoring co-religionists in the context of their religious activities.

Because it is viewpoint discriminatory, Hastings' written Policy is subject to the most exacting constitutional scrutiny. In no variety of forum for speech has this Court ever upheld rules that discriminate against religion. Although eliminating discrimination in some contexts can be a compelling governmental interest (*Roberts*, 468 U.S. at 623), such an interest has been held to override the rights of a private noncommercial expressive association only in cases where enforcement of nondiscrimination statutes

"would not materially interfere with the ideas that the organization sought to express." *Dale*, 530 U.S. at 657 (citing the exclusion of women from the Jaycees, which had no institutional belief inconsistent with the equal participation of women).

More importantly, it is a category error to extend the idea of "eliminating discrimination" based on "religion" to religious associations. This nation has a compelling interest in eradicating racism, along with other badges and incidents of slavery, in all corners of society, private as well as public, see U.S. Const. amend. XIII, and to some extent the same is true of sex discrimination. The government has no such interest, however, in eliminating the desire or ability of co-religionists to flock together. Although the *government* cannot prefer one religion to another, it is not invidious in the slightest for *private religious groups* to do so.

For example, a Talmud study group is not invidiously "discriminating" when it chooses a Jewish discussion leader rather than a Baptist. This is simply the free exercise of religion. And while it would be invidiously discriminatory and wrong (even absent state action) for a white group to exclude African-Americans from leadership posts, the same cannot be said of a Methodist prayer group that excludes Deists, who do not believe in the efficacy of prayer. Indeed, such "discrimination" is among our most highly protected constitutional freedoms. *Amos*, 483 U.S. at 342 (Brennan, J., concurring). Not only does government lack a "compelling" interest in telling religious groups not to favor co-religionists for purposes of their religious activities, but pursuit of such an interest is not even legitimate. *Smith*, 494 U.S. at 882

(intentional state action to suppress religious association violates the core of free exercise).

That is why the federal government and every state, including California, exempt religious societies from laws that would otherwise prevent them from hiring or otherwise choosing leaders on the basis of religion. 42 U.S.C. §§ 2000e-1 & 2000e-2(e)(1) (exempting religious organizations from the religious nondiscrimination provisions of Title VII); Executive Order No. 13279 (exempting religious organizations from the religious nondiscrimination requirement applicable to federal contractors); CAL. GOV. CODE § 12926(d) (exempting religious organizations from law prohibiting religious discrimination in employment); 22 CAL. ADMIN. CODE tit. 22, §§ 98100, 98222 (exempting religious organizations from prohibition on religious discrimination by state contractors and recipients of state funds).

2. Nor does Hastings have a legitimate interest in forcing a private noncommercial expressive group to abandon its moral code.

The same is true of CLS's moral as well as its strictly doctrinal beliefs. Petitioner does not dispute the right of Hastings to include sexual orientation among the categories on which Hastings itself and its sponsored organizations may not discriminate. But the government has no legitimate, let alone compelling, interest in forcing private, non-Hastings-sponsored religious groups to renounce their views that homosexual or other disputed sexual conduct is wrong. This is a diverse country, and its citizens are entitled to disagree about issues of sexual morality. *Dale*, 530 U.S. at 660.

The CLS students are not trying to impose their moral principles on others, but to adhere to those principles themselves, to associate with others who share them, and to express those principles to the rest of the student body. We cannot imagine why government in a free society would think itself entitled to interfere with that. If an Hibernian society (which has no discernible set of principles other than the celebration of Irishness) has the right to prevent gay rights groups from carrying banners in their parade, see *Hurley*, 515 U.S. at 566, surely a religious group with a well-established set of convictions regarding human sexuality has the right to prevent people who conduct their lives (unrepentantly) in violation of those convictions from leading its Bible studies or voting on which speakers it should invite to campus.

Indeed, this is an *a fortiori* case under *Dale*. That case was difficult because (1) it was disputable whether the principles of the Boy Scouts were genuinely opposed to homosexual conduct, and (2) the Boy Scouts provided important services to boys and young men (summer camps, first aid instruction, hiking experiences, merit badge work, and the like) that are valuable independently of any moral teaching the group might impart. Here, there is no possible room for doubt that CLS's traditional teaching is opposed to nonmarital sex, including homosexual sex. And CLS is purely an expressive association. With the arguable exception of its occasional dinners, which (like its other activities) are open to all Hastings students, CLS does *nothing but* engage in speech: conducting Bible studies, facilitating attendance at worship, and sponsoring speakers. One can conceive how the losing side in *Dale* might argue that the state had

a legitimate interest in ensuring that everyone could participate in the valuable activities of the Boy Scouts organization. Here, by contrast, it is absurd to say that non-Christians and those who do not share CLS's views on sexual morality should be able to lead the organization, vote on its policies, select its officers, and conduct its Bible studies.

To the extent that Hastings seeks to justify its exclusion of CLS as a necessary incident to a broad policy of nondiscrimination, the Court should evaluate that claim by comparison to other comparable contexts. Title VII does not prohibit discrimination based on sexual orientation, and proposals to expand it to sexual orientation are invariably accompanied by exemptions for religious groups with conflicting moral views. *E.g.*, Employment Non-Discrimination Act of 2009, H.R. 3017 § 6. Every state law extending nondiscrimination protections to sexual orientation has some exemption for religious groups.[10] The same is true of most university student-group regulations. As these examples show, it is not necessary to force religious groups to violate their religious tenets in or-

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[10] See COLO. REV. STAT. §§ 24-34-401(3), 24-34-402(7), 24-34-601(1); CONN. GEN. STAT. § 46A-81p; 19 DEL. CODE § 710(6); D.C. CODE § 2-1402.41(3); HAW. REV. STAT. § 515-4b; 775 ILL. COMP. STAT. §§ 5/5-102.1(b), 25/3; IOWA CODE §§ 216.6(6)(d), 216.7(2)(a), 216.9(2), 216.12(1)(a); MASS. GEN. LAWS 151B §§ (1)(5), (4); 5 ME. REV. STAT. §§ 4553(10)(C), 4602; MD. CODE, STATE GOV'T § 20-604(2); MINN. STAT. § 363A.26(2); NEV. REV. STAT. § 613.320; N.H. REV. STAT. § 354-A:2(XIV-C); N.J. STAT. §§ 10:5-5(n), 10:5-12(a); N.M. STAT. § 28-1-9(C); N.Y. EXEC. LAW § 296(11); OR. REV. STAT. § 659A.006(3), (5); R.I. GEN. LAWS §§ 28-5-6(15), 34-37-3(16); 9 VT. STAT. § 4502(L), 21 VT. STAT. § 495(e); WASH REV. CODE §§ 49.60.040(2), (11); WIS. STAT. § 111.337(2)(am).

der to maintain robust protections against discrimination.[11]

B. Hastings' alternative "all comers" account of its Policy also does not constitutionally justify the denial of recognition to CLS.

Notwithstanding the terms of its written Nondiscrimination Policy, which proscribes only a finite set of grounds on which those to whom it applies may not discriminate, Respondents maintain that registered student groups must permit any interested Hastings student to join and to seek leadership roles. As described in Joint Stipulation No. 18:

> Hastings requires that registered student organizations allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs. See Kane Depo. at 49; Chapman Depo. at 29-31. Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization. See Kane Depo. at 50.

J.A. 221. As the internal citations indicate, this stipulation is based entirely on the depositions of the Dean and the Director of Student Services. The all-

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[11] See also William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Law*, 106 YALE L.J. 2411, 2456 (1997) ("Gay rights advocates put [the religious exemption] provision in ENDA, and it should be retained."); Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125 (2006).

comers policy has never been incorporated in the College's written Nondiscrimination Policy and, so far as the record shows, has never been applied to any student group. At an earlier stage of this litigation, Hastings insisted that it "permit[ted] political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." J.A. 93. Indeed, the record shows that the bylaws of a number of registered student groups limit their members or leaders to students who share their goals or beliefs. See *supra* at 12-14.

1. This case should be decided under the rules applicable to the forum at the time.

Respondents' shift in its description of its practices is a tacit admission that its written Policy is constitutionally indefensible. Evidently the College came to realize during discovery that it cannot constitutionally burden religious groups with restrictions not imposed on any others.

The usual rule is that once the government has set the boundaries of its forum, it must respect them. *Rosenberger*, 515 U.S. at 829; *Walker*, 453 F.3d at 866 (noting that when a forum is "declared open to speech ex ante," participants "may not be censored ex post" when government decides the speech is not welcome) (citation omitted). As the record shows, the written Policy was in effect when the forum was opened to speech. Moreover, the Director of Student Services handed the CLS vice president a copy of the written Policy when she inquired about registration, and referred to the written Policy when explaining the basis for denial. The first mention of an all-comers policy arose during depositions. Thus, to the

extent that the all-comers policy differs from Hastings' written Policy, it is the latter, not the former, which should govern the constitutional analysis.

2. The all-comers policy infringes the rights of all student groups at Hastings without any discernible reasonable purpose.

In any event, the "all-comers" variant of the Policy is no less unconstitutional than its original written form. The only difference is that, whereas the original written Policy infringed the First Amendment rights of only some student expressive associations, the all-comers policy infringes the rights of all such groups.

It is well settled that "[r]egulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest." *Clingman* v. *Beaver*, 544 U.S. 581, 586-587 (2005); *Dale*, 530 U.S. at 648, 657-658. Moreover, these principles apply with full force to interference with students' "rights of speech and association on the campus," which "must be subjected to the level of scrutiny appropriate to any form of prior restraint." *Widmar*, 454 U.S. at 268 n.5 (citing *Healy*, 408 U.S. at 181, 184).

As we have shown, application of Hastings' Policy to CLS imposes a severe burden on CLS's associational rights. See *supra* at 26-35. The burden is no less severe if imposed via an all-comers rule rather than the written Policy. It follows that strict scrutiny applies to the all-comers policy as well. In this context, however, Hastings' all-comers policy is not even reasonable, let alone compelling.

Far from being compelling, the all-comers policy is frankly absurd. The notion that the Democratic Caucus should not be able to "discriminate" against Republicans in the selection of officers or discussion group leaders is risible. In her deposition, Dean Kane suggested that the purpose is to ensure that students of different beliefs and interests mingle together. J.A. 346. That is all well and good, but surely no one thinks that all people should mingle together randomly at all times. Groups are built around common interests and beliefs—interests and beliefs that are typically less than universal. Free association, including the right to exclude, better facilitates the goal of promoting an exchange of ideas; it protects the seedbeds where ideas emerge and mature in the first place. There can be no diversity of viewpoints in a forum if groups are not permitted to form around viewpoints.

As compared to the written Policy, the all-comers policy is vastly more intrusive, yet it serves no discernible reasonable purpose. Whatever interest a public university may have in enforcing a properly structured, viewpoint-neutral rule against invidious discrimination, it has no good reason to prevent students from associating on the basis of noninvidious differences such as shared interests or beliefs.

Hastings' lack of a compelling interest is confirmed by the fact that the College never had such a policy in the past and (so far as the record shows) has never put this one into effect. Moreover, according to our research, few if any other public law schools have seen fit to adopt such a policy. If other schools can get along without an all-comers policy, we would suggest that it is not compelling at Hastings. Indeed, it appears to be little more than a pretext for the view-

point discrimination embodied in the written Policy, which Respondents evidently found too difficult to defend.

3. The all-comers policy disadvantages small and unpopular groups.

It is not even clear that the all-comers policy is viewpoint neutral. Although nominally neutral, it systematically and predictably burdens most heavily those groups whose viewpoints are out of favor with the campus mainstream. Allowing all students to join and lead any group, even when they disagree with it, is tantamount to establishing a majoritarian heckler's veto. It has a homogenizing effect, flattening diversity of opinion, disadvantaging outliers, and potentially turning every group into an organ for the already-dominant opinion. See *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 304 (2000) ("[T]he majoritarian process * * * guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced."); *Board of Regents* v. *Southworth*, 529 U.S. 217, 235 (2000) ("Access to a public forum * * * does not depend upon majoritarian consent.").

As this Court has observed, conditions on government benefit programs that have the systematic effect of skewing debate in a particular direction "implicate[] central First Amendment concerns." *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533, 547 (2001). The government "cannot recast a condition * * * as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Ibid.* For example, a university caught up in anti-war fervor, as some have been, cannot keep student chapters of the VFW or American Legion

from participating in its speech forum by forcing it to admit all students. Similarly, a university cannot exclude a student chapter of the ACLU by barring groups that engage in litigation—claiming this is an activity that it does not wish to support. *Univ. of So. Miss. Chapter of the Miss. Civil Liberties Union* v. *Univ. of So. Miss.*, 452 F.2d 564 (5th Cir. 1971).

Thus, in *Velasquez*, the Court invalidated limits on legal services funding that forbade legal services lawyers from bringing constitutional challenges to statutes. Although this restriction was nominally viewpoint-neutral (it applied to all possible constitutional challenges, from any perspective), in practice it "operate[d] to insulate current welfare laws from constitutional scrutiny." *Velasquez*, 531 U.S. at 547. Hastings' all-comers policy—which would work to the advantage of large, politically dominant groups and to the injury of small, politically vulnerable groups—suffers from the same infirmity.

4. The all-comers policy is unreasonable in light of the purpose of the forum.

Even if the all-comers policy could be viewed as neutral toward all viewpoints, it cannot be deemed "reasonable in light of the purpose served by the forum." *Cornelius* v. *NAACP Leg. Def. Fund*, 473 U.S. 788, 806 (1985). This requirement is not the same as a rational basis test, which permits restrictions based on any rational basis at all. *Ibid.*; see also *Tucker* v. *California Dep't of Educ.*, 97 F.3d 1204, 1215 (9th Cir. 1996). Rather, "the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Heffron* v. *International Soc. for Krishna*

Consciousness, Inc., 452 U.S. 640, 650-651 (1981). The purpose of Hastings' forum is clearly set forth in the University policy: "to ensure an ongoing opportunity for the expression of a variety of viewpoints." Pet. App. 82a. The question, then, is whether an all-comers policy reasonably relates to the fostering of such an opportunity.

If taken seriously, the all-comers policy would frustrate, not promote, the purposes of the forum. Not only would it allow Republicans to undermine the activities of the Democratic Caucus and Zoroastrians to take over CLS, but it would make it impossible to have a Graduating Class association (which would have to admit first years), a vegetarian club (whose menus could be voted upon by carnivores), a tutoring program targeted to economically disadvantaged students (which would have to be open to the rich), or even an intramural football team (which could not limit its captains to those skilled in the game).

A "variety of viewpoints" is far more likely to be achieved when students are allowed to sort themselves out by interest and viewpoint—Republicans in one club, Democrats in another; Muslims in one organization, Lutherans in another. Without such sorting, all viewpoints are blurred. The Democratic Caucus becomes the Bipartisan Caucus; the Christian, Jewish, and Muslim clubs become the Ecumenical Society; and every other group organized around a belief becomes a Debate Club. Each group becomes no more than its own diverse forum—writ small. The all-comers rule thus defeats the very purpose of recognizing any group *as a group* in the first place. Preventing students from organizing around shared beliefs does not foster a robust or diverse exchange of views.

III. These First Amendment Principles Apply To The Denial Of Generally Available Benefits Within The Context Of The Campus Forum.

A. The government may not penalize the exercise of a group's constitutional right by denying the benefit of access to a forum to which the group is constitutionally entitled.

It is no answer to say, as did the district court (Pet. App. 42a), that these constitutional principles do not apply because the Hastings policy does not force CLS to admit non-adherents to its rolls, but "merely" denies the group access to public facilities and benefits. That is an old argument (see *McAuliffe* v. *Mayor of New Bedford*, 29 N.E.2d 517, 517 (Mass. 1892) (Holmes, J.) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.")), and it has long been rejected by this Court. *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 716-717 (1996). Permitting government to condition benefits on the sacrifice of constitutional rights "would allow the government to produce a result which it could not command directly. Such interference with constitutional rights is impermissible." *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (quotation omitted); see also *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958); Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); William Van Alstyne, *The Demise of the Right-Privilege Doctrine in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

Indeed, Hastings' Policy is doubly illegitimate, because the penalty it imposes for exercising one constitutional right (the freedom of association) is the

forfeiture of another constitutional right (equal treatment within a forum for speech). If it is true, as this Court has stated unanimously, that "government may not deny a benefit to a person on a basis that infringes his constitutionally protected * * * freedom of speech even if he has no entitlement to that benefit," it must be doubly true that the government may not deny such a benefit when the person is constitutionally *entitled* to that benefit. *FAIR*, 547 U.S at 59. It cannot be a "reasonable" limitation on the constitutional right to participate in a forum to require speakers to relinquish other constitutional rights in order to enter.

The district court's argument also flies in the face of this Court's long line of cases upholding the right of unpopular or disfavored student groups to participate on an equal basis in speech forums on public university campuses, see *Healy*, 408 U.S. at 184, *Widmar*, 454 U.S. at 269-270, *Rosenberger*, 515 U.S. at 830, as well as those involving other public property, see *Hurley*, 515 U.S. at 573-574; *Lamb's Chapel*, 508 U.S. at 392-393; *Mergens*, 496 U.S. at 249-250. This Court would be compelled to overrule all of those decisions if it accepted the district court's argument that government can require waiver of speech or association rights as the price of access to public facilities, parade permits, campus participation, or other benefits of an open forum.

B. Equal access principles apply to funding in the context of a forum for speech.

The same principles apply to the disbursal of funds where "the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views

from private speakers." *Rosenberger*, 515 U.S. at 834; *Southworth*, 529 U.S. at 229.

Eligibility to apply for funding for certain activities is one of the incidents of RSO status at Hastings. Petitioner's complaint did not seek funding for any particular activity, but it did seek recognition and the attendant benefits; and if that relief is granted, CLS would be eligible, going forward, to apply for funding of any otherwise eligible activities. J.A. 80-81. Insofar as Hastings maintains that CLS is barred from eligibility to apply for any sort of funding, that argument is inconsistent with this Court's decisions.

The government generally has considerable latitude to decide how to expend the citizens' tax dollars, but that latitude does not extend to the use of student activities fees that are collected from all students, including CLS members, and dispensed for the purpose of fostering diverse activities that are initiated by students and not by the government. *Southworth*, 529 U.S. at 229. In that context, equal access principles prevail. *Rosenberger, supra*.

In evaluating selective funding, this Court has distinguished between two categories. The first comprises programs, epitomized by the student activities fund in *Rosenberger*, whose purpose was to "indiscriminately 'encourage a diversity of views from private speakers'" or allocate benefits objectively to all speakers on a nonselective basis. *Nat'l Endowment for the Arts* v. *Finley*, 524 U.S. 569, 586 (1998) (quotation omitted). In this category, the government's freedom to pick and choose recipients is circumscribed by the First Amendment, and viewpoint-based selectivity is subject to the strictest scrutiny. Accord *id.* at 588-589 (Scalia, J., concurring) (agree-

ing that the government may not engage in selective or discriminatory funding where the funding program is a limited public forum).

The second category comprises both (1) programs (like that in *Finley*) where, by the nature of the program, the government "may decide to fund particular projects for a wide variety of reasons" and must do so on the basis of subjective evaluations of content, 524 U.S. at 585, and (2) programs in which the government uses subsidies as a means of promoting its own viewpoint. See *Velazquez*, 531 U.S. at 541 (explaining subsidy cases such as *Rust* and *Regan* on the latter ground). In this category, the government "has wide latitude to set spending priorities" and "may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Finley*, 524 U.S. at 587-588.

There is no need to delve into this dichotomy in detail, because this case falls squarely within the first category. See *Southworth*, 529 U.S. at 229. Indeed, Hastings' RSO scheme is identical in all relevant respects to the University of Virginia's program in *Rosenberger*. Here, as there, the entire purpose of the funding, as of the provision of meeting space and access to communications, is to facilitate and encourage "a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834; see Pet. App. 82a. Because any funding in this case is incidental to a "forum for speech," *Davey*, 540 U.S. at 720 n.3, the constitutional principles applicable to funding are the same as those applicable to the provision of meeting space.

* * * * *

Under a proper understanding of the First Amendment, this case is most emphatically *not* a clash between religious freedom and rights pertaining to sexual orientation. Religious groups and gay rights groups share common ground in the need for freedom of association. Both are vulnerable (in different parts of the country) to the hostile reactions of university administrators and fellow students. Both can pursue their objectives best if free to decide for themselves who will lead and speak for them.

On the other hand, if Respondents were to prevail in this case, it *would* provoke a collision between religious freedom and rights of sexual orientation. That would mean, in essence, that when sexual orientation is added to the list of forbidden grounds under nondiscrimination laws, religious and other groups that adhere to traditional moral views could be driven from the public square in the name of enforcing nondiscrimination. This would raise the stakes in the political battles over sexual orientation discrimination to a dangerous extent. It would be far better to adhere to the framers' wisdom of "live and let live" under the First Amendment than to treat religious and sexual orientation discrimination laws as a rationale for ostracizing dissenters.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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RESPONDENT'S BRIEF

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In the Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a public university violates the First Amendment by creating a program through which public funds, use of the school's name and logo, and other modest benefits are made available to student groups that agree to open their membership to "any student ... regardless of their status or beliefs," JA-221 ¶18, thus ensuring that all students have equal access to all school-funded and school-recognized groups.

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INTRODUCTION

Because petitioner and its amici apparently have little interest in litigating the case that came to this Court, we begin with the central components of the case that is actually presented.

First, this case does not concern any "force[d]" intrusion into the internal affairs of an expressive association. Pet.Br.2. It concerns whether a public university may limit the provision of public funds and benefits—including the use of the school's own name—to student groups that agree to abide by a longstanding policy of requiring all recognized student groups to open their membership to "any student ... regardless of their status or beliefs," JA-221 ¶18, thus ensuring that all students have equal access to all school-funded and school-recognized groups. Every student group at Hastings has a reasonable choice: it may either abide by the open-membership policy and qualify for the modest funding and benefits that go along with school recognition, or forgo recognition and do as it wishes. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 58 (2006) ("*FAIR*"). But no group is forced to do anything.

Second, Hastings' policy does not discriminate on the basis of viewpoint—so this case is far afield from the prototypical viewpoint discrimination cases on which petitioner grounds its argument.[1] The policy that was jointly stipulated to by the parties and recognized by both courts below "imposes an open

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[1] *E.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Healy v. James*, 408 U.S. 169 (1972).

membership rule on all student groups—*all* groups must accept *all* comers." Pet.App.2a (emphases added); *see* Pet.App.30a; JA-221 ¶¶17-18. That is the antithesis of a viewpoint-discriminatory rule. To underscore the point, the record shows that Hastings recognized petitioner's predecessor Christian group *for a decade* (when it agreed to abide by the School's open-membership policy). Pet.App.36a; JA-222-25.

Third, Hastings' policy does not impose any "severe burden" on student groups, much less threaten their very existence. Pet.Br.49. This case therefore is nothing like *Healy v. James*, 408 U.S. 169, 176, 181 (1972), where the school "barred" a group from campus and even disbanded the group when it tried to meet in a "campus coffee shop." To the contrary, Hastings has made clear that the Christian Legal Society ("CLS") may use "Hastings facilities for its meetings and activities." JA-294. In the year after it chose to forgo school recognition, CLS continued to meet and hold activities and its membership nearly *doubled*. Pet.App.10a, 13a, 48a. With access to school facilities, the ability to communicate through Internet social networking sites, email, and the like, JA-114, and only a relatively modest amount of funding at stake, any real-world burden on CLS due to its decision to forgo school recognition is slight—and far from coercive.

Fourth, petitioner is not seeking—and by no means has been denied—*equal* access to Hastings' programs and activities. It seeks a *favored* status: the funds and benefits that go along with school recognition *plus* an "exemption" from the rules that apply to every other group seeking such benefits. JA-292. A series of important decisions culminating in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), holds that

religious groups are entitled to equal access to forums opened for speech at America's public schools. Hastings has long embraced that principle. Religious student groups have for decades been an important part of Hastings' educational community and remain so today. But no student group is entitled to a *special* "exemption" from Hastings' neutral and generally applicable open-membership policy. JA-292.

Tellingly, petitioner devotes scant attention in its opening brief to the case that is actually before this Court, instead attacking straw men of its own making. By custom, and for good reason, this Court does not reach out to decide constitutional questions that are not actually presented and that have not received the full benefit of ventilation by the lower courts. There is no reason to depart from that practice here. As to the case that *is* presented, the Court should hold that Hastings' open-membership policy is constitutional because it is viewpoint-neutral, reasonable in light of the purposes of the forum, and non-coercive.

STATEMENT OF THE CASE

CLS's Refusal To Comply With Hastings' Policy

1. Like many public universities, Hastings College of the Law ("Hastings" or the "School") permits students to register qualifying student organizations with its Office of Student Services to receive modest public funding and other benefits, including priority access to facilities. Pet.App.7a, 85a, JA-124-27, 216-19 ¶¶9-10, 270. The funding made available to such registered student organizations, or "RSOs," comes from the mandatory student activity fee imposed by Hastings, a voluntary student activity fee adopted by the student body, and vending machine commission monies that belong to the School. JA-217 nn.1-2.

Hastings maintains this RSO program to provide its law students with opportunities to pursue academic and social interests outside the classroom that further their education, contribute to developing leadership skills, and generally contribute to the Hastings community and experience. JA-349 ¶4. Hastings offers RSO status and assistance only to groups that agree to abide by certain basic ground rules that Hastings believes to be essential to the educational purposes of the program and its mission.

To be eligible for RSO status, a group must (1) be a "non-commercial organization whose membership is limited to Hastings students," Pet.App.83a, and (2) agree to abide by the School's policies and regulations, including its longstanding nondiscrimination policy. Pet.App.8a; JA-219 ¶12, 220 ¶14. That policy was adopted in 1990 and states:

> The College is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, College-owned student residence facilities and programs sponsored by the College, are governed by this policy of nondiscrimination....
>
> The University of California, Hastings College of the Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.

JA-220 ¶15.

Although the second paragraph of the policy contains a list of particular characteristics, Hastings implements the broader prohibition against "legally impermissible, arbitrary or unreasonable discriminatory practices" by requiring every RSO to open its membership to "any student ... regardless of their status or beliefs." JA-221 ¶18; *see id.* ("Hastings requires that [RSOs] allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status and beliefs."); *See also* JA-349 ¶5; Pet.App.2a, 9a; JA-54.

That policy does not foreclose neutral and generally applicable membership requirements unrelated to "status or beliefs." JA-221 ¶18. For example, RSOs have imposed dues, attendance, and even conduct requirements, *see, e.g.*, JA-173, 178, and the law journals have used academic and writing competitions that are open on the same terms to all students.

2. During the 2004-05 academic year, when this dispute arose, Hastings had approximately sixty RSOs, including groups devoted to a wide variety of academic, political, religious, cultural, and athletic topics, as well as many other pursuits. *See* JA-236-45. Those groups included three religious organizations: the Hastings Association of Muslim Law Students, the Hastings Jewish Law Students Association, and Hastings Koinonia. JA-215-16 ¶7, 238, 240.

From 1994-95 through 2003-04, a student group known as Hastings Christian Legal Society or Hastings Christian Fellowship (collectively "HCF") was an RSO at Hastings. Pet.App.9a. HCF is the direct predecessor to CLS. *Id.*; JA-64 ¶2.1. For the first eight years, HCF used bylaws sent to student chapters throughout the years by the National Christian Legal

Society ("CLS-National"). Pet.App.9a. Those bylaws provided that the group would comply with Hastings' policies and regulations. Pet.App.10a. In the latter two years, the group used bylaws that stated that "all students" were welcome to become members. *Id.*

In 2004, HCF decided to formally affiliate with CLS-National. Pet.App.11a. CLS-National required CLS to adopt a specific set of bylaws to become a formal student chapter. *Id.*; Pet.App.99a-108a. Those bylaws require any interested member to sign a "Statement of Faith," which CLS interprets as barring gay students from becoming members or officers. Pet.App.11a-12a, 22a & n.2, 100a-01a; JA-38, 50, 67-68 ¶3.8, 72 ¶¶4.1-4.3, 144-47, 226-27 ¶¶33-35, 280.

In the fall of 2004, CLS adopted CLS-National's bylaws and thereafter refused to comply with Hastings' open-membership policy. Hastings advised CLS that it could not be an RSO unless it complied with the policy. Pet.App.12a. When CLS refused to do so (because it wanted to exclude students "on the basis of religion and sexual orientation," JA-281), Hastings informed CLS that it could not become an RSO, and that it would not be eligible to receive the $250 in travel funds previously set aside for its officers to attend CLS-National's annual conference. Pet.App.6a, 12a-13a; JA-227 ¶37, 229 ¶42.

In the nearly 20-year history of the policy, CLS is the first and only student group that has ever demanded both RSO status *and* an exemption from the open-membership policy. JA-220-21 ¶16.

Hastings' Open-Membership Policy

The record establishes three central facts that are key to understanding Hastings' open-membership policy: the policy is viewpoint-neutral, reasonable in

light of the purposes of the RSO program, and offers interested groups a reasonable and non-coercive choice.

1. Petitioner claims (Pet.Br.19) that Hastings' policy is viewpoint-discriminatory in that only religious groups are forbidden to restrict their membership to persons sharing the group's ideology or beliefs. Not so. The parties jointly stipulated—and the courts below based their rulings on the undisputed fact—that "Hastings imposes an open membership rule on all [RSOs]—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group." Pet.App.2a; *see* JA-221 ¶¶17-18. Thus, "for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization." JA-221 ¶18.

The record supports that stipulation. For example, the former dean testified that "in order to be a registered student organization you have to allow all of our students to be members and full participants." JA-343. The director of student services confirmed that RSOs must "be open to all students"—"even to students who may disagree with their purposes." JA-320. And that policy has repeatedly been recognized throughout this litigation. *See* Add. 1a-6a.

Pointing to various RSO bylaws, petitioner asserts that the policy has not been implemented in an evenhanded manner. Pet.Br.12. But CLS fails to mention that every one of those groups also signed the policy and thus agreed to abide by it, and that the record establishes that no other RSO "has ever attempted to restrict its membership on the basis of a protected category." JA-350 ¶7. Moreover, the record establishes that Hastings does not interpret the bylaw

references to which petitioner points "as an attempt to establish a test or criteria for membership in any way," JA-350 ¶8, and groups themselves have "confirmed" that their bylaws "allow[] all students to join," JA-351 ¶10. *See also, e.g.*, JA-343. There is, in short, no evidence that Hastings has ever exempted any RSO from complying with its open-membership policy. Pet.App.65a-66a.

2. Hastings' open-membership policy is reasonable in light of the purposes of the RSO program and serves important educational and public policy objectives. A public university is a vibrant civil society of groups with varying degrees of organization, formality, and official connection to the university itself. The vast majority of those associations are informal, private, and frankly exclusionary—such as private study groups, groups of students and faculty members working on joint projects that interest them, and groups that come together around common interests like sports, outdoor activities, religion, or politics. Such groups play a crucial role in the overall intellectual and social ferment of the institution, and Hastings is not in any way hostile to them or to their membership practices.

Non-registered groups are permitted to meet on campus, even in unused classrooms and public spaces at the law school, and to use certain bulletin boards and chalkboards. Any student may email any other student (or any number of other students, so long as the names are entered manually) through the School's Exchange server.[2] And of course students and groups may take

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[2] *See* Hastings College of the Law, University of California, Email Frequently Asked Questions, *at* http://www.uchastings.edu/infotech/email/faqs.html.

advantage of the many other means of electronic communication in the 21st century—like Internet chat groups or Facebook—to reach out to other students. JA-218-19 ¶¶10-11, 233 ¶61.

RSOs play a different role. They facilitate the university's pedagogical and civic mission and expand the universe of extracurricular academic and social opportunities for all students on a non-exclusive basis. *See* JA-349 ¶¶4-5. CLS quotes a general Hastings directive to the effect that the School should "ensure an ongoing opportunity for the expression of a variety of viewpoints ... in accordance with the highest standards of ... freedom of expression" as if it were the exclusive purpose of the RSO program specifically. Pet.Br.2-3 (quoting Pet.App.82a, 74a). Hastings certainly values and pursues that principle, and the fact that there were some sixty different RSOs when this lawsuit was filed—and even more today—is a testament to its success. But the program has other objectives too.

The RSO program is an extension of Hastings' educational mission and community. Student groups that choose to join that program are agreeing to accept a particular kind of role within the school community. Hastings provides assistance and funding to such groups because it assumes they will enhance the Hastings community and educational experience for all students. JA-349 ¶¶4-5; *see* Pet.App.37a.

Petitioner repeatedly states that Hastings has disavowed any explicit "sponsorship" of RSOs. *See* Pet.Br.4, 23, 44. And, to be sure, for "liability" purposes, Hastings states that it does not "sponsor" RSOs or otherwise take responsibility for what they do or say. JA-121; *see* Pet.App.83a, 85a-86a. But Hastings is nevertheless intimately connected with RSOs in a

way that it is not with the variety of other informal groups and activities that take place on campus.

Hastings allows RSOs to publicize their official affiliation with the School by using Hastings' name and logo. JA-124-25, 216, 270. It allows them to place announcements in a weekly newsletter published by the Office of Student Services; to use a particular bulletin board in the basement of Snodgrass Hall; and to participate in an annual "Student Organizations Faire" organized and paid for by Hastings. JA-125-27, 216-18. It also gives them office space, priority access to classrooms and other space, and the right to use the school's audio/visual equipment and other property. JA-218-19. RSOs are also eligible for modest amounts of discretionary public funding. JA-217 & nn.1-2.

Against that backdrop, Hastings' open-membership policy serves at least four weighty objectives:

First, the policy ensures that all Hastings students have equal access to all school-recognized and school-funded activities. JA-349 ¶5. Many students, like many people, may tend to gravitate to what is familiar to them, form cliques, or exclude others who are unpopular or socially, intellectually, or physically different. If a group of friends organizing a trip to Seattle to participate in a hockey tournament does not wish to invite some student because he has a different faith, holds unpopular views, or is a native of a country that lacks a hockey tradition, that is their prerogative. But it is a different matter entirely when the school-recognized Hastings Ice Hockey (JA-239) group acts the same way—when it organizes the trip out of offices paid for with tuition money, subsidizes its activities in part with mandatory student activity fees to which the

excluded student has contributed, and competes in jerseys saying "Hastings Ice Hockey."

Second, the policy ensures that public funds and mandatory student activity fees as well as the School's facilities and own name and logo are not used to support groups that choose to engage in conduct that the School and the State of California do not wish to subsidize or lend their name to. That includes discrimination that all—including CLS (Pet.Br.44)—agree the School and State are entitled to disapprove of even if it is not "invidious" as a constitutional matter.

The people of California, through their elected representatives, have barred discrimination based on various enumerated factors, including religion and sexual orientation, "in any program or activity conducted by any postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid." Cal. Educ. Code §66270. Hastings has concluded that this mandate—which is reinforced by other laws—precludes the School from allowing any such discrimination in its publicly funded RSO program. *See also, e.g.*, Cal. Educ. Code §§66030, 66251, 66252, 66292.2; Cal. Gov. Code §11135(a).[3]

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[3] Petitioner claims that it is "undisputed" that no "law" prohibits a student group from confining its membership to co-religionists. Pet.Br.9. That is incorrect for groups choosing to participate in programs and activities subsidized by the State. And Hastings has consistently maintained that California law prohibits it from recognizing and subsidizing groups in its publicly funded RSO program that choose to discriminate on the basis of religion or sexual orientation. *See, e.g.*, JA-132, 154, 294; Pet.App.37a, 76a. Petitioner cites various statutory exemptions, Pet.Br.44, but they do not apply to §66270 or the activities at issue in this case. California law does provide an exemption to §66270

Third, a simple open-membership policy allows Hastings to avoid the difficulties, needless entanglement with RSOs' internal operations, and potential allegations of bias or favoritism that would be associated with undertaking to judge whether an RSO's particular reasons for excluding a particular student were legitimate or illegitimate (or, indeed, lawful or unlawful). JA-349 ¶5. Adopting anything short of an all comers rule raises administrability issues that Hastings may reasonably take into account. And Hastings' desire to avoid particularized scrutiny of RSOs' membership decisions is especially compelling as applied to religious groups like CLS.

Fourth, the policy strives to bring together students of different backgrounds and viewpoints in order to foster discourse, cooperation, and learning. *Id.* Groups do form around particular ideas and viewpoints, and Hastings has benefited from great diversity among student groups. JA-236-45. But Hastings also encourages recognized groups to expose students to different views and seeks to foster discussion *within* groups as well. Hastings may conclude that lawyers-in-training, in particular, may benefit from such discourse. And as it has turned out, Hastings for decades has enjoyed the best of both worlds—a rich diversity of RSOs and a guarantee that no student is excluded from joining any RSO.

3. Finally, the choice presented to student groups is reasonable and non-coercive. The amount of funding involved is modest, typically in the range of a few hundred dollars per group on a yearly basis. Moreover, CLS still enjoys access to the School's facilities as well

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for religious *schools* (Cal. Educ. Code §66271), but it does not contain an exemption for religious organizations at public schools.

as communications engines like the Yahoo! chat group that its president used. Pet.App.48a. Indeed, after CLS chose to forgo RSO status, Hastings repeatedly informed CLS that, "[i]f CLS wishes to form independent of Hastings we would be pleased to provide the organization the use of Hastings facilities for its meetings and activities." JA-294; *see also* Pet.App.8a; JA 232 ¶58, 300.

CLS never requested to use such facilities for its chapter meetings during the 2004-2005 academic year. Pet.App.8a; JA-232 ¶58. But CLS still participated actively in campus life that year. For example, it held weekly Bible-study meetings and hosted a beach barbeque, a Thanksgiving dinner, a campus lecture on the Christian faith and legal practice, several fellowship dinners, an end-of-year banquet, and several informal social activities. Pet.App.13a. CLS also invited Hastings students to attend Good Friday and Easter Sunday church services with it. *Id.* Between nine and fifteen Hastings students regularly attended CLS's meetings and activities during the 2004-05 school year. *Id.* That was substantially more than when CLS's predecessor was an RSO. JA-224 ¶29.

Proceedings Below

When Hastings refused to grant CLS the "written exemption" that it had demanded from the School's open-membership policy, JA-292, 294, CLS filed suit alleging that Hastings had violated, *inter alia*, its rights to free association, free speech, and free exercise of religion under the First Amendment, JA 61-82.

1. The parties jointly stipulated to the facts (JA-213-35) and then filed cross-motions for summary judgment. The district court denied CLS's motion for

summary judgment and granted the motions filed by Hastings and respondent-intervenor Hastings Outlaw.

a. The district court rejected CLS's claim that Hastings' policy violates its right to free speech. The court concluded that the policy regulates conduct, not speech, Pet.App.16a-24a, and that it satisfies the standard of *United States v. O'Brien*, 391 U.S. 367 (1968). Pet.App.24a-27a. The court further held that the policy satisfies this Court's forum analysis. Pet.App.27a-38a. The court explained that the policy is viewpoint-neutral: "Hastings has not excluded CLS *because* it is a religious group but rather because it refuses to comply with the prerequisites imposed on all student organizations." Pet.App.32a; *see* Pet.App.35a-36a. And the court concluded that the policy is consistent with and furthers Hastings' educational mission, and therefore is reasonable in light of the purposes of the forum. Pet.App.36a-38a.

b. The district court also rejected CLS's claim that the policy violates its right to expressive association. Pet.App.38a-62a. The court explained that "Hastings is not directly ordering CLS to admit certain students. Rather, Hastings has merely placed conditions on using aspects of its campus as a forum and providing subsidies to organizations." Pet.App.42a. If CLS does not wish to participate in the program, it "may continue to meet as the group of its choice on campus, excluding any students they wish, and may continue to communicate its beliefs as it did all through the 2004-2005 academic year." *Id.* The court also concluded that any effect on expressive association was justified by Hastings' compelling interest in barring discrimination in school-funded activities. Pet.App.54a, 59a-62a.

c. The district court also rejected petitioner's claims that the policy violated its free exercise rights, holding that the policy "does not target or single out religious beliefs." Pet.App.63a; *see* Pet.App.62a-69a.

2. The court of appeals affirmed. It explained that "[t]he parties stipulate that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group." Pet.App.2a. And pointing to a recent precedent, the court held that "[t]he conditions on recognition are therefore viewpoint neutral and reasonable." Pet.App.2a-3a (citing *Truth v. Kent Sch. Dist.*, 542 F.3d 634, *reh'g en banc denied*, 551 F.3d 850 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2866 *and* 129 S. Ct. 2889 (2009)).

SUMMARY OF ARGUMENT

Hastings' open-membership policy is a constitutionally permissible limit on participation in the School's publicly subsidized RSO program.

I. The open-membership policy before this Court requires all student groups to admit "any student ... regardless of their status or beliefs." JA-221 ¶18. Petitioner devotes almost its entire brief to attacking a "dramatically different" (Pet.Br.19) policy that, it says, forces religious groups to accept members regardless of their status or beliefs while leaving other groups free to select members based on their status or beliefs. That claim is refuted by the parties' own joint stipulations, both lower court decisions, and the record. Consistent with settled principles of judicial restraint, the Court should decide the constitutionality of the open-membership policy that the parties stipulated to and litigated below. If that is not the case the Court

believed it was getting when it granted certiorari, it should dismiss the writ as improvidently granted.

II. The School's open-membership policy is constitutional under the settled principles governing access to public funding programs and limited forums, including in the public university context, because it is viewpoint-neutral, reasonable in view of the purposes of the forum, and non-coercive. The policy is a prototypical example of a viewpoint-neutral rule. This Court has held that nondiscrimination laws that enumerate proscribed factors are viewpoint-neutral. *E.g., Roberts v. United States Jaycees*, 468 U.S. 609, 615, 623 (1984). An open-membership policy is no less neutral. Moreover, the record in this case contains no evidence that the policy has been applied based on viewpoint, and the history of religious-based RSOs at Hastings—which includes petitioner's predecessor—underscores the lack of any viewpoint discrimination.

The open-membership policy is also reasonable in light of the purposes of the RSO program. That policy reasonably ensures that all students enjoy equal access to all student-funded and school-recognized activities. The policy reasonably furthers state laws that prohibit discrimination, including on the basis of sexual orientation, in any program receiving state support. The policy reasonably obviates the need for the School to meddle in the internal affairs of student organizations in reviewing whether students were excluded on a permissible basis. And the policy reasonably promotes discourse *within* student groups and thereby encourages cooperation and learning among students, while at the same time allowing for a rich diversity *among* student groups at Hastings.

Likewise, the choice presented to petitioner is non-coercive. There are some advantages to being an RSO. By forgoing recognition, CLS loses eligibility for a modest amount of public funds as well as access to a bulletin board and certain other means of communications enjoyed by RSOs. But CLS has been granted access to Hastings' facilities, it has ample means—like Internet networking sites and email—to communicate with students, and its membership *grew* the year after it decided to forgo school recognition. As a result, the choice offered to CLS does not go "beyond the 'reasonable' choice offered in [*Grove City College v. Bell*, 465 U.S. 555, 575 (1984)]." *FAIR*, 547 U.S. at 59 (quoting *Grove City*, 465 U.S. at 575).

Petitioner's contrary argument is grounded on the suppositions that Hastings "force[s]" (Pet.Br.2) groups to admit unwelcome students, which is not true in light of the *choice* that all groups have in deciding whether to seek RSO status; that the policy will lead to the "sabotage" or "hijack[ing]" of groups (Pet.Br.28-29 & n.4), which is not supported by one piece of record evidence and is utterly belied by the 20-year experience with the policy at Hastings; and that the policy will "skew[] debate" and eliminate diversity among RSOs (Pet.Br.51), which is contradicted by the rich universe of RSOs—and attendant debate—that has existed at Hastings over the past two decades. If circumstances change, petitioner may bring an as-applied challenge to the policy, but the record before the Court does not support its First Amendment claim.

III. The case law on which petitioner grounds its position underscores that it does not want to litigate the stipulated facts of this case. The equal access cases—including *Rosenberger v. Rector of the*

University of Virginia, 515 U.S. 819 (1995)—are inapposite because those cases involved situations in which religious groups were subject to flagrant viewpoint discrimination. The open-membership policy at issue here is, by contrast, overtly viewpoint-neutral. Neither *Healy v. James*, 408 U.S. 169 (1972), nor *Widmar v. Vincent*, 454 U.S. 263 (1981), supports petitioner's "prior restraint" rule because those cases involved situations in which the plaintiff student groups were completely excluded from campus—again, on viewpoint-discriminatory grounds. CLS, in contrast, has been granted access to Hastings' facilities. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), is fundamentally different because it involved the "forced inclusion" (*id.* at 650) of a scout leader pursuant to a regulatory prohibition, not a reasonable condition on access to public subsidies and a limited forum. And *Employment Division v. Smith*, 494 U.S. 872 (1990), simply underscores that CLS is not entitled to a religion-based exemption from the School's neutral and generally applicable open-membership rule.

IV. Under the rule that petitioner asks this Court to adopt, any "noncommercial expressive association[]" (Pet.Br.2) in America is entitled to receive public subsidies and participate in limited forums while refusing to comply with viewpoint-neutral prohibitions on discrimination. Petitioner carves out discrimination on the basis of race and—"to some extent" (Pet.Br.43)—sex. But it argues that every expressive association has a constitutional right to insist on such subsidies and discriminate on the basis of age, military status, disability, religion, sexual orientation, and *any* other factor. And under petitioner's rule, expressive associations not only may insist that the public

subsidize their practices, they may insist on using the State's name while doing so. Nothing in the First Amendment compels that remarkable result.

ARGUMENT

I. THE COURT SHOULD DEAL WITH THE CASE AS IT CAME TO IT AND AFFIRM OR DISMISS THE WRIT OF CERTIORARI

1. This Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied upon below." *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988); *see also National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) (Court generally "do[es] not decide in the first instance issues not decided below"). Petitioner asks this Court to depart sharply from that settled practice.

In this Court, petitioner devotes almost its entire argument to attacking a policy that has never existed at Hastings—one that selectively "targets solely those groups whose beliefs are based on 'religion' or that disapprove of a particular kind of sexual behavior," and leaves other student groups free to choose members based on their beliefs. Pet.Br.19; *see* Pet.Br.42. As its lead example petitioner says that, under Hastings' policy, a "political ... group can insist that its leaders support its purposes and beliefs" whereas "a religious group cannot." Pet.Br.20.

The parties, however, jointly stipulated that Hastings' policy is that student groups must open their membership to "any student ... regardless of their status or beliefs." JA-221 ¶18. Moreover, the parties specifically stipulated that a political student group like the Hastings Democratic Caucus is *not* free to close its doors to students who have different beliefs. *Id.* Petitioner apparently just refuses to accept the "joint"

in "joint stipulation." Indeed, it says in one sentence that "*[r]espondents* maintain" that Hastings has an open-membership policy, but in the very next sentence admits that this policy is "described in *Joint* Stipulation No. 18." Pet.Br.47 (emphases added).[4]

Petitioner does not address the constitutionality of the open-membership policy that was actually the subject of the litigation below until page 49 of its brief, and then devotes only seven pages to discussing it—much of which is predicated on false premises adopted earlier in the brief. Instead, petitioner devotes almost its entire brief to attacking a straw man: a policy under which only religious groups are selectively denied the freedom to discriminate on the basis of "ideology." *See, e.g.*, Pet.Br.19-20, 39. But that is not, by any stretch, the policy that has been adopted or applied by Hastings, it is not the policy that was jointly stipulated to by the parties, and it is not the policy that served as the basis for the decisions below.

Petitioner refers throughout its brief to two different policies—a "written policy" and an "all-comers" policy. To be clear, Hastings has *one* policy: every student group wishing to become an RSO must

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[4] Pointing to one sentence in Hastings' answer (JA-93 ¶10.4), petitioner suggests that Hastings "changed" its policy during the course of the litigation. Pet.Br.14, 37, 41-42, 48. That is incorrect. Hastings did not change its policy during this litigation, and read in context the sentence to which petitioner points simply denies an allegation that religious groups were "single[d] out" (JA-79 ¶10.4) for discriminatory treatment by explaining that the policy applies to *all* groups in the same fashion. Moreover, petitioner's interpretation of the answer is contradicted by its own joint stipulations concerning Hastings' policy. JA-221 ¶¶17-18. And, in any event, because petitioner did not raise this argument below or advance it in its certiorari papers, the argument was waived.

admit "any student ... regardless of their status or beliefs." JA-221 ¶18. Hastings refers to that policy as the open-membership or all-comers policy. That policy is how Hastings ensures compliance with the written nondiscrimination provision (JA-220 ¶15) in the School's RSO program and its legal obligations under state law. JA-349 ¶5; *see* pp. 7-12, *supra*. And that policy properly takes into account that the "arbitrary or unreasonable discriminatory practices" language of the School's nondiscrimination mandate (JA-220 ¶15) extends its protection beyond the specifically enumerated factors in that provision. *See* p. 5, *supra*.

2. In First Amendment cases, this Court has assumed added leeway to "review the factual record." *Dale*, 530 U.S. at 648-49. But petitioner is not just asking this Court to "review the factual record." It is asking the Court to invent a brand new case for consideration in this Court—and, in the process, to override the joint stipulations of both parties as well as the conclusions of both the district court and the court of appeals as to the policy at issue in this case.

It is well established, however, that parties are bound by their stipulations. Where parties stipulate to the facts, they are entitled to have the "case tried upon the assumption that these ultimate facts, stipulated into the record, were established." *H. Hackfeld & Co. v. United States*, 197 U.S. 442, 447 (1905); *see Fisher v. First Stamford Bank & Trust Co.*, 751 F.2d 519, 524 (2d Cir. 1984); *Lloyd v. Franklin Life Ins. Co.*, 245 F.2d 896, 897 (9th Cir. 1957). The joint stipulations are binding concessions and prevent petitioner from attempting to litigate the constitutionality of a policy "dramatically different" (Pet.Br.19) from the one to which it stipulated.

The courts below accepted the stipulated facts. Petitioner's request that this Court ignore those facts "disregard[s] this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'" *Berenyi v. Dist. Dir.*, 385 U.S. 630, 635 (1967) (citation omitted); *accord Exxon Co., USA v. Sofec, Inc.*, 517 U.S. 830, 840-41 (1996). It is true that this case involves stipulated facts rather than findings of fact. But if anything, the rationale for the "two-court" rule applies with even greater force here, given the absurdity of concluding that a court commits "obvious and exceptional ... error" by relying on the facts jointly presented by the parties themselves.

And of course, First Amendment cases are no exception to "the cardinal principle of judicial restraint" that "if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs., Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment); *see United States v. Resendiz-Ponce*, 549 U.S. 102, 104 (2007). Disregarding the parties' joint stipulations and the decisions of both courts below to decide the constitutionality of a policy that Hastings has never had would leave that "cardinal principle" lying in the street with tire tracks over it.

In any event, the bottom line is that petitioner cannot point to any situation in which Hastings acted in a manner inconsistent with the parties' stipulation—since it is undisputed that Hastings has never, before now, been called upon to enforce its policy. JA-221 ¶16; *see also* JA-221 ¶19; JA-350 ¶7; Pet.App.66a.

3. If this Court granted certiorari based on a different understanding of the case, it should dismiss the writ as improvidently granted. Dismissal of the writ is warranted where the lower courts "ha[ve] not considered" the issue framed by the petitioner. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 108 (2001). Dismissal is also warranted where an issue is not "presented by the record" or the record is not "'sufficiently clear and specific to permit decision of the important constitutional question[] involved.'" Eugene Gressman *et al.*, *Supreme Court Practice* 359 (9th ed. 2007) (quoting *Massachusetts v. Painten*, 389 U.S. 560, 561 (1968)); *see id.* at 359-60 (citing cases).

Dismissal is also appropriate where resolution of a case would result in what amounts to an advisory opinion. *See, e.g., Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994). Petitioner is effectively seeking an advisory ruling because even it does not dispute that Hastings' policy *today* requires all groups to accept any student regardless of their status or beliefs. Moreover, much of petitioner's case rests on hypothetical scenarios—like the specter of group "hijack[ings]," Pet.Br.29 n.4—that have not occurred in the *two decades* that Hastings' policy has been in effect.

The constitutional issues presented by this case are undeniably important and—as the number and nature of the amicus briefs filed in this case underscore—of great interest to many. But this Court's cases, not to mention settled principles of judicial restraint, favor dismissing the writ rather than attempting to decide this case based on the made-up policy and hypothetical scenarios alleged by petitioner in this Court.

II. HASTINGS' POLICY PASSES THE SETTLED PRINCIPLES FOR PUBLIC FUNDING AND LIMITED FORUMS

The open-membership policy before this Court is constitutional under the settled principles governing limits on access to public funding and forums.

A. The Government May Condition Funding And Participation In A Limited Forum On Compliance With Reasonable, Viewpoint-Neutral, And Non-Coercive Rules

1. It is well settled that the State is not required to subsidize private speech. *See Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1098 (2009). Moreover, as this Court recently reaffirmed in *Rumsfeld v. FAIR*, the government "is free to attach reasonable and unambiguous conditions" to participation in a government program. 547 U.S. at 59 (quoting *Grove City*, 465 U.S. at 575). In *Grove City*, this Court held that "[r]equiring [schools] to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the ... program [and receive federal benefits] infringes no First Amendment rights." 465 U.S. at 575-76.

FAIR involved an association of law schools (which did not include Hastings) that sought "to restrict military recruiting on their campuses because they object to the policy Congress has adopted with respect to homosexuals in the military." 547 U.S. at 52. The association challenged the constitutionality of a federal law that "forces institutions to choose between" their desire to restrict military presence on campus and "continuing to receive specified federal funding." *Id.* This Court rejected FAIR's argument and reaffirmed

that a condition burdening First Amendment rights is unconstitutional only if it "goes beyond the 'reasonable' choice offered in *Grove City* and becomes an unconstitutional condition." *Id.* at 59-60.

2. The *Grove City* baseline that the Court reaffirmed in *FAIR* squares with this Court's unconstitutional conditions jurisprudence generally. In determining whether a restriction on participation in a government program rises to the level of an unconstitutional condition, this Court has considered the relationship between the benefit offered and the condition imposed and whether the choice is coercive.

While the government may place limits on its programs, it may not penalize someone or arbitrarily deny them access to a government program for exercising their constitutional rights *outside* of the program. For example, in *Regan v. Taxation with Representation*, 461 U.S. 540, 546-48 (1983), this Court held that government may limit a tax exemption to entities that refrain from substantial lobbying activities, while recognizing that it may not punish groups for maintaining related lobbying entities that do not participate in the tax exemption program. *See also Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994) (condition acceptable where there is an "essential nexus" between the condition and "the legitimate state interest"); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (condition unrelated to government's purpose can amount to "an out-and-out plan of extortion"). And while the government may condition benefits on a "reasonable choice," it may not present a choice "so coercive as to pass the point at which 'pressure turns into compulsion.'" *South Dakota v.*

Dole, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

In assessing the reasonableness of funding conditions, this Court has deferred to the government's definition of the scope of its own programs. As the Court reiterated in *United States v. American Library Association*, 539 U.S. 194 (2003) (plurality opinion), "[w]ithin broad limits, 'when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.'" *Id.* at 211 (quoting *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

Petitioner argues that the government may not impose a condition on benefits or access to a limited forum if it could not do so through a direct regulatory prohibition. Pet.Br.54. In *FAIR*, this Court made the common-sense observation that "a funding condition cannot be unconstitutional if it could be constitutionally imposed directly." 547 U.S. at 59-60. But this Court has never adopted the converse proposition that a funding condition is unconstitutional *unless* it could be imposed directly. That would eliminate the need for an unconstitutional conditions doctrine altogether.

Indeed, in *FAIR* the Court observed that a "'reasonable' choice" is *not* an "unconstitutional condition," thus confirming that some choice is permissible—*i.e.*, a "reasonable" one. *Id.* at 59; *see also Ysursa*, 129 S. Ct. at 1099 n.2. And the Court's prior cases preclude petitioner's proposed rule. In *Dole*, for example, the Court did not hold that the funding condition at issue was constitutional because Congress could directly require the States to adopt a minimum drinking age; it held that it was permissible because "Congress has directed only that a State desiring to establish a minimum drinking age lower than 21 lose a

relatively small percentage of certain federal highway funds," the practical effect of which was not "coercive." 483 U.S. at 211. Likewise, in *Regan*, the Court did not hold that Congress could constitutionally bar particular groups from engaging in lobbying activities; it held that Congress could "refuse[] to pay for the lobbying out of public monies" (by withholding a tax exemption for groups engaged in such efforts) and, instead, require groups to maintain separate lobbying and non-lobbying entities to preserve separation. 461 U.S. at 545 (distinguishing *Perry v. Sindermann*, 408 U.S. 593 (1972), and *Speiser v. Randall*, 357 U.S. 513 (1958)).

3. Limited forums for student speech at public universities are a particular type of government subsidy program, but they are subject to the same basic principles. In a series of cases, this Court has held that the purposes of such programs, and the character of the university setting, require that any conditions on participation must be viewpoint-neutral. *See, e.g., Rosenberger*, 515 U.S. at 834. But this Court has also consistently reaffirmed a university's right to enforce viewpoint-neutral conditions on participation in such a forum, including nondiscrimination rules, where they are reasonably related to the legitimate purposes of the program. *See id.* at 829; *Widmar*, 454 U.S. at 273-74; *Healy*, 408 U.S. at 193-94; Part III.A, *infra*.

When a public university creates a limited public forum for use by student groups, it may confine the forum to "the limited and legitimate purposes for which it was created." *Rosenberger*, 515 U.S. at 829. Thus, a university may "reserv[e] it for certain groups or for the discussion of certain topics," so long as the restrictions are viewpoint-neutral and reasonable in light of the purpose served by the forum. *Id.*; *see also*

Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1132 (2009) ("[A] government entity may create a forum that is limited to use by certain groups ... [and] may impose restrictions on speech that are reasonable and viewpoint-neutral.") (citing cases).

In short, both this Court's public funding cases and its limited forum cases point to the same conclusion: Hastings' open-membership condition on access to its RSO program is permissible so long as it is (1) viewpoint-neutral; (2) reasonable in view of the purposes of the program; and (3) not so coercive that it operates like a regulatory measure rather than presenting groups with a "reasonable choice" about whether to participate in the program.[5]

B. The Policy Is Viewpoint-Neutral

The government engages in viewpoint discrimination when it "targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger*, 515 U.S. at 829. An open-membership policy like Hastings', applicable to all student organizations without regard to their mission or viewpoint, is quintessentially viewpoint-neutral.

Petitioner eventually concedes at the tail-end of its brief that Hastings' open-membership policy is "nominally" viewpoint-neutral. Pet.Br.51. It is no less viewpoint-neutral in practice. Hastings' policy applies equally to every RSO. It does not target any particular viewpoint or make any distinction between religious and non-religious speech. Pet.App.35a-36a. To be

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[5] Because Hastings' policy satisfies the standard that this Court has used to evaluate limited forums for speech, it *a fortiori* satisfies the standard for limits on expressive conduct in *United States v. O'Brien*, 391 U.S. at 376-77. Pet.App.24a-27a.

eligible for RSO status, Hastings Outlaw cannot exclude students who believe homosexuality is morally wrong any more than CLS is permitted to exclude students who believe it is not.

The record in this case—which petitioners repeatedly ignore—reveals "no evidence" of discriminatory motive or practice with respect to CLS or religious viewpoints generally. Pet.App.35a. A number of organizations that, like CLS, engage in worship, Christian fellowship, and Bible study have thrived at Hastings as RSOs—both before and after CLS refused to comply with the policy—including the Law Students' Christian Fellowship and Hastings Koinonia.[6] And CLS's own predecessor group, HCF, was an RSO for a decade before this litigation (when it allowed any interested Hastings student to be a member). In short, the policy plainly does not exclude speech because of its "religious viewpoint." *Good News Club*, 533 U.S. at 111. Nor any other viewpoint.

A nondiscrimination policy is also viewpoint-neutral when it prohibits discrimination on the basis of specifically enumerated factors. This Court has repeatedly held that public accommodations laws written that way do not discriminate on the basis of viewpoint (and, indeed, regulate conduct not speech). *See Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993); *Roberts*, 468 U.S. at 614-15; *see also* Eugene Volokh, *Freedom of Expressive Association and Government*

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[6] The 2009-10 list of RSOs includes the Hastings Catholic Law Students Association, Hastings Jewish Law Students Association, J. Reuben Clark Law Society, and Law Students Christian Fellowship. Hastings College of Law, University of California, Student Organizations, *at* http://www.uchastings.edu/student-services/student-orgs/index.html (last visited Mar. 5, 2010).

Subsidies, 58 Stan. L. Rev. 1919, 1930 (2006). And so what petitioner calls the "written" policy that Hastings implements through its open-membership rule is perfectly viewpoint-neutral as well. Contrary to the suggestion of petitioner (Pet.Br.48), Hastings focuses on the open-membership policy because it is the policy that in fact is used by Hastings—as the parties stipulated—and not because of any concerns about its constitutionality. But to remove any doubt, the School's position is that application of the enumerated nondiscrimination factors in JA-220 ¶15 would also be constitutional as applied to CLS here.

Petitioner appears to suggest that prohibitions on discrimination on the basis of religion and sexual orientation are somehow uniquely viewpoint-discriminatory, at least as applied to religious groups.[7] But that argument is contradicted by this Court's cases holding that nondiscrimination provisions are conduct- rather than viewpoint-based. *E.g.*, *Roberts*, 468 U.S. at 628; *see Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). Moreover, this Court has never suggested that legislatures are uniquely disabled from enacting laws protecting against discrimination on the basis of religion or sexual orientation. To the contrary, the Court *struck down* a state constitutional provision that would have prevented localities from extending nondiscrimination protections to sexual orientation. *Romer v. Evans*, 517 U.S. 620, 628-29 (1996); *see also Wisconsin v. Mitchell*, 508 U.S. at 480, 490 (upholding sentencing enhancement applied to crimes based on, *inter alia*,

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[7] Petitioner says this argument is limited only to "written" proscriptions on religious-based discrimination and does not apply to the School's "all-comers" policy. Pet.Br.37 n.9.

"sexual orientation"). And laws prohibiting discrimination on the basis of religion are an important part of our national fabric. In the end, CLS is simply confusing its *own* viewpoint-based objections to such nondiscrimination laws (which it is entitled to have and voice) with viewpoint *discrimination*.

This Court has long recognized that the fact that a neutral rule may have a *disparate impact* on groups holding particular viewpoints does not establish that it amounts to unconstitutional viewpoint discrimination. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."); *Madsen v. Women's Health Ctr, Inc.*, 512 U.S. 753, 763 (1994) ("That petitioners all share the same viewpoint ... does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated" the restriction.). And *Employment Division v. Smith* underscores that this principle extends to religious groups as well. *See* Part III.D, *infra*.

Petitioner suggests that any funding or limited forum restriction that implicates an expressive group's choice of members is inherently viewpoint-discriminatory. But there is no basis for concluding that a generally applicable, viewpoint-*neutral* condition on participation in a government program is a viewpoint-based restriction on speech simply because associational rights are implicated. Associational interests are implicated almost any time a university (or other public entity) creates a limited public forum. To take only one example, it is commonplace for such forums to be open only to registered students. *See*

Pet.App.83a. But students are constitutionally entitled to associate with non-students. They may even have viewpoint-based reasons for wanting to do so, such as a religious group that wanted to include an ordained minister. Yet no one could seriously question the constitutionality of such a viewpoint-neutral "students only" restriction on the use of university resources. *See Widmar*, 454 U.S. at 267 n.5.[8]

C. The Policy Is Reasonable In Light Of The Purposes Of The Program

1. Hastings' policy ensures that the leadership, educational, and social opportunities afforded by registered student organizations are available to all students. Like countless other universities, Hastings views the RSO program as an important part of its own educational mission and program. Hastings does not allow its professors to host classes open only to those students with a certain status or belief. It would not subsidize bringing outside speakers to the campus if the talk were not going to be open to everyone. And when it creates—and publicly subsidizes—a forum for student speech, it may very reasonably conclude that the student and educational experience is best promoted when all participants in the forum must provide equal access to all students.

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[8] Because the policy at issue in this case is viewpoint-neutral, petitioner's reliance on *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547 (2001), is misplaced. Pet.Br.51-52. As explained in *American Library Association*, the restrictions invalidated in *Velazquez* were "viewpoint-based." 539 U.S. at 213 n.7 (plurality opinion); *see Velazquez*, 531 U.S. at 548-49 (explaining that a "funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest").

Indeed, Hastings' open-membership policy is consistent with public accommodations laws going back all the way back to the middle ages. "At common law, innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 571 (1995) (quoting *Lane v. Cotton*, 12 Mod. 472, 484-85 (K.B. 1701) (Holt, C. J.)); *see Rex v. Ivens*, 7 Car. & P. 213, 219, 173 Eng. Rep. 94, 96 (N.P. 1835) ("every one coming and conducting himself in a proper manner has a right to be received" by innkeepers). And modern-day legislatures have permissibly extended that concept to any business that "'receives financial support through solicitation of the general public or through governmental subsidy of any kind.'" *Romer*, 517 U.S. at 628 (citation omitted).

The fact that the RSO program is funded in part with mandatory student activity fees reinforces that its benefits should be open to all. Hastings' policies specifically, and reasonably, require that programs funded from mandatory student activity fees must be "germane to the educational mission of the College," "must benefit the student body as a whole," and must "make significant contributions to student life." Excerpts of Record 375 ¶35.11(A). It is reasonable for Hastings to conclude that students should not have to subsidize group activities that they are formally excluded from participating in.

2. The policy also reflects Hastings' obligation to follow state law. California law declares that no person shall be subjected to discrimination on the basis of various enumerated factors, including sexual orientation and religion, in "any program or activity

conducted by any postsecondary educational institution" that receives any financial assistance from the state. Cal. Educ. Code §66270; *see also* Cal. Gov. Code §11135(a). This provision—which petitioner does not mention—legally obligates Hastings to prohibit discrimination in its RSO program. That obligation is reinforced by other provisions, including Cal. Educ. Code §66292.2. *See* p. 11, *supra*. And, if there were any ambiguity, the School may err on the side of caution and nondiscrimination and conclude that public funds and facilities should not be used to support groups that engage in practices that the people of the State of California deem to be discriminatory.[9]

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[9] California law generally authorizes the Regents of the University of California to determine the extent to which the part of the code in which §66270 is located applies to the University of California. Cal. Educ. Code §67400. But a separate provision specifically obligates the president of "each University of California campus" to ensure "that campus programs and activities are free from discrimination based on ... the characteristics listed in Section 66270." Cal. Educ. Code §66292.2. Moreover, although Hastings is "affiliated with the University of California," the School is governed by its own board of directors (and not the Regents). Cal. Educ. Code §§92201, 92204. In addition, the Regents have long imposed the same nondiscrimination mandate embodied in §66270. *See, e.g.*, Regents of the University of California, *Policies Applying to Campus Activities, Organizations and Students* §20.00 & App. C (Oct. 20, 2008), *available at* http://www.ucop.edu/ucophome/coordrev/ucpolicies/aos/toc.html; Regents of the University of California, *Regents Policy 4402: Policy on Nondiscrimination on Basis of Sexual Orientation* (June 17, 1983), *available at* http://www.universityofcalifornia.edu/regents/policies/4402.html. And that is not surprising since there are well over 100 other public state colleges in California that are subject to the nondiscrimination mandate in §66270 as well.

Petitioner argues strenuously that discrimination on the basis of sexual orientation or religion is not the constitutional or moral equivalent of race or sex discrimination. And petitioner suggests that a rule prohibiting such discrimination merely reflects what is "[]fashionable at Hastings." Pet.Br.39; *see* Pet.Br.36. To be clear, the people of the State of California (not just "the Hastings authorities," Pet.Br.36) have made that judgment. So have many other States and municipalities. Certainly there are other States and municipalities that have chosen not to proscribe such practices, and they are of course entitled not to do so. But it is at least *reasonable* for the School to decline to subsidize with public monies and benefits conduct of which the people of California disapprove.

"Petitioner does not dispute the right of Hastings to include sexual orientation among the categories on which Hastings itself and its *sponsored* organizations may not discriminate." Pet.Br.44 (emphasis added). But petitioner fails to account for the fact that RSOs receive school funds and have the right to use the School's name and logos, JA-216 ¶9(a), and that it is only natural that the outside world will conclude that Hastings' RSOs say something about the "image ... the [School] ... wishes to project," *Pleasant Grove*, 129 S. Ct. at 1134; *see Hurley*, 515 U.S. at 575-76. "Freedom of association" has never been a means of forcing the State not only to subsidize but to lend its name to practices deemed discriminatory by the citizenry.[10]

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[10] Petitioner asserts that its membership policies discriminate on the basis of belief and conduct—not on the basis of "sexual orientation." *See* Pet.Br.35-36. But as the district court found, petitioner made a "binding ... judicial admission[]" that it intended to exclude members and officers based on their "religion and

3. The policy also allows Hastings to ensure that students are complying with basic nondiscrimination requirements (including those that CLS does not challenge) without any need to meddle in an RSO's internal affairs or to inquire into the sincerity of its stated reasons for excluding a student. That is particularly valuable when it comes to the sincerity of religious beliefs. Hastings also need not get into the messy factual business of evaluating whether a particular student was denied participation because of his religious beliefs or instead because of, say, his disability, veterans' status, or age. Hastings should not be required to choose between closing the forum entirely and being placed in the untenable position of judging the bona fides of a particular group's justifications for exclusion in every case.

4. Far from discriminating against those with minority viewpoints, as petitioner suggests (*e.g.*, Pet.Br.30), Hastings' policy reasonably seeks to *promote* minority viewpoints. The policy ensures that students with minority viewpoints may express them without risking expulsion from a student group. In addition, Hastings may reasonably conclude that the RSO program is enhanced if there is an opportunity for debate *within* groups as well as *among* them. In that sense, the School may reasonably determine that the policy promotes "learning among students." JA-349.[11]

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sexual orientation." JA-460; *see* Pet.App.22a; JA-38, 50, 72 ¶¶4.1-4.3. In any event, the open-membership policy at issue bars any group from excluding a student because of their status or beliefs, and that includes their beliefs about the appropriateness of "nonmarital sex." Pet.Br.36; *see also* Pet.App.22 n.2.

[11] Former Dean Kane explained during her deposition in this case that the policy promotes pluralism not just among *groups* but

Petitioner's challenge to the reasonableness of the policy boils down to the view that absolute ideological purity within groups is necessary to ensure diversity *across* a spectrum of groups. Pet.Br.50. But Hastings' own experience irrefutably shows that its open-membership policy is not incompatible with a diverse universe of student groups. JA-236-45. That is not surprising because students, like other people, often gravitate towards like-minded persons and groups. In any event, it is reasonable for a law school, in particular, to encourage its students to learn to thrive in a setting where they discuss their views with others. Even divinity schools often share that view.[12]

"among[] my students." Deposition of Mary Kane, at 25, *Christian Legal Soc'y v. Kane*, No. C 04 4484 JSW (N.D. Cal. June 6, 2005). She further explained that the policy "promotes an opportunity for students to come together who share different viewpoints." *Id.* Although that sworn testimony was not made a part of the summary judgment record in this case, it is as good a statement as any concerning the purpose of the policy to encourage diversity *within* groups.

[12] The President of one divinity school put it this way:

> "We are a diverse campus with more than 35 denominations represented and a fairly wide range of theological points of view. Not everyone here will be like you, think like you or worship like you. ... This diversity is something we like. We like it because we believe that it will make you think, be more intellectually agile, and develop in you the skills to help navigate the borderlands of difference."

Andover Newton Theological School, Message from the President, *available at* http://www.ants.edu/welcome/message (last visited Mar. 7, 2010); *see also, e.g.*, Vanderbilt University (Vanderbilt Divinity School) 2009/2010 Student Handbook, Chapter 1: University Policies and Regulations, *available at* http://www.vanderbilt.edu/student_handbook/chapter1.html (last visited Mar. 7, 2010) ("all religious groups," like "all registered groups" shall not discriminate on religious grounds); Harvard

The truth is, Hastings has enjoyed the best of both worlds: a broad and diverse universe of RSOs and an environment in which any student can join any RSO regardless of their status or beliefs. That conclusion is supported by nearly twenty years' experience with the policy. If the open-membership policy were to have the extreme homogenizing effect that petitioner hypothesizes of eliminating the diversity among groups that Hastings has enjoyed, then the School could reconsider the trade-offs. But so far Hastings has not been forced to choose between the extremes of encouraging diversity only *among* groups or only *within* groups; it may reasonably choose a policy that promotes *both* to some degree, as its open-membership policy does in practice. *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55, 49 (1973) (upholding State's educational policy, which represented "rough accommodation" of "two competing forces").

Moreover, seasoned administrators at Hastings are not required to agree with CLS about what forms of group structure are best suited to the discourse Hastings hopes to foster and are not required to choose between having no RSO forum at all and creating one that best suits CLS's wishes. It is the state as school administrator—and not the student population, or a single student group—that is entitled to decide the purposes of this limited forum. *See Rust*, 500 U.S. at 194; *Regan*, 461 U.S. at 548-49; *American Library Ass'n*, 539 U.S. at 211-12. And such expert judgments are entitled to no less respect than the difficult

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Divinity School Student Handbook 58, *available at* http://www.hds.harvard.edu/registrar/handbook/handbook2009-10.pdf (last visited Mar. 7, 2010) (barring religious discrimination).

judgments that school administrators make on other matters. *Cf. Morse v. Frederick*, 551 U.S. 393 (2007).[13]

The administrators of the Nation's public universities may reach—and have reached—different judgments on this issue. But surely there is room for universities reasonably to take different approaches. A State's decision "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985). Hastings' open-membership policy meets that standard.

D. The Choice Presented To Student Groups Is Non-Coercive

Nor is there any reason to view Hastings' conditions on the RSO program as a "severe burden" on anyone's expressive or associational rights. Pet.Br.49. To begin with, though one would scarcely know it from reading petitioner's brief, the policy offers "a choice" (*FAIR*, 547 U.S. at 58), rather than imposing a regulatory proscription. A group may abide by the School's viewpoint-neutral open-membership policy and obtain the modest funding and benefits that go along with school recognition, or forgo recognition and do as it wishes. Nothing is forced on any group; indeed, nothing prevents students from doing both—

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[13] This Court has held that the government's assessments are entitled to even greater deference when it acts as an employer or public service provider. *See Waters v. Churchill*, 511 U.S. 661, 671-73 (1994); *Bd of County Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996). Although the Court need not invoke such precedents to sustain the reasonableness of Hastings' policy, similar considerations nevertheless support giving deference to the government-as-educator in drawing viewpoint-neutral rules governing access to limited forums and public funds.

associating within the RSO program consistent with that program's rules, and also *outside* that program in any manner they wish. *See Regan*, 461 U.S. at 545.

This Court has repeatedly recognized that the denial of funding is neither inherently coercive nor penal. *See American Library Ass'n*, 539 U.S. at 212. In the abortion context, for example, this Court has held that a State has no obligation to provide affirmative financial assistance to indigent women seeking abortions, even though the Court has also held that a State may not ban abortion outright. *Maher v. Roe*, 432 U.S. 464, 475 (1977); *see also National Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998); *id.* at 596 ("'[D]enial of participation in a tax exemption or other subsidy scheme does not ... as a general rule, have any significant coercive effect.'") (Scalia, J., joined by Thomas, J., concurring in the judgment); *Rust*, 500 U.S. at 193; *Xiu Ling Chen v. Gonzales*, 489 F.3d 861, 862 (7th Cir. 2007) (Easterbrook, J.) ("incentives differ from compulsion") (discussing *Maher* and *Rust*); *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 91-92 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004). And in *Regan*, *Grove City*, and *Bob Jones University v. United States*, 461 U.S. 574 (1983), this Court held that the denial of federal benefits far more lucrative than the modest funds here was not unduly burdensome. *See* Part II.A, *supra*.[14]

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[14] Nor is there anything inherently problematic about a religious group choosing to stick by its convictions and turning away public subsidies because the group does not wish to comply with reasonable and viewpoint-neutral strings that are attached. Indeed, at the founding, "[t]he most intense religious sects opposed establishment on the ground that it injured religion and subjected it to the control of civil authorities. Guaranteed state

Held up against those standards, Hastings' policy is within the bounds of the "'reasonable' choice offered in *Grove City*." *FAIR*, 547 U.S. at 59. The relatively modest benefits offered by the RSO program are not so significant "as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211 (quoting *Steward Mach.*, 301 U.S. at 590). Petitioner builds its counter-argument around *Healy*, but as explained below, the university in *Healy* barred the plaintiff student group from "exist[ing]" on campus *at all*. 408 U.S. at 181, 183; *see* Part III.A, *infra*. In sharp contrast, Hastings has repeatedly told CLS that it may use "Hastings facilities for its meetings and activities." JA-294; Pet.App.8a; JA-232 ¶58, 300.

The availability of that choice is more than enough to resolve this case, but it also bears mention that this Court has repeatedly rejected the notion that "an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." *Dale*, 530 U.S. at 653. The only record evidence concerning the impact of allowing gay students and those who hold different religious beliefs to participate in a Christian group's meetings is that their inclusion did *not* "impede the organization's ability to engage in [its] protected activities or to disseminate its preferred views." *Roberts*, 468 U.S. at 627; *see* JA-224, 324-27; Pet.App.58a.[15]

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support was thought to stifle religious enthusiasm and initiative." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1438 (1990).

15 The fact that the Bible, much like the Constitution, is "a book whose interpretation is not free from controversy"

Petitioner repeatedly suggests that the policy "requir[es] CLS to accept leaders who do not follow its moral teachings." Pet.Br.32; *see also* Pet.Br.2, 27. Again, the policy does not *force* CLS to do anything; it gives it a choice. Moreover, for those groups that accept RSO status, the policy obligates them only to permit members "to *seek* leadership positions." JA-221 ¶18 (emphasis added). The policy places no restrictions at all on the selection process. For CLS, a member may not become a leader without, at a minimum, "a majority vote of the Chapter members," Pet.App.102a; no serious infringement on association could be occasioned by a student selected by (at least) the majority of a group. By ensuring that all students who join RSOs are *eligible* for leadership positions, the policy simply ensures that students are admitted as full-fledged members—not second-class ones.

Petitioner hypothesizes that if it chooses to honor the policy, it will be subject to "sabotage," or even a "hijack[ing]." Pet.Br.28-29 & n.4. But Hastings' open-membership policy is two decades old and there is not one shred of evidence in the record before this Court that any of the scores of RSOs at Hastings has ever been threatened with—much less subjected to—a takeover. To the contrary, the School has always enjoyed a diverse universe of RSOs. Neither petitioner's facial challenge nor certainly its as-applied challenge permits the Court to invalidate the policy on

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(Pet.Br.30) does not mean that allowing students to offer different interpretations of it would "sabotage[]" CLS. Pet.Br.31. And the only record evidence on this question supports that conclusion, *see* JA-325-27. In any event, if CLS does not wish to allow such discourse, it may of course forgo RSO status. And CLS may consider other options such as a general rule that Bible study leaders must first attend a certain number of meetings.

the basis of a hypothetical theory that has no support in the record and, indeed, virtually no support in the history of higher education in America. *Cf. Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1623 (2008); *New York v. Ferber*, 458 U.S. 747, 767 (1982).[16]

Though petitioner's opening brief promised that amici would provide "numerous examples" of sabotage and takeover (Pet.Br.29 n.4), petitioner's amici have failed to identify a *single* actual "takeover"—anywhere. The one "example" amici offer is not an example at all; it concerned a mere suggestion of one student on a social networking site that apparently was never acted upon. *See* Br. of *Amici Curiae* Foundation for Individual Rights in Education and Students for Liberty ("FIRE Br.") at 9-10. Amici's other "evidence" has nothing to do with the infiltration or takeover of student groups by dissenters, but involves basic disputes between student groups and universities over eligibility for recognition despite non-compliance with a non-discrimination policy. *See* FIRE Br.8-14. In other words, the best that petitioner and amici have to offer simply confirms that the risk of takeover or sabotage to which petitioner repeatedly alludes is remote.

Petitioner is free to bring an as-applied challenge if circumstances change. Pet.App.49a n.5. But petitioner cannot meet its burden of proving that the policy is unconstitutionally coercive simply by hypothesizing

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[16] There are also checks in place. The School's student code of conduct applies to RSO activities and, *inter alia*, prohibits "[o]bstruction or disruption," "[d]isorderly" conduct, and threats. Policies and Regulations Applying to College Activities, Organizations and Students §§52.00, 54.00, *reprinted in Academic Regulations and Other Rules Applicable to Students* 35-39 (2009-2010), *at* http://www.uchastings.edu/academics/regulations.html.

circumstances that have no foundation whatsoever in experience, much less the case litigated below. *Cf. Ysursa*, 129 S. Ct. at 1099 n.3; *Gonzales v. Carhart*, 550 U.S. 124, 167-68 (2007); *Finley*, 524 U.S. at 587.

III. PETITIONER'S THEORY OF THE CASE IS BASED ON PRECEDENTS THAT ARE READILY DISTINGUISHABLE

Petitioner rests its case almost entirely on precedents that are readily distinguishable when it comes to the case that is before this Court.

A. Petitioner's Reliance On *Healy* And *Widmar* Is Misplaced

Petitioner builds its case around *Healy* and *Widmar*, and argues that those decisions establish that a public university's denial of recognition to a student group is "presumptively unconstitutional." Pet.Br.17-18; *see also* Pet.Br.21-22. Petitioner bases that argument on the statement in *Healy* that "the effect of the College's denial of recognition"—*in that case*—was "a form of prior restraint." 408 U.S. at 184. But it takes that statement—and the "heavy burden" language that appears in the very next sentence, *id.*—completely out of context. The Court's use of the term "prior restraint" was explicitly tied to the fact that the college in that case had not just refused to recognize the student group at issue—it systematically sought to prevent the group from *existing* on campus, even going so far as to disband an informal meeting of the group in a "campus coffee shop." *Id.* at 181; *see id.* at 176 ("[M]ost importantly—nonrecognition barred them from using campus facilities for holding meetings.").

Likewise, in *Widmar*, the Court considered a policy that "[n]o University buildings or grounds (except

chapels as herein provided) may be used for purposes of religious worship or religious teaching." 454 U.S. at 265 n.3. As in *Healy*, the restriction amounted to a *total* exclusion of religious groups from campus (since there were no chapels on campus). *See id.* at 264-65 (framing the issue as whether a university may "close its facilities" to a religious group altogether). On those facts, virtually on all fours with *Healy*, the Court again analogized the school's policy to a "form of prior restraint." *Id.* at 268 n.5. By contrast, as discussed, CLS has been granted access to the School's facilities for its meetings and activities. JA-294.

Furthermore, *Healy* and *Widmar* both involved total expulsion from campus on a blatantly *viewpoint-discriminatory basis*. In *Healy*, the school banned the group from campus because it found its "philosophy abhorrent." 408 U.S. at 187; *see id.* at 175. And in *Widmar*, the provision at issue expressly targeted "religious worship or religious teaching." 454 U.S. at 265; *id.* at 269-70. This case, again, is the opposite.

Healy and *Widmar* are nevertheless instructive for a different reason. They recognize that student groups may be denied recognition when they fail to comply with "reasonable," viewpoint-neutral conditions—including nondiscrimination rules—"compatible with [the school's] mission upon the use of its campus and facilities." *Widmar*, 454 U.S. at 267 n.5; *see id.* at 277 (reaffirming the school's "right to exclude even First Amendment activities that violate reasonable campus rules"); *Healy*, 408 U.S. at 192-93 (reasonable viewpoint-neutral rules "do[] not impose an impermissible condition on the students' associational rights"); *see id.* at 195 (Burger, C.J., concurring) ("student organizations seeking the privilege of official

campus recognition must be willing to abide by valid rules of the institution applicable to all such organizations"). Indeed, *Healy* expressly stated that it was not questioning the school's content-neutral standards for recognition, which prohibited discrimination based on religion. *See id.* at 183 n.11.[17]

B. *Rosenberger* And The Equal Access Cases Are Similarly Inapposite

Petitioner's reliance on *Rosenberger* and the "equal access" cases is also unavailing. In those cases, religious groups were singled out and denied access to public facilities or funds because of their religious viewpoint. Neither *Rosenberger* nor any other case retreats from the settled principle that a public university may set reasonable, viewpoint-neutral rules.

In *Rosenberger*, a university created a program to subsidize the costs of various student publications, but refused to fund publications that "'promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality.'" 515 U.S. at 827 (citation omitted) (alterations in original). Breaking no new ground, the

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[17] Petitioner offers a string cite for the proposition that "denial of [certain] incidents of registered status, even with access to meeting space, is a constitutional infringement under *Healy*." Pet.Br.25. But *every one* of those cases was decided on the ground that the school had engaged in *viewpoint* discrimination. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006); *Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 528 (3d Cir. 2004) (Alito, J.); *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317, 1333 (5th Cir. 1984); *Gay Activists Alliance v. Board of Regents of Univ of Okla.*, 638 P.2d 1116, 1121-22 (Okla. 1981); *Gay Lib v. University of Mo.*, 558 F.2d 848, 852, 854-55 (8th Cir. 1977); *Gay Alliance of Students v Matthews*, 544 F.2d 162, 164-65 (4th Cir. 1976); *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).

Court held the First Amendment "forbid[s] the State to exercise [such] viewpoint discrimination." *Id.* at 829. Likewise, in *Good News Club* and *Lamb's Chapel*, religious groups were denied access to facilities solely because they proposed to address from a religious viewpoint subjects otherwise within the scope of the limited forum. *See Good News Club*, 533 U.S. at 111; *Lamb's Chapel*, 508 U.S. at 393-94.

In stark contrast, Hastings' open-membership policy is plainly viewpoint-neutral. *See* Part II.B, *supra*. CLS has been offered the same viewpoint-neutral choice as every other student group at Hastings, and thus enjoys the *same* access to the RSO program as every other group. Surely a doctrine built on guaranteeing religious groups equal access at our Nation's public schools does not support petitioner's claim to *special* access. Indeed, extending the doctrine to such claims ultimately could cause it to unravel given the unique concerns presented by "singl[ing] out religious entities for special benefits." *Rosenberger*, 515 U.S. at 854-55 (Thomas, J., concurring). And there is an unmistakable (and unfortunate) irony in petitioner's attempted reliance on the equal access cases to invalidate a policy that exists to ensure equal access by all students to all school-funded activities.

C. Neither *Dale* Nor *Hurley* Extends To The Choice At Issue Here

Petitioner is also wrong in suggesting that this case follows "*a fortiori*" from *Boy Scouts of America v. Dale*." Pet.Br.45. In *Dale*, New Jersey sought to apply its public accommodations law to *compel* the Boy Scouts to reinstate "an avowed homosexual and gay rights activist" as a scout leader. 530 U.S. at 644. The Court found that "the *forced inclusion* of Dale"

violated the Boy Scouts' right of expressive association. *Id.* at 650 (emphasis added). By contrast, Hastings' policy does not "force" CLS to admit anyone. It simply presents groups with a choice: Open your membership and enjoy access to limited public funds and benefits, or forgo such public subsidies and exclude whomever you wish. *Dale* is therefore inapposite.

Petitioner's reliance on *Hurley* is similarly misplaced. Like *Dale*, *Hurley* involved the direct application of a public accommodations law rather than a funding condition. Moreover, *Hurley* concerned a group seeking access to a quintessential public forum—the streets. 515 U.S. at 560-62. When the State creates a limited forum for expression it is entitled to define the purposes of the forum and limit participation in a manner reasonably consistent with those purposes, so long as the limits are viewpoint-neutral. Part II.A, *supra*. The State cannot define or limit the purposes of private expression on the streets of Boston. The government certainly could not, for example, decree that only veterans may march in the streets. But the government *could* open a parade ground at West Point on the Fourth of July to honor various military units and limit participation to groups composed only of members of those units. *Cf. Regan*, 461 U.S. at 547-48; *Cornelius*, 473 U.S. at 806-07.

This Court has consistently held that a campus speech forum is a *limited* forum subject to reasonable, viewpoint-neutral rules. *See, e.g., Good News Club*, 533 U.S. at 106-07; *Rosenberger*, 515 U.S. at 829; *Widmar*, 454 U.S. at 268 n.5. Petitioner is thus quite wrong in saying that this case is about "driv[ing]" anyone's views "from the public square." Pet.Br.58.

D. Petitioner's Half-Hearted Free Exercise Argument Is Telling

Petitioner does not address the Free Exercise Clause until page 40 of its brief and does so only in passing. The reason is obvious—*Employment Division v. Smith*. "Under *Smith*, neutral, generally applicable laws are not subject to First Amendment challenge no matter how severe an impediment they may be to the exercise of religion." Michael W. McConnell, *Freedom From Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 819, 819 (1998); *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) ("In *Smith*, ... we rejected the interpretation of the Free Exercise Clause announced in *Sherbert v. Verner*, 374 U.S. 398 [(1963)].").

Nevertheless, despite the rule of *Smith*, there is an unmistakable current in the briefs of petitioner and its amici that the policy at issue in this case cannot be applied to *religious* groups—in particular—because of the unique burdens that religious groups alone assertedly would face if they were required to abide by it. These are precisely the sort of considerations that *Smith* dismisses in the case of a neutral and generally applicable law—like the policy here. And it is hard to see what would be left of *Smith* if a religious group could circumvent it simply by reframing its alleged injury in terms of *associational* rights.[18]

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[18] In *Smith*, this Court hypothesized that "a challenge on freedom of association grounds" may be "reinforced by Free Exercise Clause concerns." 494 U.S. at 882. But the Court did not suggest that a plaintiff bringing such a challenge would be excused from having to establish a violation of freedom of association, or

As petitioner notes (Pet.Br.46), many laws include religious-practice-based exemptions. "But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts." *Smith*, 494 U.S. at 890. This Court has always treated such exemptions as a permissible means of *accommodating* religion through the "play in the joints" of the Religion Clauses rather than constitutionally compelled carve-outs. *See, e.g., Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329-30 (1987); *cf. Shrum v. City of Coweta*, 449 F.3d 1132, 1143 (10th Cir. 2006) ("The religious accommodation requirements of Title VII ... extend beyond the dictates of the Free Exercise Clause, as interpreted by *Smith* ....") (McConnell, J.).

Courts have generally recognized a "ministerial exception" that exempts the church-minister relationship from the reach of direct regulatory prohibitions, such as Title VII's, that might otherwise compel intrusions into a church's selection of its

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would be entitled to a wholesale exemption from *Smith*. That would leave little of *Smith*, since virtually any free exercise claim could be reframed as a free association claim. It is not surprising, then, that the lower courts have routinely rejected such "hybrid" rights challenges in the context of viewpoint-neutral zoning ordinances directly bearing on a religious group's associational rights. *See, e.g., Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 656 (10th Cir. 2006); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1031-33 (9th Cir. 2004); *see also Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 440 n.45 (9th Cir. 2008) ("[N]o court has ever allowed a plaintiff to bootstrap a free exercise clause in this manner. We decline to be the first.") (citation omitted).

leadership, in order to prevent excessive entanglement between government and religion. *See, e.g., Petruska v. Gannon Univ.*, 462 F.3d 294, 303-04 (3d Cir. 2006). That exception is not at issue here because this case involves a funding condition and the policy at issue does not compel the selection of anyone. Moreover, CLS has not held itself out as a *church* and does not seek funding for *clergy*. *See* Pet.App.67a n.6.[19]

IV. THE FIRST AMENDMENT DOES NOT REQUIRE STATES TO SUBSIDIZE DISCRIMINATORY PRACTICES

This Court has long held that the government is not required to subsidize entities engaged in discriminatory practices, simply because it subsidizes other associations that do not engage in discriminatory practices. *See, e.g., Bob Jones*, 461 U.S. at 583; *Norwood v. Harrison*, 413 U.S. 455, 462-63 (1973). That rule accounts for the fact that a State's "decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan*, 461 U.S. at 549. It also reflects the fact that extending public subsidies to a group may be viewed as a sign of the State's approval of group's mission or activities. *Cf. Hurley*, 515 U.S. at 575. Indeed, if petitioner is constitutionally entitled to RSO status, then it is entitled to the use of Hastings' own name and logo. JA-216 ¶9(a). While RSOs must specify in written materials that Hastings does not "sponsor" them, JA-219 ¶13, the School may

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19 Of course, "a law targeting religious beliefs as such is never permissible." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993). In this case, however, there is no basis for concluding that the policy at issue in this case was designed to "target[] religious beliefs." Pet.App.63a.

reasonably act on the assumption that members of the public will not always read the fine print.

Petitioner concedes that compelling state interests would still allow the government to refuse to subsidize and assist groups that discriminate on the basis of race and—"to some extent," petitioner says—sex. Pet.Br.43. But the "straightforward" rule that it advocates (Pet.Br.2) would grant any "noncommercial expressive association[]" in America a First Amendment right to receive public funds and participate in limited public forums while excluding individuals on the basis of *any* other factor, including "age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or of his or her associates." *Romer*, 517 U.S. at 629.

Military reservists and servicemen may be particularly vulnerable to discriminatory treatment under petitioner's rule. College students represent approximately 30 percent of reserve personnel, *see* Andy P. Fernandez, *The Need for the Expansion of Military Reservists' Rights in Furtherance of the Total Force Policy: A Comparison of the USERRA and ADA*, 14 St. Thomas L. Rev. 859, 863 (2002), and, sadly, are not immune from discrimination on campus.[20] But

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[20] *See, e.g.*, Alec Magnet, *Veterans Take Grievances to Columbia Provost*, N.Y. Sun, Feb. 1, 2006, *available at* http://www.nysun.com/new-york/veterans-take-grievances-to-columbia-provost/26823/ ("[A]nti-military bias and comments, mostly by other students, are prevalent university-wide"); Andrew Lee, *Discrimination Against the Military Must End*, Tufts Daily (Nov. 15, 2006; updated Aug. 17, 2008) *available at* http://www.tuftsdaily.com/2.5519/discrimination-against-the-military-must-end-1.593009 (discussing "schism between the

under petitioner's rule, the official Hastings Outdoor Club (JA-241) could refuse to let student reservists participate in a school-subsidized hiking trip because the student leaders of that group disagree with the military's conduct of the war on terror. And Hastings not only would be constitutionally precluded from doing anything about it, it would have to subsidize the group's activities and let it use the School's name.

Petitioner's theory would render unconstitutional federal, state, and local laws conditioning the eligibility of expressive associations and other groups to receive public funds, use public facilities, or participate in limited public forums on their willingness to comply with routine nondiscrimination provisions. To take only one example, the federal government has long required any group wishing to contract with the government to agree "not [to] discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin." Exec. Order No. 11246, 30 Fed. Reg. 12,319, 12,320 (Sept. 24, 1965).[21] In 2002, the President carved out an exemption for religious groups. Exec. Order No. 13279, §4, 67 Fed. Reg. 77,141, 77,143 (Dec. 16, 2002). But the President did not suggest that this accommodation was constitutionally compelled.

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military and civilians on campus" and noting that "[m]isunderstandings are fostered by a lack of dialogue").

[21] *See also, e.g.*, Office of Disability Employment Policy, Dep't of Labor, *Demystifying the Rehabilitation Act: What Faith-Based and Community Organizations Need to Know*, *at* http://www.dol.gov/odep/ pubs/fact/faith.htm (last visited Mar. 5, 2010). Nothing in the amicus brief filed by the States of Michigan *et al.* is to the contrary. Indeed, that brief is based solely on the mistaken premise that Hastings' open-membership rule is viewpoint-based. *See* Br. of *Amici Curiae* Michigan *et al.* at 3.

Furthermore, adopting petitioner's position also would invite similar claims by other groups seeking exemptions from viewpoint-neutral and generally applicable equal access policies. Although Hastings respects CLS's "complete right" to its religious beliefs, JA-343, and the right of other groups to express their viewpoints, nothing prevents the School from adopting a neutral and generally applicable open-membership policy that allows it to avoid subsidizing groups that engage in exclusionary practices, especially those proscribed by state law. That goes for the student environmental group that refuses to admit students who do not believe in global warming as much as it does for the student hate group that refuses to admit students who accept the Holocaust as historical fact.[22]

* * * * *

Hastings agrees with petitioner this far: "this case is most emphatically *not* a clash between religious freedom and rights pertaining to sexual orientation."

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[22] A number of universities have been forced to struggle with student groups organized around animus towards persons of different backgrounds or viewpoints. *See, e.g.*, David Holthouse, *Black Hats on Campus: Student Hate Group Roils Michigan State*, Intelligence Report (2007), *available at* http://www.splcenter.org/intel/intelreport/article.jsp?aid=869 (last visited Mar. 5, 2010) (describing Michigan State student group that tried to organize a "Catch an Illegal Immigrant Day" contest, held a "Koran Desecration" competition, joked about distributing smallpox-infested blankets to Native American students, and hosted a series of lectures by hate group leaders that drew skinheads and other white supremacists to the MSU campus). Of course, such groups are protected by the First Amendment from viewpoint-based discrimination. But the Court has never suggested that they enjoy a First Amendment right to public funds and other public benefits where they refuse to comply with viewpoint-neutral nondiscrimination rules.

Pet.Br.58. Indeed, as petitioner frankly admits, "[t]he right that CLS is asserting ... is by no means limited to religious groups." Pet.Br.19. Far from it. Petitioner claims that *every* "noncommercial expressive association[]" (Pet.Br.2) in America has a First Amendment right *both* to demand access to public funds and benefits—indeed, even the right to use the State's own name—and to demand a special exemption from viewpoint-neutral nondiscrimination provisions that apply to such public funds or benefits. This Court has never come close to adopting such a remarkable proposition. And there is no reason to do so here.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed, or the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

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ADDENDUM

1. The following are portions of the record reflecting Hastings' open-membership policy:

Deposition of Judy Chapman (July 6, 2005)

- In determining whether student organization bylaws comply with the policy, the director of student services looks to see "is the organization open to all Hastings students." JA-108.
- "Q. ... Is it permissible for student organizations, for registered student organizations to limit their membership to students who can support their group's purpose or mission?

  A. ... [T]hey need to be open to all students so it would not be permissible, no.

  Q. So student organizations have to be open even to students who may disagree with their purposes?

  A. Yes. .... [W]e would say membership in all organizations is open to all students." JA-320.

Deposition of Mary Kay Kane (July 6, 2005)

- "[I]n order to be a registered student organization you have to allow all of our students to be members and full participants if they want to. Somebody may not come to you initially with all of your views but all of our organizations should be open to every member in the community.... But to the extent that they would not allow every member of our community, any member of our community who

wanted to participate, then they should not be able to be a registered student organization." JA-343-44.

- "Q. Is it fair to say it is the college's position that any student should be able to join or seek to lead an organization, any registered student organization?

  A. Yes.

  Q. Regardless of their religious beliefs, right?

  A. Correct.

  Q. Regardless of their political beliefs?

  A. Correct." JA-346.

Joint Stipulation (Oct. 7, 2005)

- "In order to become a registered student organization, a student organization's bylaws must provide that its membership is open to all students and the organization must agree to abide by the Nondiscrimination Policy." JA-221 ¶17.
- "Hastings requires that registered student organizations allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs." JA-221 ¶18.
- "Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization." JA-221 ¶18.

Pl's Motion for Summary Judgment (Oct. 7, 2005)

- "Hastings interprets the Policy on Nondiscrimination such that student organizations must allow *any* student, regardless of their status or beliefs, to participate in the group's activities and meetings and to become voting members and leaders of the group. For example, Hastings requires that the Hastings Democratic Caucus must allow an ardent Republican to be president of the organization." *Id.* at 4.

Defs' Motion for Summary Judgment and Opposition to Pl's Motion for Summary Judgment (Oct. 21, 2005)

- "Hastings interprets the Policy as requiring registered groups to allow *any* interested student to participate, become a member or seek leadership positions in the group, regardless of the student's status or beliefs." *Id.* at 3.

Declaration of Judy Chapman (Oct. 21, 2005)

- "Hastings interprets the Nondiscrimination Policy as requiring that student organizations wishing to register with Hastings allow any Hastings student to become a member and/or seek a leadership position in the organization. Hastings requires registered student organizations to be open to all students in this manner for several reasons." JA-349 ¶5.

Pl's Reply in Support of Summary Judgment and in Opposition to Defs' Motions for Summary Judgment (Nov. 7, 2005)

- "To determine whether a student organization's constitution conforms to the Policy on Nondiscrimination, Ms. Chapman checks to see if the organization ensures that *any* interested student may participate, become a member or seek a leader position in the group, regardless of the students' beliefs." *Id.* at 3 (internal quotation marks, citation, and ellipsis omitted).

Hearing Before the District Court on Cross-Motions for Summary Judgment (Dec. 2, 2005)

- Pl's Counsel: "It's important to understand what Hastings' policy is. According to paragraph 18 of the stipulated facts, ... 'Hastings requires that registered student organizations allow any student to participate, become a member or seek leadership positions in the organization regardless of their status or beliefs. Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership policies in the organization.'" JA-438-39.

- Defs' Counsel: "[A]s a condition to funding those organizations, giving them facilities, giving them access to channels of communication—you have to open your doors to any student who is interested in participating in your group." JA-445.

District Court Opinion (May 19, 2006)

- "Hastings requires registered student organizations to allow any student to participate, become a member, or seek leadership positions, regardless of their status or beliefs." Pet.App.9a.

Brief of Appellant (Sept. 28, 2006)

- "Hastings illustrates the application of the Nondiscrimination Policy by explaining that for the Hastings Democratic Caucus to gain recognition, it must open its leadership and voting membership to Republicans." *Id.* at 29.

Brief of Appellees (Jan. 12, 2007)

- "Hastings interprets the Policy as requiring registered groups to allow *any* interested student to participate, become a member or seek leadership positions in the group, regardless of the student's status or beliefs." *Id.* at 3.

Court of Appeals Opinion (Mar. 17, 2009)

- "The parties stipulate that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group." Pet.App.2a.

Petition for Writ of Certiorari (May 5, 2009)

- "The material facts of this case are undisputed." *Id.* at 2.
- "Hastings asserts that it requires RSOs to 'allow any student to participate, become a member, or

seek leadership positions in the organization, regardless of their status or beliefs.'" *Id.* at 4.

Reply on Petition for Writ of Certiorari (July 21, 2009)

- "Of course, in the instant case, Respondents will recognize CLS only if it agrees to allow *anyone* to become a leader or voting member, without regard to his or her viewpoint, conduct or expression." *Id.* at 9 n.2.

2. The following are pertinent provisions of the California Code:

CALIFORNIA GOVERNMENT CODE § 11135

Title 2. Government of the State of California
Division 3. Executive Department
Part 1. State Departments and Agencies
Chapter 1. State Agencies
Article 9.5. Discrimination

§ 11135. Programs or activities funded by state; discrimination on basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability; federal act; definitions; legislative findings and declarations

(a) No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. Notwithstanding Section 11000, this section applies to the California State University.

* * *

CALIFORNIA EDUCATION CODE § 66030

Title 3. Postsecondary Education
Division 5. General Provisions
Part 40. Donahoe Higher Education Act
Chapter 2. General Provisions
Article 4. Educational Equity for Students

§ 66030. Intent regarding educationally equitable environments

(a) It is the intent of the Legislature that public higher education in California strive to provide educationally equitable environments that give each Californian, regardless of age, economic circumstance, or the characteristics listed in Section 66270, a reasonable opportunity to develop fully his or her potential.

(b) It is the responsibility of the governing boards of institutions of higher education to ensure and maintain multicultural learning environments free from all forms of discrimination and harassment, in accordance with state and federal law.

CALIFORNIA EDUCATION CODE
§§ 66251-66252

Title 3. Postsecondary Education
Division 5. General Provisions
Part 40. Donahoe Higher Education Act
Chapter 4.5. Sex Equity in Education Act
Article 1. Title and Declaration of Purpose

§ 66251. Policy; purpose

It is the policy of the State of California to afford all persons, regardless of disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any other basis that is contained in the prohibition of hate crimes set forth in subdivision (a) of Section 422.6 of the Penal Code, equal rights and opportunities in the postsecondary institutions of the state. The purpose of this chapter is to prohibit acts that are contrary to that policy and to provide remedies therefor.

§ 66252. Legislative findings and intent

(a) All students have the right to participate fully in the educational process, free from discrimination and harassment.

* * *

CALIFORNIA EDUCATION CODE
§§ 66270-66271

Title 3. Postsecondary Education
Division 5. General Provisions
Part 40. Donahoe Higher Education Act
Chapter 4.5. Sex Equity in Education Act
Article 3. Prohibition of Discrimination

§ 66270. Prohibited discrimination

No person shall be subjected to discrimination on the basis of disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any characteristic listed or defined in Section 11135 of the Government Code or any other characteristic that is contained in the prohibition of hate crimes set forth in subdivision (a) of Section 422.6 of the Penal Code in any program or activity conducted by any postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid.

§ 66271. Exception

This chapter shall not apply to an educational institution that is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization.

CALIFORNIA EDUCATION CODE § 66292.2

Title 3. Postsecondary Education
Division 5. General Provisions
Part 40. Donahoe Higher Education Act
Chapter 4.5. Sex Equity in Education Act
Article 5. Compliance and Enforcement

§ 66292.2. Primary responsibility for ensuring that university campus activities and programs are free from discrimination

The President of the University of California and the chancellor of each University of California campus shall have primary responsibility for ensuring that campus programs and activities are free from discrimination based on age and the characteristics listed in Section 66270.

CALIFORNIA EDUCATION CODE § 67400

Title 3. Postsecondary Education
Division 5. General Provisions
Part 40. Donahoe Higher Education Act
Chapter 16. Applicability to University of California

§ 67400. Regents of university; provisions applicable by resolution

No provision of this part shall apply to the University of California except to the extent that the Regents of the University of California, by appropriate resolution, make that provision applicable.

CALIFORNIA EDUCATION CODE § 92201

Title 3. Postsecondary Education
Division 9. University of California
Part 57. University of California
Chapter 3. Special Colleges
Article 1. Hastings College of the Law

§ 92201. Affiliation with University of California

The college is affiliated with the University of California, and is the law department thereof.

CALIFORNIA EDUCATION CODE § 92204

Title 3. Postsecondary Education
Division 9. University of California
Part 57. University of California
Chapter 3. Special Colleges
Article 1. Hastings College of the Law

§ 92204. Board of directors; function; quorum; compensation; members; term of office

The business of the college, which includes the power to incur indebtedness, shall be managed by the board of directors. Six directors constitute a quorum for the transaction of all business. The directors shall serve without compensation.

One of the directors shall always be an heir or representative of S.C. Hastings. All other directors taking office after January 1, 1981, shall serve for terms of 12 years. Directors in office prior to January 1, 1981, shall serve for the terms provided in the bylaws of the college in effect on that date.

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
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No. 08-1371

IN THE
Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

BRIEF ON THE MERITS FOR RESPONDENT-INTERVENOR HASTINGS OUTLAW

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March 8, 2010

QUESTION PRESENTED

1. Whether a public university, in choosing to establish a forum for student groups that receive official recognition and a small subsidy, has sufficient latitude under the First Amendment to establish, as a viewpoint-neutral condition for receiving limited benefits, the requirement that a recognized group be open to all students?

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INTRODUCTION

Hastings Outlaw is a registered student organization at the Hastings College of Law ("Hastings") whose members have a strong interest in being able to participate in all other Hastings-affiliated registered student organizations, regardless of their individual status or beliefs. Its members have chosen to attend a law school, Hastings, that has concluded that its students benefit educationally from the equal opportunity to meaningfully participate in any recognized student organization.

To advance its educational objectives, Hastings has decided to confer certain limited benefits on non-commercial registered student groups that open their membership to any Hastings student. The petitioner here, the Hastings student chapter of the Christian Legal Society ("CLS"), claims a constitutional right to an exemption from Hastings' Nondiscrimination Policy that would broadly permit it to exclude other students from membership while receiving the benefits that Hastings provides to registered student organizations ("RSOs"). But what CLS ignores in its brief is Hastings' legitimate interest in allocating its limited resources only to assist those student groups that are open and accessible to all students. Hastings has reasonably concluded that its open access policy channels resources in a manner that will most enhance the educational opportunities available to its students.

The viewpoint-neutral decision not to provide benefits to groups with exclusionary policies does not

single out CLS's views or suppress its ability to speak or to associate. As a group of students organized for religious purposes, CLS remains free to exercise its expressive association rights both on the law school campus and in the community at large, including the right to exclude potential members on the basis of religious belief. But CLS has no right to demand a *subsidy* from the law school while failing to abide by the requirement that all RSOs must be open to all students. Absent any suggestion – and there is none in the record – that Hastings' policy is aimed at suppressing certain specific viewpoints or ideas, Hastings' policy must be upheld under the First Amendment.

STATEMENT

A. Registration of Student Organizations and the Hastings Nondiscrimination Policy.

Hastings – a public law school located in San Francisco – has made the decision to provide assistance "to students wishing to create organizations among themselves for academic and/or social purposes" in order to provide students with "opportunities to pursue academic and social interests outside of the classroom that further their education, contribute to developing leadership skills, and generally contribute to the Hastings community and experience." Joint Appendix ("JA") 349 ¶¶ 3-4. Hastings allows non-commercial student organizations to register with the College to receive certain benefits, so long as they comply with the College's Policies and Regulations Applying to College Activities, Organizations and Students,

which includes compliance with Hastings' Policy on Nondiscrimination ("Nondiscrimination Policy" or "Policy"). *See* JA 219-20 (Joint Stipulation of Facts ("JSF") ¶¶ 12, 14).

A broad array of organizations have registered as RSOs, formed around a variety of interests chosen by students. In the 2004-05 academic year, there were approximately sixty registered student organizations at Hastings, three of which had a religious focus. *See* JA 215-16 (JSF ¶ 7). Other RSOs have identified themselves as promoting any number of interests, including professional development,[1] social entertainment,[2] athletic interaction,[3] provision of legal services to the disadvantaged,[4] political engagement,[5] the study of religion,[6] and academic

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[1] *See, e.g.*, JA 409 (Association of Communications, Sports & Entertainment Law seeks to provide students with opportunities "to learn more about the practice of law in the sports and/or entertainment industries" and "to make professional connections within these fields"); JA 420 (Internet Technology & Venture Group promotes "professional & social development," fostering a "greater understanding of the Internet, technology, and venture capital and its application of the law")

[2] *See, e.g.*, JA 417 (Hastings OWLS "flock together to improve life at Hastings" and "to party"), JA 423 (UC Hastings Poker Club seeks to "provide a community for people to play poker")

[3] *See* JA 415 (Hastings Intramural Basketball League), JA 418 (Hastings Soccer Club).

[4] *See, e.g.*, JA 409-10 (Association of Students for Kids), JA 411 (General Assistance Advocacy Project).

[5] *See* JA 413 (Hastings Democratic Caucus); JA 418 (Hastings Republicans).

research and publication.[7] In addition to RSOs, nonregistered student groups and organizations can exist and operate on campus. JA 233 (JSF ¶¶ 61-62), 300, 345-46.

The benefits provided to RSOs include use of the Hastings name and logo, eligibility to send mass emails through the Associated Students of the University of California at Hastings ("ASUCH"), a listing on the Office of Student Services' website, participation in the Student Organizations Fair, use of the Student Information Center for distribution of materials to the Hastings community, use of certain bulletin boards, and eligibility to apply for use of limited office space and rooms. *See* JA 216-19 (JSF ¶¶ 9-10). Nonregistered student groups are similarly eligible to reserve campus facilities for their events, and Hastings allows these groups to communicate to the Hastings community through generally available bulletin boards or classroom chalkboards. Academic functions and College-sponsored events have priority over student group events for use of Hastings' facilities, and RSO events are given priority over non-RSO events. *See* Appendix to the Petition for Writ of Certiorari ("Pet. App.") 78a-79a. RSOs may also apply for discretionary travel funds, as well as

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[6] *See* JA 411 (Hastings Association of Muslim Law Students seeks "to promote a greater understanding of Muslims, Islam, Islamic Law & Islamic Culture"). JA 415-16 (Hastings Koinonia seeks to "study the Bible" and "discuss the Christian worldview and its logical consequences").

[7] *See, e.g.*, JA 416 (Hastings Law and Policy Review); JA 418 (Hastings Race & Poverty Law Journal)

student activity fee funding derived from student fees assessed to support activities that support Hastings' educational "mission." Pet. App. 89a, 93a; *see also* JA 216-18 (JSF ¶ 9).

To become an RSO, a student organization must agree to comply with Hastings' Nondiscrimination Policy, and a group's failure to comply with the Policy may result in the denial or revocation of the status and privileges of being an RSO. JA 221, 222 (JSF ¶¶ 17, 20, 21). The Nondiscrimination Policy applicable to RSOs provides that "[t]he College is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices," and provides that Hastings and the student groups it subsidizes "shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation." JA 220 (JSF ¶ 15); Pet. App. 88a.

To ensure that "the educational and social opportunities these [registered student] organizations provide are available to all students," Hastings has interpreted the Policy as requiring registered student organizations to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs." JA 221 (JSF ¶ 18); *see also* JA 349 ¶ 5. For example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization. JA 221 (JSF ¶ 18). In order to become an RSO, a student organization's bylaws must provide that its

membership is open to all students. JA 221 (JSF ¶ 17).

Groups that comply with this open access requirement are eligible for law school-provided recognition and benefits because they serve important educational purposes. Such groups provide students with exposure to a diversity of ideas and points of view and allow students to take advantage of a wide variety of educational and social opportunities. JA 349. Further, by admitting individuals with varied perspectives, such groups also foster educationally valuable dialogue. *Id.* But organizations that do not wish to comply with the open access rule remain free to express their beliefs on campus and to exclude members based on these beliefs. JA 345-46.

Although CLS now seeks to create some doubt about the true breadth of Hastings' Policy, in the district court following discovery, CLS expressly stipulated that the Policy is understood and applied to require all recognized student groups to open their membership to all Hastings students regardless of status or belief. *See* JA 221 (JSF ¶¶ 17, 18).

Thus, the Bylaws of the Hastings Republicans, to take one example, provide that "[m]embership is open to all Hastings Students, and membership rules shall not violate the Nondiscrimination Compliance Code of Hastings." JA 183. Similarly, Respondent Hastings Outlaw complies with the Hastings Policy and does not exclude any student from membership

on the basis of status or beliefs. Pet. App. 136a.[8] Since the adoption of the Nondiscrimination Policy in 1990, no student organization – other than CLS – has sought an exemption. *See* JA 220-21 (JSF ¶ 16).

The record evidence uniformly showed that Hastings has applied its open access policy consistently to all organizations. CLS has identified membership provisions in some student organizations' bylaws that, it believes, suggest that only students who share the same interests or goals were permitted to become members. *See* Pet. Br. 12-14. But CLS stipulated in the district court that Hastings applies the Nondiscrimination Policy to all RSOs. JA 221 (JSF ¶ 17). Moreover, CLS cannot point to even one instance of another student group excluding members on the basis of such beliefs. To the contrary, Hastings' Director of Student Services testified that she had seen no registered student organization at Hastings "restrict[ing] its membership based on either students' beliefs or agreement with the group's objectives." JA 350-51.

The case of the La Raza student group is instructive. La Raza's bylaws contain an explicit nondiscrimination provision stating that La Raza will not "discriminate on the basis of race, sex, color, creed, national origin, ancestry, age, sexual

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[8] *See also* JA 172 (Hastings Koinonia); JA 211 (La Raza); Pet. App. 146a (Vietnamese American Law Society); *id.* 119a (Hastings Democratic Caucus); *id.* 129a (Hastings Health Law Journal Development Team); *id.* 110a (Association of Trial Lawyers of America); *id.* 142a (Silenced Right); *id.* 132a (Hastings Motorcycle Riders Club)

orientation, or disability." JA 191. La Raza's bylaws also provide that membership encompasses students of Hastings who are of "Raza background." JA 192. But after Hastings became aware that the La Raza bylaws "could be interpreted as requiring that voting members of the group be of Hispanic descent" notwithstanding the bylaws' express racial nondiscrimination provision, La Raza's officers confirmed that they believed that "any Hastings student may become a voting member of La Raza," JA 351, and pledged to amend the bylaws to make this clear. *See* JA 351-53.

B. The Dispute with CLS.

Petitioner CLS is a nonregistered student organization at Hastings. Following a change in leadership in 2003-04, Petitioner first became affiliated with the national Christian Legal Society ("CLS-National") and then decided to restrict its membership to only those students who share a particular set of religious beliefs.

For ten years, from the 1994-95 academic year to the 2003-04 academic year, Hastings recognized a student group known as Hastings Christian Legal Society or Hastings Christian Fellowship as a registered student organization. *See* JA 222-23 (JSF ¶ 22). From the 1994-95 through the 2001-02 academic years, Hastings Christian Legal Society used a set of bylaws sent to student chapters from CLS-National, and the bylaws provided that Hastings Christian Legal Society would comply with Hastings' Policies and Regulations. *See* JA 223 (JSF ¶ 23), 256.

In the 2002-03 and 2003-04 academic years, this student organization registered as Hastings Christian Fellowship ("HCF"), under a different set of bylaws, which provided that "HCF welcomes all students of the University of California, Hastings College of Law." JA 223 (JSF ¶ 25) (quotations omitted). During this time, "HCF did not have a formal or informal policy of any kind barring gay, lesbian, or bisexual persons from becoming members or officers. Nor did HCF condition membership or officer positions on the basis of a person's religion or their affirmation of a 'Statement of Faith.'" JA 355-56 ¶ 3; *see also* JA 223 (JSF ¶ 25).

At the close of the 2003-04 school year, three students assumed leadership of HCF informally without a vote of the membership, and the new leaders decided to affiliate their student organization officially with CLS-National. *See* JA 225 (JSF ¶¶ 30-31). That decision to associate with CLS-National led to a change in HCF's membership policies. As a condition of becoming formally associated with CLS-National, student chapters must adopt the bylaws prescribed by CLS-National. *See* JA 225 (JSF ¶ 32). The bylaws promulgated by CLS-National for the 2004-05 school year required all members and officers to agree to and sign a "Statement of Faith." JA 226 (JSF ¶ 33). Students who refuse to sign or affirm the Statement of Faith are not permitted to become CLS members or officers and, specifically, cannot vote for or remove officers, amend the group's constitution, or stand for election for an officer position. *See* JA 227 (JSF ¶¶ 35-36). It is CLS's position that what it believes to be "unrepentant

homosexual conduct" is inconsistent with the Statement of Faith and is thus grounds for barring someone from becoming a member or officer. JA 226 (JSF ¶ 34); *see* JA 67-68.

CLS submitted its application for registration, along with its constitution, to the Office of Student Services in early September 2004. *See* JA 227-28 (JSF ¶ 38). Although the submitted constitution prohibited discrimination on the basis of "age, disability, color, national origin, race, sex, or veteran status," it did not bar discrimination based on sexual orientation or religion. Pet. App. 101a.

Shortly thereafter, the Office of Student Services informed CLS that its constitution was not in compliance with Hastings' Nondiscrimination Policy and informed CLS that, in order to become a registered student organization, CLS must open its membership to *all* students regardless of religious beliefs or sexual orientation. *See* JA 228 (JSF ¶¶ 39-40). CLS's Vice President responded with a letter prepared by CLS-National, requesting "an exemption from the religion and sexual orientation portions of the Nondiscrimination Compliance Code" because "agreement with [Hastings' Nondiscrimination Policy] is inconsistent with the CLS chapter's Statement of Faith and its membership and leadership decisions." JA 281; *see also* JA 228 (JSF ¶ 40).

Because CLS refused to include language in its constitution indicating that it would comply with Hastings' Nondiscrimination Policy, Hastings informed CLS that it could not become a registered

student organization; in doing so, Hastings made clear that "[i]f CLS wishes to form independent of Hastings[, Hastings] would be pleased to provide the organization the use of Hastings facilities for its meetings and activities," but that Hastings was "precluded from using student fees to fund [CLS] activities until CLS bylaws comport with the Hastings nondiscrimination compliance code." JA 294. As a result of CLS's failure to become a registered student organization, Hastings withdrew certain travel funds that had been set aside prior to CLS's submission of its registration paperwork. *See* JA 229 (JSF ¶ 42).

While not eligible for subsidies and benefits provided by the law school to RSOs, CLS met and remained active on campus as a nonregistered student organization. During the 2004-05 school year, CLS held weekly Bible studies, hosted a beach barbeque, a Thanksgiving dinner, a campus lecture on the Christian faith and legal practice, several fellowship dinners, an end-of-the-year banquet, and also invited Hastings students to attend Good Friday and Easter Sunday church services with the group. *See* JA 229 (JSF ¶ 44). Nine to fifteen students regularly attended CLS events. *See* JA 230 (JSF ¶ 48).

Although Hastings had informed CLS that it was free to use Hastings facilities for meetings, CLS never requested use of Hastings facilities during the 2004-05 school year. *See* JA 232 (JSF ¶ 58). Hastings again informed CLS that it was able to use Hastings facilities for meetings in the 2005-06 school

year. *See* JA 233 (JSF ¶ 61). In general, nonregistered student organizations may apply to use Hastings facilities, and notwithstanding CLS's contrary suggestion, Hastings has never indicated that it would charge CLS a fee for meeting on campus. Pet. Br. 11-12; *see* JA 294, 300. Further, CLS was able to use chalkboards and generally available bulletin boards to make announcements, just like any other non-RSO, in addition to using online communications such as Yahoo! chat groups. JA 233 (JSF ¶ 62), 300; Pet. App. 48a.

C. Procedural History

CLS commenced this action in 2004, shortly after Hastings informed CLS that it could not become a registered student organization because it refused to comply with Hastings' Nondiscrimination Policy. CLS's First Amended Complaint asserted that "[b]y enacting and enforcing the Policy on Nondiscrimination forbidding [CLS] to discriminate on the basis of religion or sexual orientation [and] refusing to recognize [CLS's] constitutional right to an exemption from said policy," Hastings had violated CLS's right to freedom of association and free speech under the First Amendment. JA 75-76. CLS also claimed a violation of its rights to free exercise of religion and to equal protection. *See* JA 78-79.

After CLS filed its First Amended Complaint, Hastings Outlaw filed a motion to intervene, on the basis that it "seeks to protect the interests of its members and of other gay, lesbian and bisexual students who wish to attend law school in an

environment free from discrimination and who wish to have an equal opportunity to become members of any registered student organization without regard to sexual orientation." Hastings Outlaw's Mot. to Intervene as Party Def. 1-2. The district court granted the motion. JA 98.

On cross-motions for summary judgment, the district court denied CLS's motion and granted the motions filed by Hastings and Hastings Outlaw. The court began by noting that the Policy, like other regulations prohibiting discrimination, "regulates conduct, not speech." Pet. App. 24a. The court went on to conclude that Hastings had created a limited public forum and that, even if Hastings' Nondiscrimination Policy regulated speech directly, the Policy was valid under forum analysis because restrictions on access to a limited public forum are permissible so long as they are viewpoint neutral and reasonable. Pet. App. 30a.

Citing to the parties' Joint Stipulation of Facts, the district court acknowledged that Hastings "requires student organizations to comply with the Nondiscrimination Policy and to *open their membership to all students*." Pet. App. 30a (emphasis added). The court concluded that the Policy was viewpoint neutral, specifically rejecting CLS's argument that Hastings' enforcement of its Policy discriminated against a Christian viewpoint: "there is no evidence in the record to [indicate] that Hastings will not allow CLS to become a recognized student organization because of CLS's religious perspective. In fact, the evidence in the record

demonstrates otherwise." Pet. App. 35a-56a. The court also concluded that Hastings' Policy is a reasonable regulation in light of the forum's purpose of "further[ing] students' education and participation in the law school environment and . . . foster[ing] students' interests and connections with their fellow students." Pet. App. 37a.

The court next rejected CLS's claim that the Nondiscrimination Policy violated its freedom of expressive association.

> Hastings is not directly ordering CLS to admit certain students. Rather, Hastings has merely placed conditions on using aspects of its campus as a forum and providing subsidies to organizations. If CLS wishes to participate in the forum and be eligible to receive funds, it must comply with Hastings' Nondiscrimination Policy. . . . CLS may continue to meet as the group of its choice on campus, excluding any students they wish, and may continue to communicate its beliefs as it did all through the 2004-05 academic year.

Pet. App. 42a. The district court also rejected CLS's claims that the Policy violated its rights to free exercise of religion or to equal protection. *See* Pet. App. 63a-69a.

In a two-sentence unpublished memorandum, the Ninth Circuit affirmed, observing that "[t]he parties stipulate that Hastings imposes an open membership rule on all student groups." Pet. App. 2a. Citing to its decision in *Truth v. Kent School District*, 542 F.3d

634 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2866 (2009), the Ninth Circuit concluded that Hastings' requirement of open membership is "viewpoint neutral and reasonable."

SUMMARY OF ARGUMENT

CLS's effort to escape application of this Court's well-established limited public forum analysis is based in large part on attempting to evade its express admission in the district court and on appeal that Hastings applies the Policy to forbid discrimination on the basis of *any* status or belief. CLS had an opportunity in the district court to create a factual dispute as to how Hastings interprets or enforces its own Policy – but instead CLS stipulated to the open access interpretation of the Policy. That is the agreed-upon record before the Court, and that record plainly establishes that Hastings' open access rule is both viewpoint neutral and reasonable.

This Court has always recognized a university's right to craft reasonable, viewpoint-neutral rules regarding the benefits it provides to students and their groups in a university-created and university-funded student activities program. In this case, Hastings has articulated a strong interest in using its resources to support only those groups that enhance the educational and social opportunities available to students through allowing all students to join, regardless of their status or beliefs. Under long-established doctrine, such a restriction on funding and recognition does not abridge the First

Amendment rights of those groups that choose not to comply with the rules of the program.

By subsidizing student group activities, Hastings has created a forum for speech. But it is not an open forum where all members of the general public, or even all campus groups, are invited to participate and speak. To be eligible for a limited set of benefits provided by the law school, groups must be non-commercial, must be limited to students, and must permit any Hastings student to become a member.

Such rules are permissible as long as they are viewpoint neutral and reasonable. *See Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995). In its brief, CLS misreads *Healy v. James*, 408 U.S. 169 (1972), and *Widmar v. Vincent*, 454 U.S. 263 (1981), as suggesting that any restriction on access to a university's forum for recognized student groups is somehow subject to strict scrutiny as a "prior restraint" on speech. Pet. Br. 21. But applying that standard would undermine the University's ability to place the kind of viewpoint-neutral conditions on university-supported campus groups that this Court has always upheld. *Rosenberger*, 515 U.S. at 834-35, *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233-34 (2000).

Here, Hastings' open access Nondiscrimination Policy is clearly reasonable and viewpoint neutral. The Policy requires all registered student groups to accept all students regardless of status or belief, and the Policy is supported by Hastings' interest in promoting open participation within groups by all

students. While Hastings' Policy is not the only conceivable or permissible means of providing support to student groups, it is a reasonable way of doing so. Indeed, notwithstanding CLS's speculation about "hostile takeover" scenarios at other schools, at Hastings, dozens of groups continue to meet and operate around common interests without the need to exclude some students from membership.

The Court's compelled speech and association cases are completely inapposite in this context. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995). By providing support for some groups as part of a limited public forum, Hastings is not attempting to force CLS to admit students who do not share its beliefs. Hastings is simply applying reasonable, viewpoint-neutral restrictions on access to monetary subsidies and other benefits provided by the school. CLS remains free, as a nonregistered organization, to meet on campus, to exercise its right to expressive association, and to exclude students on the basis of belief or conduct.

For this reason as well, CLS fails to show that Hastings' Policy of denying it a subsidy effectively deprives it of its right to expressive association under the Court's conditional funding cases. Hastings is not coercing CLS into abandoning its speech or expression rights by setting conditions on the limited set of benefits that CLS may choose to receive. Indeed, the record shows that despite CLS's non-RSO status, attendance at its events grew, and CLS

continued to speak and hold activities in the year after it refused to comply with the Nondiscrimination Policy. On this record, Hastings denial of a subsidy cannot remotely be seen as a coercive suppression of speech or associational rights.

At bottom, in seeking a "constitutional right to an exemption" from Hastings' Policy, JA 75-76, CLS seeks a rule that would grant special privileges for student groups, or some subset of groups, that wish to exclude members on the basis of belief, to take advantage of university facilities, means of communication, and funding despite a contrary university policy. Doing so would run contrary to the Court's settled forum jurisprudence and would limit the university's ability to allocate its resources in a manner that the university determines would maximize educational opportunities for all of its students. Moreover, a right to such an exemption, if recognized, would have no apparent limits. Any group could claim a right to discriminate on any basis while retaining its status as an RSO, and would thus have a constitutional entitlement to university-provided and university-funded benefits despite its discriminatory membership policy.

ARGUMENT

I. The Court Should Not Reach Issues Not Properly Presented in This Case.

As explained further in Parts II and III, Hastings' Nondiscrimination Policy, as applied pursuant to the parties' joint stipulation, passes First Amendment muster. CLS's contrary argument is premised on its contention that Hastings enforced its Policy in a

different way – that only religious groups were unable to restrict membership based on belief. Pet. Br. 36-37. But this assertion is flatly contradicted by CLS's admission in the Joint Stipulation, in the district court and in the Court of Appeals that Hastings enforced its Policy by forbidding any exclusion based on status or beliefs. CLS's attempt to create an issue of fact with its own previous admission is procedurally improper. And it is all the more dangerous here, where CLS invites the Court to wade into issues of religious and sexual orientation discrimination that have never been, and emphatically are not, raised by the record in this case.

In the district court, as noted *supra*, CLS filed a stipulation of undisputed facts, in which it agreed that "Hastings requires that registered student organizations allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs." JA 221 (JSF ¶ 18). By filing that stipulation, CLS conceded under the district court's Local Rules that it was an "undisputed fact[]." N.D. Cal. R. 56-2. In its district court briefing, CLS similarly conceded that Hastings "checks to see if the organization ensures that *any* interested student may participate, become a member or seek a leader position in the group, regardless of the students' beliefs" before registering the student organization. Pl.'s Reply Mem. in Supp. of Mot. for Summ. J. & in Opp'n to Def.'s Cross-Motions for Summ. J. at 3 (internal quotations and ellipses omitted). In fact, during the district court's hearing on the parties' motions for

summary judgment, CLS – quoting from the Joint Stipulation of Facts – stated that "[i]t's important to understand what Hastings' policy is": that registered student organizations are required to "allow any student to participate, become a member or seek leadership positions in the organization regardless of their status or beliefs." Excerpts of Record Filed Before the Ninth Circuit 628 (internal quotations omitted).

In the Ninth Circuit, CLS similarly acknowledged that Hastings has interpreted the Policy "such that student organizations must allow *any* student, regardless of their status, beliefs, or conduct to become voting members and leaders of their group." Br. of Appellant 10. Significantly, even in its petition for writ of certiorari, CLS conceded that "*[t]he material facts of this case are undisputed*" and acknowledged that "Hastings asserts that it requires RSOs to 'allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs.'" Pet. at 2, 4 (quoting JSF) (emphasis added).

CLS now argues, for the first time in its merits brief, that Hastings' "justification for denying recognition to CLS has vacillated between two dramatically different accounts of its Nondiscrimination Policy" – the stipulated open access policy and application of the "Policy's written terms" in which groups are only precluded from discriminating "on the basis of a finite list of forbidden categories" including religion and sexual orientation. Pet. Br. 19-20. It is undisputed that

CLS's constitution does not comport with either interpretation of the Nondiscrimination Policy, *see* JA 277, 294, 295, so the question CLS raises here is *what the Policy means*. While CLS now claims that it understood the Policy as preventing exclusion based only on "forbidden categories," its admission in the trial court – after it had the opportunity to litigate the issue fully – was that the Policy meant no discrimination on the basis of status or belief.[9]

It is this failure to identify a factual dispute on the meaning of the Policy in the courts below that undermines CLS's attempts to do so now, as the courts widely recognize that "a stipulation of fact that is fairly entered into is [generally] controlling on the parties and the court is bound to enforce it." *Fisher v. First Stamford Bank & Trust Co.*, 751 F.2d 519, 523 (2d Cir. 1984).[10] This is because "formal

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[9] For example, CLS points to one ambiguous statement in Hastings' Answer filed early in the case that, it believes, suggests that groups could exclude members based on belief. *See* JA 93. But that statement says nothing about permitting groups to exclude members, and in fact states that CLS was subject to the same rules as any other type of student organization. If CLS thought it truly inconsistent with later testimony, it should not have stipulated to facts based on the later testimony.

[10] *See also Block v. City of Los Angeles*, 253 F.3d 410, 419 n.2 (9th Cir. 2001) ("A party cannot create a genuine issue of material fact to survive summary judgment by contradicting his earlier version of [stipulated] facts."); *Keller v. United States*, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995) (stipulations made by a party "may not be controverted at trial or on appeal"); *Brown v. Tennessee Gas Pipeline Co.*, 623 F.2d 450, 454 (6th Cir. 1980) ("Under federal law, stipulations and admissions in the pleadings are generally binding on the parties and the Court.");

concessions in the pleadings in the case or stipulations by a party or counsel . . . have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." 2 Kenneth S. Brown, *McCormick on Evidence* § 254, at 181 (6th ed. 2006) (footnote omitted). *Cf. Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1880) ("The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced.").

In light of the general rule that parties are bound by their factual admissions, this Court has declined to address challenges to factual issues to which the parties have stipulated in the lower court. In *Southworth*, the parties stipulated that university funding for registered student organizations is "administered in a viewpoint-neutral fashion." 529 U.S. at 224 (quotation marks omitted). When respondents in the action attempted to challenge this factual issue, pointing to university policy statements stating that such funding could not be used for political or lobbying purposes, this Court declined to address the challenge, noting that "both parties entered a stipulation to the contrary at the outset of this litigation." *Id.* at 226.

Even more fundamentally, the Court has properly been reluctant to address factual disputes resolved by factual stipulations below based on the general

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Fenix v. Finch, 436 F 2d 831, 837 (8th Cir. 1971) ("It is well settled that stipulations of fact fairly entered into are controlling and conclusive and courts are bound to enforce them.").

principle that, absent unusual circumstances, the Court will not address an argument raised for the first time in this Court. *See Kennedy v. Plan Adm'r for Dupont Sav. & Inv. Plan*, 129 S. Ct. 865, 869 n.2 (2009) (declining to address argument challenging a factual issue stipulated in district court and stating that the challenging party "did not raise this argument in the Court of Appeals, and we will not address it in the first instance"); *see also Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court[s]."). As the Court has also made clear, arguments raised for the first time in an opening brief on the merits should not be addressed absent "unusual circumstances." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (quotation marks omitted).

CLS challenges, for the very first time in its merits brief here, the very fact to which it had stipulated: namely, that Hastings requires RSOs to accept any Hastings student regardless of status or beliefs. By stipulating to Hastings' interpretation and enforcement of its Policy, CLS essentially withdrew that fact from issue before the lower courts, precluding further evidentiary development of that factual issue. More broadly, the fact that CLS stipulated to this point shows that it was unable to create an issue of fact about the meaning and application of the Policy.

Thus, the Court has no basis to decide CLS's hypothetical religious discrimination claim here, as Hastings' representatives stated unequivocally that

religion was not singled out over any other belief as an impermissible ground for exclusion. To the extent that CLS now suggests that Hastings acted with some impermissible motive, that is a factual assertion at best that is long abandoned and would require further factual development below.

CLS also seeks to evade the stipulated record as to the Policy's meaning in order to create an asserted conflict between the Policy's prohibition on sexual orientation discrimination and the First Amendment that does not exist on the facts of this case. CLS asserts that it would not have sought to exclude gay or lesbian students based on their status but rather on "a conjunction of conduct and the belief that the conduct is not wrong," Pet. Br. 36, in an attempt to argue that conditioning university funding and other support on a group's agreement not to discriminate based on sexual orientation violates CLS's expressive association rights. *Id.* 39-40. But again, the parties stipulated in the district court that the exclusion of students on the basis of *any* status or belief is forbidden. The Policy at issue in this case does not distinguish between exclusion based on sexual orientation and exclusion based on one's beliefs about the morality of certain sexual conduct. Neither kind of exclusion is permitted.

Moreover, CLS was not denied recognition because it expressed disapproval of certain beliefs about moral conduct, but because it expressly reserved its right to discriminate on the basis of religion and sexual orientation. CLS chose to omit from its constitution any promise not to discriminate

on the basis of sexual orientation or religion, knowing that it would fail to comply with the Policy. *See* Pet. App. 101a (proposed constitution pledged not to discriminate on the basis of "age, disability, color, national origin, race, sex, or veteran status" only). Because CLS specifically and pointedly reserved the right to discriminate based on sexual orientation, the issue of *why* it choose to do so – and whether any actual exclusion of gay or lesbian students would have been based on conduct or belief rather than status – is not presented here.[11]

Any concern about the constitutional validity of laws barring discrimination on the basis of religion or sexual orientation should be raised and decided in other contexts if and when the issue is actually presented. CLS's efforts to interject those issues into this case are baseless. To the extent that the Court granted certiorari to address these questions based on an interpretation of the Policy entirely different from that stipulated to and addressed below, the writ should be dismissed as improvidently granted.

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[11] These issues are discussed at greater length in the Brief of *Amici Curiae* Lambda Legal Defense and Education Fund, Inc., et al.

II. Hastings' Imposition of Reasonable, Viewpoint-Neutral Restrictions When Subsidizing Expressive Activities Does Not Infringe CLS's First Amendment Rights.

A. Hastings Has Created a Limited Public Forum.

It is undisputed that in providing certain student organizations particular communication channels, funding options, and priority to use school facilities, Hastings has subsidized a "forum" for those groups' speech activities. But CLS's argument starts from a flawed premise about that forum: that Hastings' provision of facilities and benefits to RSOs is designed to create an "open speech forum," Pet. Br. 2. CLS assumes that when a university provides some benefits to student groups, it creates an unrestricted forum for speech by any and all groups, with no room for the university to impose limitations on the use of university resources based on its own legitimate interests. *See, e.g., id.* 57 (arguing that the "entire purpose" of Hastings' RSO benefits is to "facilitate and encourage 'a diversity of views from private speakers'") (citation omitted). Thus, CLS suggests that the exclusion of any particular group, for any reason, from the limited support that Hastings provides for registered student organizations is automatically subject to strict scrutiny. *Id.* 21-22.[12]

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[12] This mischaracterization also drives the arguments of a number of *amici*. *See, e.g.* Br. of Michigan, et al at 17 (describing support for RSOs as a "designated public forum" that must be open to all "public discourse"), Brief of Am. Islamic

That legal analysis is fundamentally flawed. By restricting eligibility to groups comprised only of students, that are non-commercial, and that allow any Hastings student to participate, Hastings has indisputably created a "limited" forum under the Court's governing precedents. That is, Hastings has designated otherwise nonpublic resources (for example, classroom space and law school funds) for limited expressive use by private parties for a particular purpose. *See Rosenberger*, 515 U.S. at 829; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 818-19 (1985). The First Amendment provides the government ample discretion not only to determine the purpose of the forum, but also to impose restrictions on speech in the forum, as long as they are "reasonable in light of the purpose served by the forum," *Good News Club v. Milford Central School*, 533 U.S. 98, 107 (2001) (quoting *Cornelius*, 473 U.S. at 806), and do not discriminate on the basis of the viewpoint of the speech. *Rosenberger*, 515 U.S. at 829.[13]

Conf., et al at 3 (arguing that any exclusion from forum must be narrowly tailored to a compelling interest). Of course, if the State of Michigan or other states wish to create open forums for all groups, it is within their discretion to do so, but that does not mean that Hastings has in fact done so

[13] While the terminology has varied over the years, "limited public forum" is used here as in *Good News Club*, 533 U.S. at 106, and *Rosenberger*. The key point is that when the government opens public property to a limited range of expressive activity to serve other legitimate governmental

In fact, Hastings' program is similar in type to the limited forum that the Court recognized as established by the University of Virginia in *Rosenberger* – though in this case, as explained below, there is no impermissible viewpoint discrimination. Like the University of Virginia, Hastings provides limited additional benefits to RSOs whose activities "are related to the educational purpose of the University" in order "to enhance the University environment." 515 U.S. at 824 (quotation marks omitted). Also like the University of Virginia, Hastings requires groups that wish to take advantage of this subsidy to obey its procedural rules and "pledge not to discriminate" in their membership. *Id.* The Court in *Rosenberger* analyzed the university's support of such organizations as a limited public forum and made clear that "[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for *certain groups* or for the discussion of certain topics." *Id.* at 829 (emphasis added).

In short, there is no basis for CLS to assert that Hastings has created an "open forum" to indiscriminately fund speech by any campus group. That assertion ignores Hastings' legitimate interest in regulating access to law school funds, classroom space, and other resources for educational purposes. *See Lamb's Chapel*, 508 U.S. at 390 (school district, "like the private owner of property, may legally

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purposes, it is constrained only by the requirements of viewpoint neutrality and reasonableness.

preserve the property under its control for the use to which it is dedicated"). Hastings' limited support of RSOs is far afield from government maintenance of a truly open forum such as a park or fair ground, where the government has indiscriminately opened up its property to any speaker, *e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981), or of a public street open to a parade. *E.g., Hurley*, 515 U.S. at 568-69. Indeed, as the Court recognized in *Widmar*:

> A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.

454 U.S. at 268 n.5.

B. Hastings' Policy is Viewpoint Neutral.

Consistent with the principles governing a limited public forum, the Court has always held that a public university may impose viewpoint-neutral limitations on access by student groups that relate to its legitimate educational goals. *See Healy*, 408 U.S. at 188. For example, the university may unquestionably limit access to a forum it creates to students. *Widmar*, 454 U.S. at 267-68 n.5.[14] The

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[14] Similarly, Hastings separately restricts the ability of RSOs to admit non-student members, *see* Pet. App. 83a, but CLS does

university may also limit the topics discussed in such a forum to those germane to the academic or educational purposes of the university, if done in a viewpoint-neutral manner. *Id.* at 276; *Rosenberger*, 515 U.S. at 829. And a university is entitled not to subsidize student associations that manifest an intent to engage in *conduct* that "violate[s] reasonable campus rules or substantially interfere[s] with the opportunity of other students to obtain an education." *Widmar*, 454 U.S. at 277; *see Healy*, 408 U.S. at 193-94 ("[T]he benefits of participation in the internal life of the college community may be denied to any group that reserves the right to violate any campus rules with which it disagrees").

Likewise, time and again this Court has held that anti-discrimination requirements that prohibit discrimination on the basis of status and belief categories constitute "permissible content-neutral regulation of conduct." *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (ban on discrimination in public accommodations "does not aim at the suppression of speech" nor does it "distinguish between prohibited and permitted

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not suggest that this rule somehow unconstitutionally restricts its right to associate with non-student members. If CLS's argument that Hastings has created an open forum that triggers strict scrutiny were correct, *any* membership regulation of registered student groups would be subject to scrutiny as an associational speech restriction, but the Court has never questioned such reasonable regulations. *See* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1940 (2006).

activity on the basis of viewpoint."); *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (discrimination ban "makes no distinction[ ] on the basis of the organization's viewpoint"); *see also* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919 (2006) (noting that open membership policies are viewpoint neutral). Such conduct-regulating requirements apply equally to everyone and thus do not disfavor any particular group or viewpoint.

CLS relies on cases like *Healy*, *Widmar* and *Rosenberger* in an effort to support treating Hastings' neutral Policy as an invasion of its First Amendment rights. *See* Pet. Br. 21. But in none of these cases did the Court suggest that a university that facilitates some expressive activity by student groups automatically creates a virtual "speakers' corner" where any restrictions on access are akin to a form of prior restraint. Rather, in *Healy* and *Widmar*, the university affirmatively sought to exclude the disfavored groups from campus entirely. *See Healy*, 408 U.S. at 176, 181; *Widmar*, 454 U.S. at 265 n.3. And each of those cases involved express viewpoint discrimination. In *Healy*, the university attempted to exclude the local chapter of Students for a Democratic Society because the university's president objected to the national organization's "philosophy" which he believed to be "abhorrent" and shared by the local chapter. 408 U.S. at 187. In *Rosenberger* and *Widmar*, the universities adopted policies expressly excluding religious speech from the limited forums they created. *Rosenberger*, 515 U.S.

at 837-38; *Widmar*, 454 U.S. at 273. This type of exclusion constitutes impermissible discrimination against religious viewpoints because it denies support only to religious viewpoints while permitting funding for viewpoints with non-religious perspectives. *Rosenberger*, 515 U.S. at 832.

Likewise, all of the gay student organization cases that CLS cites involved attempts to exclude such organizations from campus because officials objected to their specific viewpoint – promotion of tolerance and acceptance of homosexuality (as opposed to moral condemnation).[15] The lesson of all of these cases is that courts must be on guard against university discrimination based on *any* disfavored viewpoint, whether of religious student groups or other student groups.

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[15] *See Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 367 (8th Cir. 1988) (organization "met all objective criteria for funding" but was denied funds due to its viewpoint); *Gay Lib v. Univ. of Mo.*, 558 F.2d 848, 856-57 (8th Cir. 1977) (denial of funding due to objections to organization "pro homosexual" viewpoint); *Gay Student Servs. v. Tex. A&M Univ.*, 737 F.2d 1317, 1327 (5th Cir. 1984) (denial of funding because of objection to organization's "philosophy and goals"); *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 165 (4th Cir. 1976) (denial of funding due to fear that organization's viewpoint would spread); *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974) (restriction imposed due "in large measure . . . [to] the content of the GSO's expression"); *Gay Activists Alliance v. Bd. of Regents of the Univ. of Okla.*, 638 P.2d 1116, 1122 (Okla. 1981) (same); *accord Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 526-27 (3d Cir. 2004) (impermissible to exclude group simply because particular viewpoint is "divisive or controversial").

But all those cases are a far cry from the neutral rule applied by the Policy here, which forbids any discrimination on the basis of status or belief, and thereby does not discriminate based on the specific perspective of any particular speaker. CLS does not seriously contest this point, arguing only that it is "not . . . clear that the all-comers policy is viewpoint neutral," Pet. Br. 51, and that it "infringes the rights of all student groups," *id.* 49. Moreover, the fact that CLS wishes to exclude some students from membership, while other groups do not, does not make the Policy any less viewpoint neutral. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992) ("Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) ("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."); *United States v. O'Brien*, 391 U.S. 367, 381-82 (1968) (upholding a law prohibiting the willful destruction of draft cards even though most people violating the statute opposed the Vietnam War).

CLS also argues that because Hastings' Policy will allegedly disadvantage small and unpopular groups – a proposition for which there is no record evidence, *see infra* at 40 – campus debate will be systematically skewed in a way that raises First Amendment concerns. *See* Pet. Br. 51 (citing *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547 (2001)). But *Velazquez*, like the other cases on which

CLS relies, was a case of viewpoint discrimination: the challenged restriction was held unconstitutional because it "permit[ted] Congress to define the scope of the litigation it funds to exclude certain vital theories and ideas," 531 U.S. at 548, and was "aimed at the suppression of ideas thought [to be] inimical to the Government's own interest." *Id.* at 549. Here the Policy is not aimed at ideas to be suppressed; it is a rule that simply requires all subsidized groups to be open to all students without reference to content or subject matter, and the effect on the range of ideas expressed, if any, is incidental.

As CLS admits, the remarkable principle for which it advocates here is not limited to religious groups' sincerely held beliefs, and not limited to exclusion on the basis of religion or sexual orientation. If CLS prevails in its argument for heightened scrutiny here, all sorts of groups could claim a constitutional right to make all sorts of exclusions, for any reason or no reason at all, while receiving university support. *See, e.g., Dale*, 530 U.S. at 653-54 (associations other than religious associations entitled to deference regarding whether acceptance of openly gay and lesbian members would interfere with expression); Pet. Br. 34 (arguing that Hastings must defer to a group's own view of whether admitting a particular member would effect the group's expression). Nothing in *Healy*, *Widmar*, or any other case suggests that the First Amendment, while permitting a public university the ability to regulate the *content* of speech in a limited public forum in a viewpoint-neutral manner, somehow restricts its ability to enforce reasonable,

viewpoint-neutral conditions on the membership policies of student organizations that wish to receive the benefits of the forum.[16]

C. Hastings' Viewpoint-Neutral Conditions On Registered Student Organizations Are Reasonable.

In addition to being plainly viewpoint neutral, Hastings' Policy is also reasonable "in the light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809. In this case, as the District Court found, "Hastings' purpose in recognizing and funding student organizations is to further students' education and participation in the law school environment and to foster students' interests and connections with their fellow students." Pet. App. 37a; *see also* JA 349. Hastings' open access Policy reasonably advances Hastings' legitimate objectives.

First, the Policy advances the goal of providing every student the benefit of an equal chance to

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[16] Similarly, CLS's argument that Hastings has somehow violated CLS's Free Exercise rights by targeting its religion also fails. It is well settled that Hastings need not provide CLS with all the benefits of official recognition, while at same time exempting it from the neutral requirements of the Nondiscrimination Policy simply because CLS is a religious group. *See Employment Division v. Smith*, 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)[.]") (internal quotation marks omitted)

participate in all officially supported extracurricular activities, as Hastings seeks to promote "opportunities to pursue academic and social interests outside of the classroom that further their education, contribute to developing leadership skills, and generally contribute to the Hastings community and experience." JA 349 ¶ 4. Hastings has reasonably concluded that neither a student's status nor beliefs should limit the range of school-supported, extracurricular options available to any particular student, and has decided to implement this policy decision through a clear, easily administered open access rule. Hastings' Policy thus ensures that all students have an equal opportunity to participate and take advantage of participation in the student groups it subsidizes. The Policy is a reasonable means of compliance with the State of California's antidiscrimination laws, which forbid certain kinds of discrimination in state funding decisions. *See* CAL. GOV'T CODE § 11135; CAL. EDUC. CODE § 66270. Hastings' interest also extends beyond merely protecting students from discrimination against particular groups of persons, to a strong interest in providing students with equal access to extracurricular educational and social activities that Hastings supports.[17]

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[17] Hastings does not bar exclusion on the basis of neutral conditions unrelated to status or belief, such as the requirement to pay dues or attend a meetings, or (in the case of journals) evaluation of grades or a writing competition. All students still have the opportunity to participate, even if there are some restrictions on entry.

Separately, Hastings has also determined that its open access Policy allows students to experience and engage in dialogue with a wide variety of ideas and points of view advanced by individuals with diverse perspectives. JA 349. That reflects a reasonable judgment that the educational benefits of viewpoint diversity are best obtained by permitting students holding a wide range of beliefs to meaningfully participate in any student group, rather than encouraging individual student groups to wall themselves off from discussion and debate. The Policy thus serves the university's interest in promoting exposure to different viewpoints as part of its educational mission. *See Southworth*, 529 U.S. at 233 ("The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall.").

Third, in addition to the above goals, Hastings' Policy avoids entangling Hastings with the internal operations of the student organizations it supports. JA 349. By requiring uniform compliance with the Policy by all RSOs, rather than allowing the sort of case-by-case exception that CLS seeks here, Hastings ensures that its administrators are not called on to make a subjective judgment about whether a challenged exclusion was based on sincerely held beliefs. While CLS here is principally concerned with its members' religious beliefs, other groups may profess racially discriminatory beliefs, *e.g.*, *Bob Jones University v. United States*, 461 U.S. 574, 580

(1983), or wish to prohibit women from holding leadership roles. By adopting a blanket open membership requirement, Hastings subsidizes only those groups that are open to all its students without the need for entangling itself in evaluating the legitimacy and sincerity of such claims for an exemption on an organization-by-organization basis.

As should be apparent from the above, Hastings' purpose in adopting the Policy is not to "eliminat[e] the desire or ability of co-religionists to flock together," Pet. Br. 43, nor is it "forcing" CLS or any other group to change its religious beliefs or "renounce [its] views that homosexual or other disputed sexual conduct is wrong." *Id.* 44. Persons sharing common beliefs remain fully entitled to associate together under Hastings' Policy. To the extent that they wish to exclude other students, they remain entitled to do so, and to meet, worship and speak on or off campus, but without the benefit of Hastings' subsidy.

To be sure, other law schools and universities may have different goals in supporting and registering certain student organizations and different views on how best to meet them, and may choose to adopt a different policy that permits exclusion by some or all groups. But a university has ample discretion in making such policy decisions about how to deploy its resources, as long as the chosen policy is viewpoint neutral in substance and application. Hastings' open membership Policy "need not be the most reasonable or the only reasonable" way of furthering the educational

objectives that Hastings seeks to promote. *Cornelius*, 473 U.S at 808. Whether a policy requiring openness or one permitting exclusion better promotes Hastings' educational goals is a question of policy, not a matter of constitutional requirement.

CLS responds that Hastings' decision to recognize only those student organizations with non-exclusionary membership policies is irrational because it "defeats the very purpose of recognizing any group as a group in the first place." Pet. Br. 53. But the record here makes clear that is nonsense. A wide variety of groups – including those taking positions likely in the minority on the Hastings campus – can and have been built "around common interests and beliefs" while permitting any interested student to become a member or leader. *Id.* 50.

There is also no evidence that Hastings' Policy has led to or even encouraged the sort of "hostile takeovers" that CLS and its *amici* discuss. *See* Pet. Br. 28-29; Br. of Foundation for Individual Rights in Education 15-20. It is telling that CLS and *amici* must scour for unrelated anecdotes at other universities when Hastings itself has dozens of groups with explicit open membership requirements – including the Hastings Republicans for example – with no evidence of any "hostile takeover." For the ten years that CLS's predecessor organizations operated with an open membership policy, they were not taken over by non-Christians and anti-religionists, although they may have had some

members who held different views on some issues than the leadership of the group in 2004-05. *Supra* at 9. Moreover, CLS remains free to maintain its exclusionary membership policy and to meet and communicate on campus as a non-RSO.

Likewise, there is no evidence that small and unpopular groups are disadvantaged by the increased participation that Hastings' Policy seeks to encourage in groups that it subsidizes. Hastings Outlaw has historically been such a small and unpopular group, but it has found that the benefits of open participation far outweigh its interest in excluding potential members it disfavors. Moreover, the membership, leadership, and mission of a student group may continually change even if a group can exclude members based on a status or belief. What is orthodox for a student group in one academic year may be heretical for the same group in a later year as the membership changes. And if there was actual evidence of small and unpopular groups being "overtaken" or otherwise disadvantaged, Hastings could reasonably decide to change its policies to provide greater encouragement of exclusive groups rather than open participation by students. The First Amendment certainly does not require Hastings to tailor its open access Policy in light of hypothetical and largely imaginary dangers. *Cf. NEA v. Finley*, 524 U.S. 569, 584 (1998) (refusing to hold statute unconstitutional based on "hypothetical application to situations not before the Court") (quotation marks omitted).

D. *Dale* and *Hurley* Are Inapposite.

In arguing that Hastings has infringed its speech and associational rights, CLS relies significantly on the Court's decisions in *Dale* and *Hurley*. But these cases are inapposite, as Hastings is not attempting to force CLS to admit students who do not share its beliefs or to express a certain message. It is merely regulating access to law school funding and other benefits in a limited forum, based on generally applicable, viewpoint-neutral rules.

Dale, and the line of expressive association cases on which it draws, are inapposite because they concern direct regulatory burdens on associational rights. *Dale* involved an effort to compel the Boy Scouts, through application of a New Jersey anti-discrimination law, to admit an openly gay scout leader. 530 U.S. at 654. The Court held that such an application of the law would violate the Boy Scouts' First Amendment rights, reasoning that "[t]he *forced* inclusion of an unwanted person in a group" can infringe the group's expressive association rights if the presence of the person "affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648 (quotations omitted) (emphasis added). The Court concluded that compelling the Boy Scouts to admit a gay scoutmaster would impact the group's message regarding homosexuality and therefore sustained the Boy Scouts' as-applied challenge to the New Jersey law. *Id.* at 654.

CLS faces no such regulatory compulsion here. CLS remains free to exclude members with

dissenting views while continuing to meet and hold events, both on and off campus, as a nonregistered student organization. By contrast, the problem addressed in *Dale* was a true case of compelled association: for the Boy Scouts to operate as a group in New Jersey, the group would have had no alternative but to accept leaders with views with which it disagreed. *See Dale*, 530 U.S. at 659 (state law "directly and immediately affect[ed]" the Boy Scouts' associational right to exclude an unwanted member). That struck at the heart of the First Amendment interest that underlies expressive association claims: that "[t]he right to speak is often exercised most effectively by combining one's voice with the voices of others," but "[i]f the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006) ("*FAIR*").

CLS argues that, if anything, the rule in *Dale* is even more applicable here because in *Dale* "it was disputable whether the principles of the Boy Scouts were genuinely opposed to homosexual conduct," and CLS is much more of an expressive association than the Boy Scouts. Pet. Br. 45. This argument misses the point entirely. Hastings' Policy does not distinguish between organizations based on how "purely" expressive their activities are, and CLS's ability to meet and speak is not uniquely disadvantaged because it is more or less expressive. CLS also remains free to express itself as a religious organization, while excluding any members it wishes

on the basis of religion, without interference from Hastings.

Similarly, CLS's reliance on *Hurley* to suggest that Hastings is somehow forcing CLS to convey a message with which it disagrees. Pet. Br. 34, 45, is particularly misplaced. In *Hurley*, parade organizers participating in an open forum were forced to convey a specific message through the inclusion of a pro-gay and lesbian group's display in a St. Patrick's Day parade. 515 U.S. at 562-63. The Court ruled this to be impermissible compelled speech. *Id.* at 581. Here, however, Hastings is enforcing a neutral membership rule as a condition of obtaining access to the benefits of a limited forum. That does not compel CLS to speak, much less to convey any particular message.

As the District Court aptly observed: "Hastings is not ordering CLS to admit certain members . . . . Rather, Hastings is merely imposing a condition of participation in certain aspects of the forum on campus." Pet. App. 54a. Absent evidence of a coercive effect on a group's ability to associate, there is no First Amendment violation.

III. Hastings' Decision Not to Subsidize CLS's Expressive Activities Does Not Amount to Coercive Suppression of Those Activities and Does Not Compel Association.

A. Hastings' Policy Must Be Analyzed as a Refusal to Subsidize, Not as a Direct Restriction on Expressive Activity.

As explained above, CLS's argument that it is constitutionally entitled to receive benefits from Hastings, while receiving a special exemption from the reasonable, viewpoint-neutral conditions that Hastings imposes on those benefits, finds no basis in the Court's forum jurisprudence governing the subsidy of expressive activity. CLS's argument that Hastings' viewpoint-neutral Policy of denying it a subsidy effectively deprives it of expressive association rights similarly fails under the Court's line of decisions involving conditional public funding of speech activities. Pet. Br. 54-55. The Court's previous decisions make clear that when the government spends money, it is free to impose reasonable viewpoint-neutral conditions on those expenditures, as long as the conditions do not coercively suppress expressive activity. *See FAIR*, 547 U.S. at 68; *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 680 (1996) (analysis applies to conditions on "users of public facilities").

Thus, the Court has upheld Congress's decision to condition certain federal subsidies on the recipient libraries' implementation of filtering software limiting the availability of adult content via internet

terminals. *United States v. Am. Library Ass'n*, 539 U.S. 194, 211-12 (2003) ("*ALA*") (plurality). Likewise, the Court has approved a scheme that conditioned certain nonprofit tax exemptions on the recipient refraining from lobbying activities. *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 550 (1983). And the Court has upheld a statute excluding students pursuing degrees in theology from a state-funded scholarship program. *Locke v. Davey*, 540 U.S. 712, 720-21 (2004). In each of these cases the government refused to fund expressive activities that it plainly could not have directly suppressed. As the Court noted in *Regan*, such a decision might create an incidental burden on expressive activities by denying a speaker the resources to engage in his or her desired level of expression, 461 U.S. at 549-50, but the decision not to subsidize the exercise of First Amendment rights does not violate the First Amendment. *Id.* at 546.

B. Hastings' Withholding of Benefits Does Not Prevent CLS From Exercising Its Speech or Associational Rights.

In this case, CLS cannot reasonably contend that denial of the limited benefits of RSO status prevents it from engaging in expressive activities or associating only with members of its choice. True coercion in this context would be akin to a university effectively forbidding a student group to meet or speak on campus by denial of a benefit. But the record here shows that CLS, far from being effectively kicked off campus once it was denied RSO status, succeeded and flourished.

Hastings has carved out certain benefits that it provides RSOs beyond those accorded to any other student or group of students. RSOs have the ability to apply for office space, a voice mailbox, and a fiscal services account, and to apply limited student activity and travel funding, though such benefits are not guaranteed. *Supra* at 4-5. RSOs also receive Hastings email addresses as well as the privilege of using the Hastings name and appearing on the school's website. *Id.* Thus, while Hastings does not endorse any RSO's message, RSOs in this way are permitted to affiliate themselves with Hastings. *Id.*

CLS here focuses not on those benefits, but on others that it broadly characterizes as "the customary means by which student organizations communicate with the student body," Pet. Br. 12, and its "legal right to meet on the premises of the law school." *Id.* 11. But these characterizations go too far. In terms of communications, Hastings provides RSOs access to certain bulletin boards, a weekly Hastings newsletter, and Student Information Center space, eligibility to send out certain mass emails using a Hastings email address, and participation in the student organization fair. Aside from the bulletin boards, all of these are properly reserved for organizations in some way affiliated with Hastings: it would hardly be unusual for Hastings to restrict access to those forms of communication by commercial or non-student organizations, for example. Nonetheless, even assuming these could be considered "customary" means of communication, it is undisputed that CLS may use chalkboards and certain *other* bulletin

boards to make announcements. JA 233 (JSF ¶¶ 61-62), 300. And this does not even account for CLS's ability to meet in common areas or off campus or to communicate by any non-"customary" means that exist in the world of online discussion groups and electronic communications. *See* JA 114 (group communicated using Yahoo! groups).

CLS's ability to meet on campus is also not jeopardized. Both registered and non-registered student organizations may request use of campus facilities. Although RSOs have greater priority in available facilities, non-RSOs may obtain space on a first-come, first-served basis; and both groups' use of facilities is subordinated to academic functions and Hastings-sponsored events. Pet. App. 78a-79a. To the extent that Hastings maintained any discretion to deny use of campus facilities to non-RSOs, it made clear on this record that it would not do so in the case of CLS, and in fact CLS was never denied access to campus meeting space. *See* JA 232, 233 (JSF ¶¶ 58, 61-62); *cf. ALA*, 539 U.S. at 215 (Kennedy, J., concurring) (burden on speech minimized on facts of case). CLS's suggestion that Hastings could have revoked its permission to use facilities is needlessly speculative; the access of even RSOs may be limited on a number of grounds. CLS's claim that its members have "no right" to meet on campus finds no support in the record.[15]

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[15] CLS argues that the ability of a group excluded from a forum to still meet on campus is irrelevant. *See* Pet. Br. 24-25 (citing *Widmar* and *Board of Education v. Mergens*, 496 U.S. 226 (1990)). However, those cases both involved viewpoint

Indeed, there is no record evidence in this case that CLS's expressive activities were actually hindered by the inability to use the benefits that registration provided. After CLS changed course and opted not to comply with the Policy and thereby stop receiving the benefits of registration, CLS continued to express itself in the community life of Hastings without interference from the University. *Supra* at 11. In fact, attendance at CLS events *grew* in the 2004-05 school year. *See* JA 230 (JSF ¶ 48). The only evidence in this case shows that the CLS members were able to meet, pray, and put on a number of activities, while retaining their right to exclude members based on their core religious beliefs.

In short, Hastings has not sought to suppress particular speech or strong-arm any views from the marketplace, and its denial of a subsidy here does not violate the First Amendment.

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discrimination which is by its nature impermissible regardless of whether the groups could still meet. *See R.A.V.*, 505 U.S. at 391. In this case, where Hastings is applying a viewpoint-neutral rule, a group's ability to express itself on campus is directly relevant to whether CLS's expressive activities are actually burdened by denial of the benefit of RSO status.

CONCLUSION

The judgment of the Court of Appeals should be affirmed, or the writ of certiorari should be dismissed as improvidently granted.

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CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, PETITIONER

v.

LEO P. MARTINEZ, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION

Respondents offer no real defense of the written Policy under which they denied recognition to CLS. They offer no answer to our demonstration that the written Policy's religious nondiscrimination requirement is the only one that singles out groups based on their *beliefs*, or that it is wholly unreasonable to apply such a rule to *religious* groups. They also fail to address our showing that the Policy's sexual orientation prong is the only one that limits student groups' ability to exclude leaders based on *conduct*—to require that leaders practice what the group preaches.

Instead, Respondents say the only policy before this Court is the all-comers policy, the requirements of which continue to evolve. But the stipulated facts show that the written Policy remains fully in play. And even if Respondents' position were supported by the record, it would not save them. Respondents say the all-comers policy precludes discrimination based on "status or belief." Under the First Amendment, however, Republican student groups have the right to exclude Democratic leaders, feminist student groups have the right to exclude male chauvinists, and religious groups such as CLS have the right to exclude leaders who reject their core values. To forbid groups to form on the basis of shared beliefs is to forbid freedom of association at its most fundamental level.

Respondents also say they are merely denying "benefits" or "subsidies" ("modest" ones at that), as if this relieves them of First Amendment obligations. But this Court has repeatedly held that college speech forums are not mere government benefits, which may be denied to groups the government

disapproves, and that the freedom of association may no more be infringed by denial of otherwise available benefits than by outright prohibition. The justifications Hastings offers for excluding CLS from its speech forum are not even reasonable, let alone substantial or compelling. Hastings certainly cannot exclude CLS on account of its exercise of the constitutional right of freedom of association.

FACTUAL ISSUES

A. The stipulations place both the written Policy and the all-comers policy before this Court.

Claiming that we seek to "override the joint stipulations of both parties," Hastings suggests this Court should ignore the College's written Policy. HB-21.[1] Claiming such a Policy "never existed" (HB-19), Hastings asks this Court to decide the case based on the all-comers policy or "dismiss the writ." HB-23. These suggestions are wildly off the mark.

Stipulations cannot be stretched beyond their words. We stipulated to the existence of an all-comers policy, Joint Stipulation 18, JA-221, but we never stipulated that the all-comers policy predated discovery, is non-pretextual, or displaces the written Policy. Nor did we stipulate that the all-comers policy was ever enforced against a student group, or that it was the rationale Hastings gave when excluding CLS from the forum. All those propositions are con-

---

[1] As Intervenor-Respondent's arguments largely track those of Hastings, we refer to Outlaw's arguments only when they differ. We cite Hastings' Brief as "HB," Outlaw's brief as "OB," and our opening brief as "CLSB."

tradicted by the record—including several stipulations that Hastings ignores.

Joint Stipulation 14 states that registered student groups must "abide by the Policy on Nondiscrimination ('Nondiscrimination Policy')." JA-220. Joint Stipulation 15 quotes that policy, which sets forth nine specific criteria on which covered groups may not discriminate. JA-220. This is what we have called the "written Policy." It is not an all-comers policy. It singles out "religion" as the only viewpoint-based ground on which groups may not discriminate. As Hastings "admit[ted]" in its Answer, this Policy "permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." JA-93. Just not religious ones.

The parties also stipulated that *both* policies are in effect. Joint Stipulation 17 states: "In order to become a registered student organization, a student organization's bylaws must provide that its membership is open to all students *and* the organization must agree to abide by the Nondiscrimination Policy." JA-221 (emphasis added). As the conjunction "and" indicates, those are two different requirements.

Contrary to Hastings' claim that its "open-membership policy is two decades old," HB-42, Joint Stipulation 16 says the policy adopted in 1990 was the "Nondiscrimination Policy," defined in Joint Stipulation 15 as the written Policy. JA-220. Respondents cite nothing before 2005 that contains any hint of the all-comers policy. As late as its Answer (JA-93) and its Response to Interrogatories (JA-161), Hastings relied exclusively on the written Policy.

Nor did CLS's predecessor group "agree to abide by the School's open-membership policy" "*for a decade*." HB-2 (emphasis in original). Rather, from 1994 through 2001, that group's bylaws limited voting and officeholding to students who subscribed in writing to a statement of faith identical to that of the national CLS. JA-222-223, 258-260; HB-5-6.

Contrary to Respondents (HB-22), the courts below considered both policies, although without explicitly distinguishing between them. The district court quoted both the written Policy (Pet. App. 8a) and Joint Stipulation 18 (*id.* at 9a)—referring to "protected categories" (*id.* at 63a), which can only apply to the written Policy, since the all-comers policy contains no such categories. The Ninth Circuit paraphrased the all-comers policy, but based its decision entirely on *Truth* v. *Kent School District*, 542 F.3d 634, 639-640 (9th Cir. 2008), which involved not an all-comers policy but a nondiscrimination policy indistinguishable from Hastings' written Policy. Pet. App. 2a-3a.

Even in their brief to this Court, while insisting that the Court avert its eyes from the written Policy, Respondents cannot help reaching for the written Policy when it suits them—to craft a legal basis for the all-comers policy (HB-21), and to explain why Hastings recognized other groups with restrictive membership policies (HB-7).

In short, the stipulated facts and arguments compel consideration of both policies. This Court should affirm CLS's right to register as a student group under either policy, lest Hastings later reinstate its decision under whichever version escapes review.

B. Hastings takes liberties with the record.

Respondents make several factual assertions that either are contrary to, or unsupported by, the record. Because Respondents prevailed on summary judgment, the evidence must be viewed in the light most favorable to CLS. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). From Respondents' briefs, one would think it was the other way around.

1. The effect of nonrecognition on CLS

According to Hastings, the effect of nonrecognition on CLS was "slight," since, after Hastings denied recognition, "CLS continued to meet and hold activities and its membership nearly *doubled*." HB-2 (emphasis in original), HB-13. This says nothing about what CLS's membership might be if CLS were recognized. But in any event, Hastings neglects to mention that CLS's meetings were entirely "off campus," in apartments or dorm rooms—though Respondents conceded this point before the district court (JA-442). And the claim that CLS membership "doubled" is based on an apples-to-oranges comparison of "attendance" after nonrecognition (Pet. App. 13a) to formal membership in prior years (JA-224, ¶ 29). See HB-13. If evidence were taken now, it would show that nonrecognition has nearly destroyed the CLS chapter.

2. Access to media and meeting rooms

Respondents do not deny that CLS is barred from all campus communications media: the student e-mail list, the activities fair, newsletters that inform students of group activities, and the right to post notices. Respondents do, however, assert that "Hastings has made clear that the Christian Legal Society (CLS) may use 'Hastings facilities for its meetings and activities'" (HB-2), and they brief this case on the

assumption that CLS had access to meeting space on campus. Respondents cite this "fact" as their basis for distinguishing cases such as *Healy* and *Widmar*. HB-44-45.

The meeting space offered to CLS, however, is purely an indulgence, not a right, and may be revoked at any time. In district court, Hastings candidly described its offer as "an attempt to be accommodating here *in this litigation*." JA-441 (emphasis added). And its brief nowhere commits Hastings to abide by this policy indefinitely.

We urge the Court to read Hastings' full explanation to the district court of the terms under which CLS is allowed to meet on campus. JA-441-444. Here are the salient points in Hastings' own words:

> In an attempt to be accommodating, Hastings did say, "if you want to use university facilities, if you want to use classrooms, there is flexibility in that regard.["] Hastings allows community groups to some degree to use its facilities, sometimes on a pay basis, I understand, if they're available after priority is given to registered organizations. We offered that.

JA-442.

But with the "one exception" of "a traditional public forum"—namely "the street in front[] of the law school"—Hastings maintained that it "could properly exclude a student organization from all of the benefits that flow from participation in this limited public forum." JA-443-444.

Thus, far from having a "right" to meet in Hastings classrooms, CLS has nothing more than the "flexibility" offered to outside "community groups" to

use facilities to "some degree," perhaps "on a pay basis," and only "if they're available after priority is given to registered organizations." And "Hastings could properly exclude" CLS even from that.

In practice, things are worse. As the record shows, CLS twice tried to take Hastings up on its offer—without success. JA-297-306. In August 2005, a CLS officer asked permission to hold an "advice table" on "the beach" (a campus patio) and to promote an oceanside bonfire through campus media. His e-mail was labeled "time sensitive." JA-298. *Ten days later*, Hastings replied that CLS should contact someone else to "request to use" campus property, and that all further inquiries should be made by "your attorney." JA-296-298. The dates for both events had passed.

In September, CLS (through counsel) e-mailed Hastings, asking "to reserve a room on campus" for a guest speaker. JA-302-303. After a week's delay and another e-mail reminder, Hastings' General Counsel replied that "[b]ecause CLS is not a registered student organization, at this point use of college resources is limited." JA-301-302. She granted permission to use "the beach" (apparently in reference to the earlier request), but did not mention the request for a room for the guest speaker. *Ibid.* CLS did not get a response in time to host the speaker. *This* is what Hastings advertises as "access" to "facilities." HB-45.

Respondents' assertion that CLS could operate on campus as a "non-registered group" (HB-8) likewise cannot be squared with the record. Hastings' regulations make clear that the Nondiscrimination Policy applies to "all individuals and activities on College properties." Pet. App. 75a (§ 11.00). If Hastings pre-

vails, there would be no legal basis under the Policy for CLS to be present "on College properties" at all.

The Court should not decide this case on the false premise that petitioner enjoys access to campus facilities. That access is theoretical at best, can be yanked at any time, and does not extend to communications media.

3. Restrictive membership policies of other student groups

As discussed in our opening brief (CLSB-12-14), during the same year that CLS was denied recognition, other student groups—including Outlaw—submitted bylaws restricting membership or leadership to students who adhere to their core beliefs. None was denied recognition. This confirms that the all-comers policy either was not yet in place or is enforced selectively, and that the process is viewpoint-discriminatory. See *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983) (the character of a forum is determined by "practice" as well as "policy").

Hastings responds that "no other RSO 'has ever attempted to restrict its membership on the basis of a protected category.'" HB-7-8. But that is precisely the point: the all-comers policy contains no "protected categor[ies]." If Hastings was looking for restrictions based on protected categories, it was enforcing the written Policy, not the all-comers policy. And of course, the written Policy allows *secular* groups to limit membership to students who agree with their views, which is why those groups' bylaws never raised eyebrows.

Outlaw's response is even less forthcoming. As we have noted (CLSB-12-13), Outlaw's bylaws re-

serve the right to remove any officer who "work[s] against the spirit of the organization's goals." Pet. App. 138a. That is a right CLS would like to enjoy. Outlaw's answer? "Outlaw complies with the Hastings Policy and does not exclude any student from *membership* on the basis of status or beliefs." OB-6-7 (emphasis added). It offers no explanation for why Outlaw, but not CLS, should have the right to restrict *leadership*. Of course, we do not begrudge Outlaw the freedom to exclude from leadership students who might work against "the spirit of the organization," even if that might exclude members of CLS. We question only its unwillingness to see that freedom extended to others.

ARGUMENT

I. Respondents Virtually Concede That Their Written Policy Is Viewpoint-Discriminatory.

In our opening brief (CLSB-36-40), we demonstrated that Hastings' written Policy is facially viewpoint-discriminatory because it denies religious groups, alone among all other viewpoint-based organizations, the right to confine leaders and voting members to students who share their beliefs. Besides claiming that this Policy "has never existed" (HB-19), Hastings offers only two responses (HB-29-31).

First, Hastings cites two cases for the general proposition that policies "prohibit[ing] discrimination on the basis of specifically enumerated factors" are "viewpoint-neutral." HB-29 (citing *Wisconsin* v. *Mitchell*, 508 U.S. 476, 487 (1993), and *Roberts*, 468 U.S. at 614-615). But *Mitchell* upheld a hate-crimes enhancement on the ground that it was "aimed at conduct unprotected by the First Amendment" (508 U.S. at 487), which no one would say of this case. *Roberts*

upheld application of a nondiscrimination law to a group's membership on the ground that it "impose[d] no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." 468 U.S. at 627. Neither case involved a group singled out by virtue of its viewpoint from a freedom enjoyed by other groups. Whenever that has been the case, this Court has held the restriction unconstitutional. CLSB-37-38.

This is not mere "disparate impact" (HB-31). The written Policy applies on its face to "religion" and no other viewpoint.

Second, Hastings asserts that "nondiscrimination provisions are conduct- rather than viewpoint-based." HB-30. But "religion" presents a twist. Religion is a belief as well as a characteristic. In most contexts, including "religion" among the prohibited categories of discrimination is benign, even commendable. But applying religious nondiscrimination requirements to religious groups turns religious freedom on its head. For them, the ability to "discriminate" in favor of their beliefs is not only noninvidious, but essential. CLSB-43.

Respondents offer no response on this point, writing as if anything labeled "discrimination" is inherently a compelling concern. But unlike eradicating racism, the government has no legitimate interest in interfering with the ability of religious groups to prefer co-religionists. The explicit premise of *Corporation of Presiding Bishop* v. *Amos* was that religious groups have a free exercise right to "define and carry out their religious missions," including the right to use religious criteria in selecting employees who engage in "religious activities." 483 U.S. at 335-336; ac-

cord *id.* at 341-342 (Brennan, J., concurring). The functional equivalent for a religious student group is the right to use religious criteria in selecting its officers, Bible study leaders, and voting members. See Br. of American Islamic Congress, et al., 33-35.

Nor do Respondents explain how CLS's rule forbidding unrepentant sexual *conduct* outside of traditional marriage violates Hastings' prohibition of discrimination on the basis of sexual *orientation*.[2] As we have explained, this is the only forbidden category that arguably restricts a group's ability to be selective in terms of its members' conduct. CLSB-10, 39. Respondents now admit that even their all-comers policy allows student groups to restrict their membership on the basis of "conduct." HB-5. But if other student groups can exclude students whose conduct is inconsistent with their beliefs, it is viewpoint-discriminatory to make CLS the exception.

Respondents' only justification is to claim that CLS conceded that its nonmarital conduct rule is discrimination based on sexual orientation. HB-35 n.10. But as we explained (CLSB-10, 39), CLS officers refused to pledge not to discriminate on the basis of "sexual orientation" only because Hastings officials interpreted such a pledge as barring a nonmarital sex rule. For the same reason, the Complaint alleged that CLS considered "sexual orientation" in its selection of officers and members (JA-460) because that is how Hastings interprets its Policy. Respondents simply ignore our explanation, twisting CLS's respect

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[2] See American Psychological Ass'n Help Center, *What Is Sexual Orientation?*, http://www.apa.org/helpcenter/sexual-orientation.aspx (distinguishing between "sexual orientation" and "sexual behavior"); Br. of U.S. Conf. of Catholic Bishops 7-11.

for Hastings' interpretation of its Policy into a "binding * * * judicial admission" that CLS discriminates on the basis of "orientation." HB-35 n.10. In fact, the parties stipulated that CLS's rule applies only to "conduct." Joint Stipulation 34, JA-226.

Hastings now retreats from its original interpretation, claiming that its policy does not proscribe restrictions based on "conduct." HB-5. If Hastings would make official that "sexual orientation" under its Policy does not include "conduct," CLS could agree not to discriminate on the basis of sexual orientation.

II. The All-Comers Policy Provides No Constitutional Basis For Denying Recognition to CLS.

Hastings' all-comers policy forbids students from forming groups based on "status or belief." Joint Stipulation 18, JA-221. We have no objection to prohibiting "status" discrimination. But the freedom of individuals to form groups based on shared "beliefs" is fundamental. As Tocqueville wrote long ago: "An association simply consists in the public and formal support of specific doctrines by a certain number of individuals who have undertaken to cooperate in a stated way in order to make those doctrines prevail." Alexis de Tocqueville, *Democracy in America* 190 (J.P. Meyer ed. 1969). Restricting a group's right to organize around a shared "belief" is a broadside assault on associational liberty.

Respondents' overriding theme is that exercising the rights of speech and association on campus, using campus facilities, is merely a "modest * * * benefit[]" or "subsidy" that the government may take away for virtually any reason. HB-1, 24-28. But as *Healy* made clear, the right to associate and speak as a group on

campus is much more than that. To university students, the campus is their world. The right to meet on campus and use campus channels of communication is at least as important to university students as the right to gather on the town square and use local communication forums is to the citizen. To be sure, public colleges are not constitutionally obligated to open their facilities for speech. But all of them do so. And having done so, they must comply with the First Amendment.

As this Court has repeatedly held, the right to participate in a university speech forum is not governed by the deferential standards applicable to ordinary government "benefits" and "subsidies." See *Rosenberger*, 515 U.S. at 834 (rejecting application of *Rust* and *Regan* to student activity funding); *Southworth*, 529 U.S. at 229. Respondents thus rely on an argument rejected long ago. HB-25-26.

A. Hastings fails to distinguish the relevant precedents addressing burdens on speech, association, and religion.

In our opening brief, we based our speech and association claims on the conjunction of two lines of cases.

1. One line, exemplified by *Healy* and *Widmar*, protects the right of students at public colleges to "associate to further their personal beliefs" by forming organizations, and holds that the denial of recognition to a particular student organization is a form of "prior restraint" that requires a "heavy burden" of "justification." *Healy*, 408 U.S. at 181, 184.

Respondents dismiss *Healy* and *Widmar* on the ground that they involved not just denial of official recognition but "*total* exclusion" of the groups from

campus. HB-45 (emphasis in original). Here, Hastings says, "CLS has been granted access to the School's facilities for its meetings and activities." *Ibid.*

We have already dealt with Respondents' factual assertion that CLS has access to meeting rooms. See pages 5-8, *supra*. But as a legal matter, there is no support for confining those decisions to cases of total exclusion. *Healy* went out of its way to emphasize the importance of access to the "customary media for communicating with the administration, faculty members, and other students," without which "the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited." 408 U.S. at 181. Such a limitation, the Court said, "cannot be viewed as insubstantial." *Id.* at 181-182. Not one lower court decision applying *Healy* and *Widmar* has confined those cases to total exclusion. CLSB-25.[3]

Nor are *Healy* and *Widmar* distinguishable on the ground that Hastings' policy is merely a reasonable regulation of conduct. HB-45-46. Membership rules based on agreement with a group's beliefs are not mere conduct—they are constitutive of identity and determinative of message. *Roberts*, 468 U.S. at 623; *Hsu*, 85 F.3d at 861. In *Healy*, the Court was concerned to leave the college latitude to protect against "a substantial threat of material disruption." 408 U.S. at 189. The Court did not suggest that the college could control the way the group structured itself,

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[3] Respondents also attempt to limit *Healy* to viewpoint discrimination, but at most one of the four reasons the defendant put forward for excluding SDS was viewpoint-based. 408 U.S. at 187-188.

made decisions, or chose leaders. By the same token, Hastings has every right to insist that CLS refrain from disruptive activities or other misconduct, but it cannot insist that CLS be a different kind of group.

2. This Court's expressive association cases—including *Roberts*, *Hurley*, and *Dale*—protect CLS's right to control its message by choosing its members and leaders. Hastings tries to distinguish these cases on the ground that they "involved the direct application of a public accommodations law" rather than the denial of benefits. HB-47-48. But these opinions explicitly repudiate any such limitation.

Both *FAIR* and *Roberts* noted that "freedom of expressive association" reaches laws "impos[ing] penalties or withhold[ing] benefits based on membership in a disfavored group." *FAIR*, 547 U.S. at 69; *Roberts*, 468 U.S. at 622. For this proposition, both cases cited *Healy*, which shows that denying recognition to a student group falls precisely within the scope of the right.

Respondents insist that requiring CLS to accept non-Christian voting members and leaders, as well as students who unrepentantly violate CLS's moral code, would not affect the group's speech. HB-42-43. If this is a legal claim, it is contrary to this Court's cases. *Dale*, 530 U.S. at 654 (inclusion of Dale would "surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs"); *Hurley*, 515 U.S. at 574-575; *Amos*, 483 U.S. at 342 (Brennan, J., concurring).

If it is a factual claim, it is frankly preposterous. As the Seventh Circuit noted, forcing CLS to accept those who repudiate its central tenets would not merely affect its speech, but "would cause the group

as it currently identifies itself to cease to exist." *Christian Legal Soc'y* v. *Walker*, 453 F.3d at 863. At a minimum, enforcing Hastings' policy would put the group at the mercy of other students, many of whom do not wish CLS well. A single student invoking his right to lead a CLS Bible study could make a mockery of the occasion; a handful of students invoking their right to vote on policies and speakers could upend the group's creed.

Scrambling to defend this line of argument, Hastings says its open-membership policy "is two decades old and there is not one shred of evidence in the record before this Court that any of the scores of RSOs at Hastings has ever been threatened with—much less subject to—a takeover." HB-42. But until at least 2005, only the written Policy applied and it did not limit the ability of non-religious groups to protect themselves, which many of them did. See pages 8-9, *supra*. So of course there is no record evidence of takeovers. Moreover, Respondents do not even attempt to deny that their policy could force changes in a group's message more subtle than a "takeover." Outlaw admits that "[w]hat is orthodox for a student group" may become "heretical" if "the membership changes." OB-40. That kind of change should not be forced by governmental regulation.

In any event, the legal question is not whether *Hastings* thinks a group would be endangered by admitting non-adherents, or whether the record shows that a group has *already* been compromised. The question is whether admitting non-adherents to CLS would "affect[] in a significant way [CLS's] ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648. Allowing non-adherents to lead Bible studies and represent CLS at the student organiza-

tion fair would affect CLS's message no less than making Dale a scoutmaster would have affected the Scouts'. CLSB-45-46. And if there were any doubt on that question, this Court would have to "give deference" to CLS's own judgment about "what would impair its expression." *Dale*, 530 U.S. at 653. The amicus briefs of Islamic, Jewish, Protestant, Catholic, Sikh, and conservative political student groups attest that CLS's judgment in this regard is widely shared.

3. Hastings dismisses our free exercise claim, asserting that (1) it is foreclosed by *Smith*, and (2) the right to choose religious leaders is confined to the selection of "*clergy*" by a "*church*." HB-49-51. But *Smith* expressly reaffirmed that the right of religious association—a combination of free association and free exercise—is protected even against neutral laws. 494 U.S. at 882. And *Amos* held that the right to prefer co-religionists extends to all who engage in "religious activities" at "religious organizations," 483 U.S. at 335-336, not just "clergy" in "churches."

B. The all-comers policy is viewpoint-discriminatory.

Contradicting their claim that the all-comers policy is "quintessentially viewpoint-neutral" (HB-28), Respondents admit that they employ the policy to deny support to activities "that the School and the State of California do not wish to * * * lend their name to." HB-11. This is an unvarnished admission of viewpoint discrimination.

Indeed, Respondents' amicus ASUCH, Hastings' student government association, trumpets the fact that Hastings' policy enables students who "disagree" with the group to "join in order to effect change from within." ASUCH Br. 8-9. Indeed, the Policy is struc-

tured so that small and politically unpopular groups can be overwhelmed by a hostile majority, who need only "join" and vote to change the group's message. CLSB-29-30; see ASUCH Br. 25 ("[T]he vast majority of Hastings students share the values the school seeks to promote by enforcing the Policy."). But as this Court has held, subjecting student groups to majority vote violates viewpoint neutrality. *Southworth*, 529 U.S. at 235; *Santa Fe Ind. School Dist.*, 530 U.S. at 304-305.

The fact that the policy does not target particular viewpoints by name (HB-28) does not make it neutral. See *Velasquez*, 531 U.S. at 547. The Policy is an intentional tool for both the College administration and the politically dominant elements of the student body to give vent to their "disapproval" (HB-35; see ASUCH Br. 8-9) of dissenters. As such, it warrants the strictest constitutional scrutiny.

C. The all-comers policy lacks justification.

Because the all-comers policy imposes a severe burden on freedom of association (see pages 15-17, *supra*), abridges the free exercise of religion (see page 17, *supra*), and is viewpoint discriminatory (see pages 17-18, *supra*), it can be upheld only if necessary to achieve a compelling governmental interest. Even assuming the policy is neutral, denial of recognition can be upheld only if the state bears its "heavy burden" of justification. *Healy*, 408 U.S. at 184. And at the very least, Hastings must show that its policy is reasonable in light of the purposes of the forum. The all-comers policy fails each of these tests.

As we have shown (CLSB-52), and Respondents do not dispute, to be "reasonable in light of the purpose served by the forum" demands significantly

more than a mere rational basis. The government must demonstrate a reasonable connection between any restrictions and the "purposes of the forum." Under the stipulated facts, the purpose of the RSO forum is "to promote a diversity of viewpoints *among* registered student organizations." Joint Stipulation 8, JA-216 (emphasis added). Respondents do not mention this Stipulation, but instead posit a variety of "other objectives" (HB-9), the principal one of which is "to foster discussion *within* groups as well." HB-12 (emphasis in original). Respondents point to no pre-litigation evidence that this was among the purposes of the forum.

That is unsurprising, as the two objectives are logically incompatible. Forced diversity within groups eliminates diversity among groups. See Br. of Gays and Lesbians for Individual Liberty 10-12, 14-19. We explained this problem at length in our opening brief. CLSB-49-53. Hastings' only response is to say it has not yet noticed any homogenizing effect, and might be willing to "reconsider" its policy if it does. HB-38. But that assessment is based on Respondents' false premise that the all-comers policy has been in effect for twenty years, which is contradicted by the joint stipulations and proof of actual practice. See pages 2-4, *supra*. And Hastings does not even attempt to claim that its policy promotes the *stipulated* purpose of the forum.

Hastings' actual "practice" toward other groups (*Perry*, 460 U.S. at 47) belies any genuine purpose of encouraging "discourse, cooperation, and learning" through diversity *within* RSOs. Five years after announcement of the all-comers policy, Hastings still allows groups other than CLS to limit membership based on agreement with the group's beliefs. The Na-

tional Lawyers Guild, for example, requires members to "agree with the objectives of the organization as set forth herein,"[4] and the Black Law Students Association limits members to those "who are committed to the purpose of this organization."[5] As these bylaws show, Hastings' alleged purpose of "expos[ing] students to different views" *within* each RSO (HB-12) is a sham.

Hastings offers four other justifications for the all-comers rule, none of which is reasonably related to the stipulated purpose of the forum.

First, drawing on public accommodations law, Hastings argues that its policy "ensures that all Hastings students have equal access to all school-recognized and school-funded activities." HB-10, 16, 32. But this controversy is not about access to *activities*. All CLS activities—its Bible studies, speakers, and dinners—are open to all students, without exception, and always have been. Joint Stipulation 36, JA-227. This case is about whether students who do not share (or openly revile) CLS's beliefs are entitled to determine the content of CLS's speech by *voting* on its policies, taking a turn *leading* a Bible study, or *getting elected* to CLS leadership. That is quite another matter, with no pedigree in public accommodations law.

Respondents falsely analogize this case to one in which Hastings Ice Hockey excludes a student from an outing "because he has a different faith, holds un-

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[4] http://www.uchastings.edu/student-services/studentorgs/national-lawyers-guild.html

[5] http://www.uchastings.edu/student-services/docs/bylaws/bylaws-blsa.pdf

popular views, or is a native of a country that lacks a hockey tradition." HB-10. CLS excludes no one from its activities. This case might resemble Hastings' hypothetical if students who disliked hockey joined Hastings Ice Hockey and voted to redirect its energies to a sport that more students like. That would destroy Hastings Ice Hockey and impoverish the range of options available to all students.

Here is a better analogy. Hastings' RSO forum is like a "Speakers' Corner," where the various student groups are each allotted a soapbox. All students have the right to mill around, listen to whatever group's speakers they find interesting, and participate in any discussions. If pizza is provided, they have a right to eat (if they stay for the talk). But they do not have the right to demand a turn at another group's soapbox, determine another group's message, or vote to change the speaker.

Second, Hastings says the policy "reflects Hastings' obligation to follow state law." HB-11, 33 (citing Cal. Educ. Code § 66270). Even if true, state law must give way to federal constitutional rights. But it is not true. California Education Code § 66270 prohibits certain enumerated types of discrimination (it is not an all-comers policy) within any "program or activity conducted by" a public college. RSOs are not "programs or activities" of the College; if they were, the Establishment Clause would forbid them to be religious; political RSOs could not engage in electioneering; sororities would have to admit men; and Hastings would be liable for any torts that RSOs commit. See Pet. App. 85a (disclaiming liability for RSO activities). Moreover, California law specifically exempts student organizations from a ban on funding groups that "discriminate" on a basis prohibited

by § 66270. After prohibiting membership dues or other expenses for private associations that discriminate on one of these enumerated bases, California Education Code § 92150 states: "This section does not apply to * * * any funds that are used directly or indirectly for the benefit of student organizations." And California exempts religious organizations altogether from its prohibitions on employment discrimination based on religion and sexual orientation. Cal. Gov. Code § 12926(d). It is Hastings' policy, not CLS, that is out of kilter with California law.

Third, Hastings argues that the all-comers policy "allows Hastings to ensure that students are complying with basic nondiscrimination requirements (including those that CLS does not challenge) without any need to meddle in an RSO's internal affairs or inquire into the sincerity of its stated reasons for excluding a student." HB-36. This argument is baffling. Instead of a few defined categories, which according to Hastings have never before been violated, the all-comers policy makes every student group's membership policy a potential issue for controversy—rife with ill-defined distinctions between such concepts as conduct, speech, belief, and status. HB-5. Far from easing administrative difficulties, the all-comers policy vastly multiplies the occasions for "meddling."

Finally, Respondents say "it is only natural that the outside world will conclude that Hastings' RSOs say something about the 'image * * * the [School] * * * wishes to project.'" HB-35 (citations omitted; ellipses and brackets in original). "The policy ensures that * * * the School's facilities and own name and logo are not used to support groups that choose to engage in conduct that the School and the State of

California do not wish * * * to lend their name to." HB-11.

This justification not only fails the "reasonableness" test; it flies in the face of decades of this Court's precedents, which teach that governmental disapproval of, offense at, or desire not to be associated with student speech activities is not a valid ground for excluding groups from a forum. *E.g.*, *Healy*, 408 U.S. at 187-188 ("The College * * * may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."); *Widmar*, 454 U.S. at 274 ("an open forum in a public university does not confer any imprimatur of state approval"); *FAIR*, 547 U.S. at 64-65. As Hastings has already made clear, RSOs are "neither sponsor[ed] nor endorse[d]" by the school (Joint Stipulation 13, JA-219); and it cannot exclude a group from the forum for fear of unwarranted misunderstanding. *Mergens*, 496 U.S. at 250.

In our opening brief, we also argued that it cannot be "reasonable" to restrict access to a speech forum on the basis of a group's exercise of the constitutionally protected right of association. CLSB-55. One aspect of being "reasonable" is respecting constitutional rights. Tellingly, Respondents offer no response.

D. The peculiarity, incoherence, and suspect history of the all-comers policy all point to pretext.

Before the Court accepts the assurances of Respondents and their amici that the all-comers policy is a normal part of university governance in America, it should take a look at what other universities do, the

policy's internal contradictions, and its suspect history.

The brief filed by amicus Association of American Law Schools (AALS) is instructive. That brief asserts up and down that Hastings' all-comers policy is excellent and commendable. But its canvass of U.S. law schools reveals only four—all private—that have anything resembling an all-comers policy. AALS Br. 20 n.5. AALS cites not a single public law school, other than Hastings, that has such a policy.[6] Significantly, although AALS prohibits law schools from discriminating based on religion or sexual orientation, it deems religiously affiliated law schools exempt from the religious nondiscrimination requirement (AALS Handbook 59, § 6-3.1 (2009)), and allows them to forbid "nonmarital sexual conduct" if the prohibition applies to both heterosexuals and homosexuals. *Id.* at 82, 4. That is precisely what we propose. Better to do as AALS does, not what it says.

And consider the scope of the policy. Respondents assure us that the all-comers policy implements the written Policy. HB-5, 21, 36. But the written Policy applies not only to student groups, but to Hastings itself. CLSB-9. We can believe that Hastings refrains from discriminating based on the nine enumerated categories of the written Policy. But can Hastings possibly maintain that it has an all-comers

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[6] Respondents' amici State Universities misleadingly assert (at 11-12) that there are all-comers policies at public law schools in Idaho and Iowa. The University General Counsel in Iowa and the SBA Judiciary in Idaho have concluded that the referenced policies could not lawfully be used to exclude CLS. Their opinions are attached to this brief as Appendices A and B.

policy for selecting students or faculty, or administering its programs?

And what does the all-comers policy actually encompass? It shifts with every wind. When Respondents filed their Answer, it did not exist. JA-93. When first announced by the Dean during discovery, the policy was truly "all-comers": "in order to be a registered student organization you have to allow all of our students to be members and full participants." JA-343 (Kane Dep.). By the time Hastings' lawyers drafted Joint Stipulation 18, this transmogrified into a prohibition of restrictions based on "status or belief." JA-221. Now, Hastings' brief announces further modifications: RSOs may charge dues; impose attendance requirements; enforce membership restrictions based on "conduct"; and use "academic and writing competitions." HB-5. (Could CLS base membership on a competitive test of religious orthodoxy?) More troublingly, Respondents say the policy allows them to deny RSO status to any activities they "do not wish to * * * lend their name to." HB-11.

Respondents do not define any of these terms. If student groups may exclude members on the basis of "conduct," do Respondents now concede that CLS's nonmarital sexual conduct rule is permissible? Does "conduct" include expressive conduct? Does it include refusal to sign a piece of paper (such as CLS's Statement of Faith)? Hastings argues strenuously that requiring members to sign the Statement of Faith is "conduct" (HB-30); it must follow that a student's refusal to sign is also "conduct." But if that is so, and groups can exclude students based on conduct, this case is over and we have prevailed. The all-comers policy thus seems to encompass almost anything and almost nothing.

Finally, the provenance of the all-comers policy smacks of pretext. When CLS approached director Chapman about registering, she handed the students a copy of the written Policy, JA-130, and when she denied their application she cited the written Policy. JA-132. Other RSOs presented bylaws that required support for their core beliefs, and it never occurred to Hastings officials that these bylaws were problematic. The first mention of an all-comers policy came during discovery, after Hastings witnesses had been pressed about the viewpoint-discriminatory character of the written Policy. Either the all-comers policy was "presented only as a litigating position," *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 871 (2005), or it is selectively applied. Either way, it is an insufficient basis for refusing to recognize CLS.

III. The Availability Of Funding For Eligible Activities Is No Reason To Deny RSO Status To CLS.

This case has never focused on money. Recognition confers "eligibility to apply for student activity fee funding" (JA 217), but the record contains little information concerning what specific activities are eligible. We suspect Respondents obsess about funding because it is so hard to defend excluding CLS from meeting places and communications media.

In any event, this Court established the constitutional framework for student activity fund programs in *Southworth* and *Rosenberger*. Under these cases, student activity funds are a "metaphysical" forum governed by the "same principles" that apply to speech forums. *Rosenberger*, 515 U.S. at 830; *Southworth*, 529 U.S. at 229-230. Thus, Hastings can no more ex-

clude CLS from eligibility for student activity funding than it can exclude CLS from meeting space.

Respondents harp on the government's broad discretion over general spending programs. HB-26. But as this Court has held, the First Amendment principles applicable to funding in the context of speech forums are different from those applicable to general government subsidies. *Rosenberger*, 515 U.S. at 834; *Southworth*, 529 U.S. at 229-230; *Davey*, 540 U.S. at 720 n.3. Accordingly, there is no risk that a ruling in CLS's favor will create a broad "First Amendment right [for expressive associations] to receive public funds." HB-52. This Court's cases already draw the line.

IV. Invalidating Hastings' Policies In This Context Presents No Threat To Laws Against Invidious Discrimination.

Respondents' final tactic is to say our position "would render unconstitutional federal, state, and local laws conditioning the eligibility of expressive associations and other groups to receive public funds, use public facilities, or participate in limited public forums on their willingness to comply with routine nondiscrimination requirements." HB-53. But we have no quarrel with "routine nondiscrimination requirements." CLS excludes no one from its activities. Our position is simply that expressive associations have the right to form around and choose leaders based on shared *beliefs*, without forfeiting their other freedoms, such as the freedom to meet and speak on campus. That should not be controversial. See *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940) (the "freedom to believe" is "absolute").

It is difficult to see how a decision about an all-comers policy could pose any threat to laws prohibiting invidious discrimination. An all-comers policy is not an anti-discrimination policy; most of its applications involve innocuous grounds for distinction. Public entities may not use their unquestioned right to prohibit invidious discrimination as an excuse to prohibit associations from forming on the basis of entirely legitimate criteria. For all the concern expressed by Respondents' amici, they have not identified a single state, city, public college, or school board, other than Hastings, that forbids association on the basis of shared belief.

Nor does our challenge to the *written* Policy undermine traditional anti-discrimination laws. The federal government and every state have largely codified our position, exempting religious organizations from prohibitions on religious discrimination. CLSB-44. This Court has treated that right as constitutionally protected. CLSB-40-41 (discussing *Amos* and *Smith*). Similarly, every state with laws prohibiting sexual orientation discrimination has some form of exemption for religious organizations. CLSB-46. To the extent that these protections are not already codified, this Court has recognized First Amendment exceptions to anti-discrimination laws in the past, and the sky has not fallen. *Hurley*; *Dale*.

Respondents' position boils down to the proposition that the government may deny any "benefit" (no matter how essential to a group's survival) on account of whatever it labels "discrimination" (no matter how noninvidious and even constitutionally protected). That idea is inconsistent with decades of precedent. The unconstitutional conditions doctrine draws distinctions based on the nature of the right, the charac-

ter of the organization, the closeness of connection to the government, and the strength of the government's interest. *Bd. of Comm'rs* v. *Umbehr*, 518 U.S. 668, 680 (1996). That a university can be denied tax exemptions for discriminating against African-American students, HB-51, a concern at the heart of modern Equal Protection, does not mean that an Orthodox synagogue could be denied tax exemptions for excluding members of Jews for Jesus or that a church could be barred from renting a public facility because it withholds communion from persons who are not baptized, as suggested in *Bronx Household* v. *Bd. of Education*, 492 F.3d 89, 120 (2d Cir. 2007) (Leval, J., concurring). Indeed, it is essential that this Court enforce constitutional rights even when "benefits" are involved, lest an expanding state entail a shrinking sphere of civil liberty.

Finally, Respondents and their amici overlook the unique setting of this case: a forum expressly created to foster a diversity of views among groups on campus. RSOs are not government-sponsored, do not speak for the University, and do not administer government programs. Whatever may be the reach of viewpoint-neutral laws against invidious discrimination in other contexts, the First Amendment does not permit the exclusion of a group from a campus forum for speech simply because the group exercises a well-recognized constitutional right of freedom of association based on adherence to shared beliefs.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment below should be reversed.

Respectfully submitted.

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APRIL 2010

APPENDIX

APPENDIX A

THE UNIVERSITY
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22 June 2009

M. Casey Mattox, Esq.
Attorney at Law
Center for Law & Religious Freedom
8001 Braddock Rd, Ste 300
Springfield, VA 22151

Re: Christian Legal Society

Dear Mr. Mattox:

This letter responds to the concerns you raised in your June 3, 2009, letter, regarding the amendment of the By Laws of the Graduate and Professional Allocations Committee (GPAC) of the University of Iowa. You noted two provisions in particular: By Laws V(C)(3) and V(D)(8); and you requested that the University bring these By Laws into compliance with its constitutional obligations. Thank you for bringing these concerns to our attention.

We have reviewed the relevant provisions of GPAC's amendments to its By Laws and concluded that By Laws V(C)(3) and V(D)(8) should be removed. The Vice President for Student Services has taken action to remove these provisions. Funding requests submitted by religious student organizations are scheduled to be reviewed by GPAC in September. At that time, all religious student organizations will be permitted to apply for GPAC funds, and GPAC funds

will be allocated in compliance with constitutional standards.

You requested institutional changes to avoid this situation in the future. We decline to provide an exemption from religious discrimination rules for religious student groups, as you have proposed, We have implemented training on these issues, however, for members of GPAC and the Student Assembly Budgeting & Allocating Committee (SABAC).

Again, we appreciate your bringing these issues to our attention. Please feel free to call or write regarding any remaining concerns you might have.

/s/ Maria Lukas

Maria Lukas
Senior Associate Counsel

C: Tom Rocklin
Tom Baker

APPENDIX B

IN THE STUDENT BAR ASSOCIATION
JUDICIARY OF THE UNIVERSITY OF IDAHO
COLLEGE OF LAW

CHRISTIAN LEGAL SOCIETY STUDENT CHAPTER OF THE UNIVERSITY OF IDAHO,
Petitioner,

CASE NO. 01-01

v.

FINAL DECISION AND ORDER

STUDENT BAR ASSOCIATION COUNCIL OF THE UNIVERSITY OF IDAHO COLLEGE OF LAW
Respondent.

PER CURIAM for the unanimous SBA Judiciary,

BACKGROUND

The University of Idaho College of Law Student Bar Association Council ("SBA") is the legislative body of the law students at the University of Idaho College of Law ("College of Law") under the Student Bar Association Constitution ("SBA Constitution"). Each year, the SBA receives money from the fees that law students are required to pay to attend the College of Law. The SBA allocates this money each spring to

organizations affiliated with the College of Law pursuant to the [Page 2] SBA Constitution. To receive funds, an organization must, among other things, be recognized by the SBA, and must timely submit an application to the SBA. The SBA may deny funding to an organization that discriminates according to religion or other prohibited bases.

In early April, 2001, the Christian Legal Society Student Chapter of the University of Idaho (CLS), a recognized and previously funded organization, submitted an application to receive funds from the SBA. The National Christian Legal Society is an organization of lawyers which requires its members to sign a statement of faith. CLS also requires its local officers, voting members and members who are eligible to run for office to sign the statement of faith. All activities of CLS, including meetings, are open to anyone at the law school, regardless of that person's religion.

On April 17, 2001, the SBA held its annual budget meeting to consider funding applications submitted by recognized organizations. The SBA discussed the fact that CLS requires its officers and voting members to sign a statement of faith, and on this basis, the SBA decided that CLS discriminates according to religion in violation of the SBA Constitution. The SBA then voted to deny funding to the CLS and reserved the amount requested by the CLS in the event that CLS both complies with the SBA Constitution and files a supplemental budget request. CLS filed a notice of appeal of the SBA's decision, after which an open hearing was held on the matter.

JURISDICTION

The SBA Judiciary is created and governed by the SBA Constitution. See Article 1, Section 4. Article 4, Section 3(A) states that the SBA Judiciary shall make rulings in accordance with the SBA Constitution. Such rulings shall be binding on the SBA membership and the SBA Council. See Section 3(B). The SBA Judiciary's jurisdiction is limited under Section 3(B): "the SBA Judiciary shall only have the power to strike down an action taken or omitted by the other [Page 3] SBA officers if it finds the acts or omissions to be contrary to [the SBA] Constitution." SBA Council members are officers. See Article 5, Section 2. CLS has challenged the SBA Council's action denying funding to the CLS, based upon the SBA Council's determination that CLS discriminates on the basis of religion. CLS argues that the SBA's action in contrary to the SBA Constitution. We therefore have jurisdiction to consider this matter.

DISCUSSION

In the case before us, we must decide whether the CLS "discriminates" on the basis of religion. In determining whether the CLS discriminates on the basis of religion, the SBA Council refers us to Article 6, Section 2: *"Any organization that discriminates according to race, religion, sex, color, disability, sexual orientation or national or ethnic origin shall not be recognized as an entity worthy of funds, endorsement or participation through the SBA."*

What does discrimination mean? The word "discriminate" is not defined in the SBA Constitution. Therefore, we must look beyond the document itself. Both parties suggested in oral arguments that we use

a "common sense" definition, and also suggested in their briefs that we look to outside sources, including societal understandings and other bodies of law. In defining "discriminate," common sense approaches include consulting a regular dictionary definition, a legal dictionary definition, and definitions illuminated by outside law. All of those approaches yield a similar result. We will consider each of them.

One common dictionary defines "discriminate" as making "a difference in treatment or favor on a class or categorical basis in disregard of individual merit." Webster's Third New International Dictionary, 1976. The SBA points to a nearly identical definition in Justice Thomas' dissent in Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 614 (1999). Under this definition, CLS makes a [Page 4] difference in treatment or favor on a categorical basis; CLS allows only those who adopt their statement of faith to be voting members and officers in their religious organization. But does the CLS make a difference in treatment "in disregard of individual merit?" Merit is defined as "worth or excellence in quality or performance." Webster's Third New International Dictionary, 1976. As we understand it, individual merit is a person's qualifications or ability to perform a certain function. Certainly one could argue, as has CLS, that a person who does not have the same core religious beliefs as their religious organization, or who will not sign a statement adopting those core beliefs, likely is not the best qualified person to lead CLS in the accomplishment of its purposes. Arguably, under this definition, CLS does not discriminate.

As we are interpreting a "quasi-legal" document, another "common sense" option is to use a "legal" definition. Black's Law Dictionary (Seventh Edition)

contains several definitions. The first defines discrimination as "the effect of a law or established practice that confers privileges on a certain class or denies privileges to a certain class because of race, age, sex, nationality, religion, or handicap." As an example, Black's then refers to Title VII of the Civil Rights Act which prohibits "employment discrimination based on any one of those characteristics." See 42 U.S.C. § 2000e. The SBA points to a similar definition in Justice Thomas's dissent in Olmstead, supra.

However, the Black's definition above, and the definition pointed to in Olmstead is only part of the equation. The second part of Black's definition is "differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." Federal case law uses a definition nearly identical. One federal court, in deciding what actions constitute discrimination under Title VII noted, " "[d]iscrimination" is a term well understood in the law. It is in general a failure to treat all persons equally where no reasonable [Page 5] distinction can be found between those favored and those not favored." Baker v. California Land Title Co., 349 F.Supp 235 (1972), aff'd 507 F.2d 235 (1974), cert. denied 422 U.S. 1046 (1975) (*quoting* Franchise Motor Freight Association v. Seavey, 196 Cal. 77, 81).

While we recognize that we are not interpreting Title VII, both parties point to that body of law to shed light on what would or would not be discrimination under the SBA Constitution. Additionally, with the similarities between Title VII and the SBA anti-discrimination clause, it requires no great stretch of the imagination to believe the

drafters of the SBA Constitution were mindful of Title VII, and likely even based the SBA anti-discrimination clause on the principles contained in Title VII. Furthermore, the SBA describes Title VII as "the quintessential discrimination law." For these reasons, we find the above definitions of discrimination useful and appropriate in interpreting the SBA anti-discrimination clause.

One reading of the SBA Constitution's anti-discrimination clause suggests that to receive funding, differential treatment may never be based on the enumerated grounds, including race and religion. Such reading, however, ignores the "no reasonable distinction" language used by Black's Law Dictionary, and used by federal courts when deciding what conduct constitutes discrimination, as noted above. We therefore find it necessary to consider whether differential treatment is based upon a reasonable distinction.

CLS engages in differential treatment of its members when it requires that those who wish to vote for officers or hold office sign a statement of faith. Therefore, we ask whether there is a reasonable distinction upon which the CLS may treat its members differently. In other words, is there any reasonable distinction between those who sign or do not sign CLS's statement of faith which would justify CLS's granting or withholding the benefits of voting for officers or becoming [Page 6] officers of the CLS?

The CLS was formed in large part for both religious, as well as for speech or expressive purposes. CLS bylaws state that one part of its mission is to maintain a Christian law fellowship through, among other things, prayer and Bible study.

The bylaws state that its purposes are to be accomplished through expressive activities, including "proclaiming the gospel in word and in deed . . ." Additionally, persons desiring to be leaders or voting members must adhere to and express CLS's core religious beliefs by signing CLS's statement of faith.

A person who will not adhere to or sign the CLS's statement of faith may not be the most effective person to advance the group's mission and purposes. If they had such beliefs or agreed fully with the purposes and beliefs of the CLS, why would they not sign? The statement of faith requirement is one way the CLS can attempt to maintain its identity and defining features; giving the leadership of the group to someone who is unwilling to sign or adopt the statement creates the possibility that the group will cease to be what it was created to be. The statement can help to ensure that its officers and voting members will be those most devoted to CLS's core beliefs and to advancing such beliefs. It is not foolproof, for one may sign the statement without sincerity; however, it is one reasonable way to ensure CLS officers will be those most likely to advance the core beliefs, the mission, and the purposes of the organization.

Even requiring voting members to sign the statement is a reasonable way to ensure that CLS officers are those most likely to advance CLS's cause. It is reasonable to believe that members who sign the statement will be more likely to elect officers most devoted to the beliefs outlined in the statement.

Under the facts of this case, we find that CLS's distinction between those who sign the [Page 7] statement of faith and those who do not sign the

statement is reasonable.

When deciding whether such distinctions are reasonable, outside law is helpful. Title VII sheds light on the reasonableness of distinctions based on religious beliefs. Even though Title VII prohibits discrimination on the basis of religion in the employment context, the statute carves out an exemption for a religious organization that makes employment decisions based on a potential or current employee's religious beliefs. See 42 U.S.C. § 2000e-1(a). In other words, the statute allows a not-for-profit religious organization to differentiate in the employment context based on religion. Such exemption appears to be an implicit statement by federal lawmakers that the religious beliefs of potential or current employees are reasonable distinctions upon which to base employment decision, at least when made by religious organizations in the employment context. State law is similar. See Idaho Code § 67-5910(1).

Of course, not all distinctions by religious organizations are reasonable, even if they are a part of the organization's religious beliefs. A religious organization is not exempt from racial discrimination in the educational setting when it seeks to qualify for a government benefit. See Bob Jones Univ. v. United States, 461 U.S. 574 (1983). Additionally, no Title VII exemption is granted to religious organizations that differentiate based on race. See 42 U.S.C. § 2000e-1(a). In the case before us, however, race is not a factor.

Based on the above analysis, we find that the CLS action requiring persons to sign the statement is a reasonable distinction upon which to grant or deny

the ability to vote for officers or become officers. Additionally, because such distinction is reasonable, we find that CLS does not discriminate on the basis of religion in violation of the SBA Constitution. [Page 8]

Additional policy considerations bolster this holding. The SBA, through its budgeting requirements, advances a policy of club openness to SBA members. By recognizing many different clubs with differing ideologies, the SBA also promotes a wide variety of viewpoints. In this case, the activities of the CLS are open to all SBA members, while the control of the club's viewpoints rests in those willing to sign the CLS statement of faith. This division between control and participation serves both SBA policies.

In a broader sense, the policies which drive federal and state law also support this finding. The definition of discrimination which we adopt today is tempered by such policy concerns. In our law and in our society, we recognize a strong policy of allowing differing viewpoints, including religious viewpoints room for expression, even when groups advocating those viewpoints seek government benefits. See Rosenberger v. University of Virginia, 515 U.S. 819 (1995). We also recognize a policy of promoting freedom of association. See NAACP v. Alabama, 357 U.S. 449 (1958); see also Roberts v. United States Jaycees, 468 U.S. 609 (1984).

By contrast and by way of example, our society, legal or lay, does not have a policy of encouraging racial discrimination. Entities seeking government benefits, as a general matter, are subject to government policies regarding racial discrimination

or other strong policies. See Bob Jones Univ., 461 U.S. 574; see also Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). If a club wished to restrict its membership on the basis of race, as a relevant characteristic of a race-based organization, such a policy would probably work an entirely different result under this same definition.

We find it unnecessary to reach the issue of whether the SBA Judiciary should or must consider this case consistently with federal and state constitutional law at this time. Nonetheless, we [Page 9] are mindful of the policies behind U. S. Constitutional law, and their obvious influence upon the drafters of the SBA Constitution.

CONCLUSION

The SBA Constitution does not define the term "discriminate." In order to find a sensible definition, we have undertaken the task of interpreting the meaning of the term. The meaning of the word is reasonably resolved using definitions grounded in lay and legal sources. Policies rooted in the SBA funding process, federal and state law, and our society on the whole further support this finding. We therefore hold that CLS does not discriminate on the basis of religion in violation of the SBA Constitution when it requires its voting members and officers to sign the CLS statement of faith.

In light of the above discussion, we strike the SBA Council's action determining that the CLS discriminates on the basis of religion in violation of the SBA Constitution.

IT IS SO ORDERED.

DATED this 23rd day of May, 2001.

[Page 10]

_____
David B. Hargraves
3L SBA Judiciary Justice

_____
Jennifer Douglass
3L SBA Judiciary Justice

_____
Ian Johnson
2L SBA Judiciary Justice

_____
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_____
Richard Stover
1L SBA Judiciary Justice

disclaimer: Due to the effect of limited time allowances in the SBA Constitution, the SBA Judiciary humbly acknowledges that the citations in this opinion would fail to pass the rigorous standards of our favorite publication, the Bluebook.

AMICUS CURIAE BRIEF

(23)

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CHRISTIAN LEGAL SOCIETY
CHAPTER OF UNIVERSITY OF CALIFORNIA,
HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* ADVOCATES INTERNATIONAL IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Founded in 1992, Advocates International ("AI") is an international association of lawyers, law students, law professors, and judges who share a common Vision, Mission and Statement of Christian Faith, Commitment and Practice similar to the core values and statement of faith for which Petitioner was denied recognition by Respondents in this case. AI is also a tax-exempt 501(c)(3) not-for-profit organization incorporated in the Commonwealth of Virginia.[2] Since the fall of the Berlin Wall in 1989 and the subsequent collapse of the USSR in 1991, AI's core mission has been to mobilize advocates around the globe to promote the rule of law, religious freedom, human rights and peaceful conflict resolution. AI also views strengthening professional responsibility and ethical integrity within the legal profession and the judiciary as core components of its mission.

AI's global network informally links thousands of advocates – composed largely of lawyers, judges, law professors and students – in about 150 nations

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[1] Pursuant to Rule 37.6, *Amicus* disclose that: (1) no counsel for a party authored this brief, in whole or in part; and (2) no person or entity has made a monetary contribution to the preparation or submission of this brief. As required by Rule 37.3(a), letters from all the parties consenting to the filing of this *amicus* brief have been received by *Amicus* and submitted for docketing with the Clerk of Court.

[2] See AI's web site for further information, www.advocates international.org.

through regional networks organized on each of the six continents, such as Advocates Africa, Advocates Asia and Advocates Europe. Since its inception, AI, through its Global Council, six regional networks and its more than 100 affiliated national groups have conducted over 150 conferences addressing human rights, including the problems associated with the state-imposed discrimination or denial of the freedoms of speech, association and moral conscience rooted in sincerely held religious beliefs, such as those involved in this case. In the past 17 years, well over 25,000 conferees have participated in these sessions locally, nationally, regionally and globally. In October 2008, over 1,000 advocates convened for just these purposes at the Advocates International 5th Global Convocation in Washington, DC.

Through its national affiliates, the AI network has been extensively engaged in advocacy before government agencies, legislatures, as well as in both trial and appellate courts on all continents, including participating as *amicus curiae* in cases before this Court. In many such matters, the central issue involved the rights of religious minorities to exercise their fundamental rights, particularly those impacting the freedom of expression, freedom of conscience, freedom of belief, freedom of religion, freedom of association and freedom of the press.

A serious concern of AI, its regional networks and national affiliates is the growing worldwide state denial of the fundamental rights of freedom of speech, association and religion in cases analogous to the

instant case where private religious fellowships who otherwise pose no threat to public health or safety, like the CLS Law Student Chapter in this case, are discriminatorily denied registration or recognition because of their disfavored religious beliefs, ideals or commitments.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case as set forth in the Brief for Petitioner. Pet. Brief at 2-20.

SUMMARY OF ARGUMENT

As Petitioner's Brief emphasizes, this case does *not* present a "clash between religious freedom and rights pertaining to sexual orientation." Pet. Brief at 58. Rather, under the false rubric of "non-discrimination" asserted by Respondents in this case, the contested state university policy and practice actually presents an unreasonable and unwarranted challenge by Respondents to the well-established First Amendment jurisprudence of this Court that has long-protected the rights of all people, including religious people like Petitioner, to privately associate without state discrimination in any public forum for the free expression of their most deeply held beliefs.

While not otherwise binding on this Court, it is a well-established prudential practice in this Court to cite and rely on foreign law in the process of both upholding and striking down the constitutionality of federal or state laws. While not without its critics, this practice seems least controversial when the Court cites and relies on international instruments and foreign laws and adjudicated judgments which merely serve to confirm a universally acknowledged principle of human rights already firmly rooted in our nation's constitutional jurisprudence. Such an instance is presented in this case.

Amicus write to inform the Court that this case presents an issue of common concern to people all over the world who, like Petitioner, face growing state denials or impermissible conditions perniciously designed to muzzle the exercise of their freedoms of speech, association and religion in cases analogous to the instant case where private religious fellowships who otherwise pose no threat to public health or safety are discriminatorily denied registration or recognition because of their disfavored religious beliefs, ideals or commitments.

The universally acknowledged freedoms of speech, association and religion set forth in the UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR), the INTERNATIONAL COVENANT ON CIVIL & POLITICAL RIGHTS (ICCPR) and the EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (ECHR), as adjudicated in analogous cases by the European Court of Human Rights, confirm the

prudential wisdom of the applicable First Amendment cases upon which Petitioner relies in asking this Court to reverse the judgment below. *Amicus* joins in this request.

ARGUMENT

I. The Freedoms of Speech, Association and Religion Protected by International Human Rights Declarations and Covenants to which the United States Is a Signatory Support Reversal of the Decision Below

Obviously inspired, in part, by the already well-established First Amendment principles involved in this case, the rights of individuals to freely express themselves, form and exercise their religious beliefs according to the dictates of their conscience, and come together and form associations for these and other purposes – political parties, social and cultural associations, churches, human rights organizations, trade unions, charitable welfare associations and the like – were clearly established in international law more than 60 years ago when the United Nations (UN) General Assembly adopted the UNIVERSAL DECLARATION OF HUMAN RIGHTS on December 10, 1948. GA res. 217A (III), UN Doc. A/810 at 71 (1948).

Article 2 of that Declaration (the "UDHR") expansively states:

> *Everyone is entitled to all the rights and freedoms set forth in this Declaration, without*

distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

UDHR, Article 7 states:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

UDHR, Article 18 states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

UDHR, Article 19 states:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

UDHR, Article 20 states:

Everyone has the right to freedom of peaceful assembly and association.

In recognition of the fact that the UDHR does not of its own force impose obligations as a matter of international law, the United Nations General Assembly, on December 16, 1966, adopted the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) as a multilateral treaty committing its parties to respect the civil and political rights of individuals, including the rights to freedom of speech, religion and assembly implicated in this case. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976. As of October 2009, the Covenant had 72 signatories, including the United States, and 165 parties.[3]

With the intention of turning the UDHR's aspirations into binding legal obligations, the ICCPR, *inter alia*, also seeks to protect the freedoms of speech, religion and association that are involved in this case.

---

[3] The United States Senate ratified the ICCPR in 1992, with five reservations, five understandings, and four declarations. U.S. RESERVATIONS, DECLARATIONS, AND UNDERSTANDINGS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 138 CONG. REC. S4781-01 (daily ed., April 2, 1992). Included in the Senate's ratification was the declaration that "the provisions of Article 1 through 27 of the Covenant are not self-executing". Id. at S4781-84 and in a SENATE EXECUTIVE REPORT stated that the declaration was meant to "clarify that the Covenant will not create a private cause of action in U.S. Courts." S. Exec. Rep. No. 102-23 (1992); *see generally* Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 346 (1995).

ICCPR, Article 3, states:

> *The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.*

ICCPR, Article 18, establishing the freedom of thought, conscience and religion states:

> *1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
>
> *2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
>
> *3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*
>
> *4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

ICCPR, Article 19, establishing the freedom of expression states:

> *1. Everyone shall have the right to hold opinions without interference.*
>
> *2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
>
> *3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> > *(a) For respect of the rights or reputations of others;*
> >
> > *(b) For the protection of national security or of public order, or of public health or morals.*

ICCPR, Article 21, establishing the right of peaceful assembly, states:

> *The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or*

> *morals or the protection of the rights and freedoms of others.*

ICCPR, Article 22, establishing the freedom of association, in pertinent part, states:

> *1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*
>
> *2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. . . .*

While this Court has recognized the "moral authority" that the above-cited international authorities are entitled to receive, it has also held that these authorities are not binding law in this country. *Sosa v. Alvarez-Machin*, 542 U.S. 692, 734 (2004). More recently, the Court has also said that "the opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Roper v. Simmons*, 543 U.S. 551, 578 (2005). Such confirmatory reliance is especially appropriate in this case where the confirmatory international or foreign law sources cited above simply affirm "fundamental rights" and confirm well-established First Amendment precedents securing "individual freedoms" under our constitutional law.

In the words of this Court written by Justice Kennedy in *Roper v. Simmons* and joined by Justices Stevens, Souter, Ginsberg and Breyer):

> *Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. See The Federalist No. 49, p. 314 (C. Rossiter ed.1961). The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.*

Id. *See generally* Steven G. Calabresi, *A Shining City on a Hill: American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 BOSTON U. L. REV. 1335 (2006).

For all of the reasons set forth in the Brief of Petitioner, this is an important case about religious liberty affecting the First Amendment expressive association, equal access and the viewpoint non-discrimination rights of thousands of religious student groups at university campuses throughout the nation. But it is also a case where this Court's reversal of the decision below will not only affirm its own applicable First Amendment precedents, but it will also affirm in the circumstances of this kind of case the fundamental freedoms of speech, religion and association protected by the international norms set forth in UDHR and ICCPR that protect people all over the world. A result not only deserving of the "veneration of the American people," but the grateful thanks of freedom-loving people around the world.

II. Analogous Cases Adjudicated by the European Court of Human Rights Interpreting the European Convention for the Protection of Human Rights and Fundamental Freedoms Consistently Confirm the Precedents of this Court Supporting the Reversal of the Decision Below.

THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (ECHR) is an international treaty to protect human rights and fundamental freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe, the

convention entered into force on September 3, 1953.[4] All 47 Council of Europe member states are party to the Convention and new members are expected to ratify the convention at the earliest opportunity.[5]

Section II of the ECHR established the European Court of Human Rights (the European Court). Any person who feels his or her rights have been violated under the Convention by a state party can take a case to the European Court. The decisions of the Court are not automatically legally binding, but the Court does have the power to award damages. The establishment of the European Court to protect individuals from human rights violations is an innovative feature for an international convention on human rights, as it gives the individual an active role on the international arena (traditionally, only states are considered actors in international law). The ECHR is still the only international human rights agreement providing such a high degree of individual protection. As such the European Court's adjudication of cases and issues analogous to those presented in this case are instructive and are respectfully offered by *Amicus* in

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[4] CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, CETS No.: 005, open for signature, April 11, 1950; entry into force, with 10 ratifications, March 9, 1953. See generally http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG

[5] COUNCIL OF EUROPE, PARLIAMENTARY ASSEMBLY, Resolution 1031 (1994). Http://assembly.coe.int/Documents/AdoptedText/TA94/ERES1031.HTM

confirmatory support of this Court's reversal of the decision below.

Like the UDHR and ICCPR, the ECHR protects the same fundamental rights that are asserted by Petitioner in this case.[6] Under the ECHR, any association of individuals for religious purposes, like Petitioner, would enjoy – as a society – rights of freedom of religion, freedom of expression, freedom of association and non-discrimination under ECHR Articles 9, 10, 11 and 14, respectively.

A. Freedom of Thought, Conscience and Religion

ECHR, Article 9 – Freedom of thought, conscience and religion, provides:

1 *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*

2 *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a*

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[6] ECHR, Article 1 – Obligation to respect human rights, provides: "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I [Article 2 through 18] of this Convention.*"

> *democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

In *Kokkinakis v. Greece* (1994) 17 EHRR 397, the European Court considered a case involving a man prosecuted for proselytism for trying to convert the wife of a Greek Orthodox cantor in Crete to his Jehovah's Witness faith. In finding the prosecution violated ECHR, Article 9, the European Court stated:

> *31. As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions. According to Article 9 (art. 9), freedom to manifest one's religion is not only exercisable in community with others, "in public" and within the circle of those whose faith one shares, but can also be asserted "alone" and "in private"; furthermore, it includes in principle the right to try*

> *to convince one's neighbour, for example through "teaching", failing which, moreover, "freedom to change [one's] religion or belief", enshrined in Article 9 would be likely to remain a dead letter. Thus Article 9 protects not only the right to have and to change a belief, but the right to seek to persuade others to change their faith."*

As argued by Petitioner in this case the "religion" and "sexual orientation" provisions of Respondent's Nondiscrimination Policy is viewpoint-discriminatory in violation of their First Amendment rights as interpreted by the prior decisions of this Court. Pet. Brief at 36-41. As these same principles were adjudicated by the European Court in its *Kokkinakis* decision, ECHR, Article 9, requires no less protection than Petitioner asserts in this case.

B. Freedom of Expression

ECHR, Article 10 – Freedom of expression, provides:

1 *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2 *The exercise of these freedoms, since it carries with it duties and responsibilities, may*

> *be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

In *Handyside v. United Kingdom,* (5493/72) [1976] ECHR 5 (7 December 1976), the European Court considered a case where the publisher had been charged with printing an obscene publication in violation of the OBSCENE PUBLICATIONS ACT, the Court held that the Act, as applied, violated ECHR, Article 10, stating:

> *49. Court's supervisory functions oblige it to pay the utmost attention to the principles characterizing a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of ECHR, Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness*

> *without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.*

As Petitioner's Brief argues, it doesn't matter whether the theological or ethical views of Petitioner are socially disfavorable or offend Respondents. In this case Petitioner is protected by its First Amendment rights of free speech and expressive association. Pet. Brief at 21-34. As adjudicated in the European Court's *Handyside* decision, ECHR, Article 10, only serves to support and confirm this just conclusion.

C. Freedom of Assembly and Association

ECHR, Article 11 -- Freedom of assembly and association, in pertinent part, provides:

> 1 *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
>
> 2 *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. . . .*

In *Sidiropoulos and Others v. Greece*, (57/1997/841/1047) (10 July 1998), the European Court considered the refusal of the Greek authorities to register a proposed cultural association, ('Home of Macedonian Civilisation'). In finding a violation of ECHR, Article 11, the Court stated:

> *40. The Court points out that the right to form an association is an inherent part of the right set forth in Article 11, even if that Article only makes express reference to the right to form trade unions. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned. Certainly States have a right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions. Consequently, the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the States have only a limited margin of appreciation, which goes*

> *hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts. When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 11 the decisions they delivered in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.*

Most recently, in *Moscow Branch of the Salvation Army v. Russia* (Application No. 72881/01) (5 October 2006), the European Court found a violation of ECHR, Article 11, read in the light of ECHR, Article 9 in Russia's refusal to re-register the Moscow Branch of the Salvation Army. This decision contains the fullest statement so far of the relevant Convention principles concerning religious associations.

The Court stated:

> *57. The Court refers to its settled case-law to the effect that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it (see Metropolitan Church of Bessarabia and Others v. Moldova, no. 45701/99, § 114, ECHR 2001-XII).*
>
> *58. While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion" alone and in private or in community with others, in public and within the circle of those whose faith one shares. Since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious*

communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. The State's duty of neutrality and impartiality, as defined in the Court's case-law, is incompatible with any power on the State's part to assess the legitimacy of religious beliefs (see Metropolitan Church of Bessarabia, cited above, §§ 118 and 123, and Hasan and Chaush v. Bulgaria [GC], no. 30985/96, § 62, ECHR 2000-XI).

59. The Court further reiterates that the right to form an association is an inherent part of the right set forth in Article 11. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned. Certainly States have a right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions (see Sidiropoulos and Others v. Greece, judgment of 10 July 1998, Reports of Judgments and Decisions 1998-IV, § 40).

In requiring adherence to its Statement of Faith by its members, particularly its leaders, Petitioner in

this case is acting in accordance with its religious freedom and expressive association rights protected by the Court's First Amendment jurisprudence to associate with those it pleases and determine the identity of its association by what it expresses and determines not to express. Respondents' imposition of an alternative standard for such association in the form of its Nondiscrimination Policy represents a prima facie restriction of that fundamental right. Like the Greek and Russian governments adjudicated in the European Court's *Sidiropoulos* and *Moscow Branch of the Salvation Army* decisions, Respondents have simply failed to provide a legitimate, much less any "convincing and compelling reasons" needed to justify restrictions on Petitioner's freedom of association. ECHR, Article 11, as interpreted by the European Court, only serves to support and confirm these compelling conclusions fact and law.

D. Prohibition of Discrimination

ECHR, Article 14 – Prohibition of discrimination, provides:

> *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

In *Thlimmenos v. Greece* (2000) 9 B.H.R.C. 12, the European Court had to consider the problem of a

Jehovah's Witness whose conscientious objection led to his being denied entry to the accountancy profession. The Court found unlawful religious discrimination under ECHR, Article 14, in conjunction with a violation of ECHR, Article 9. The Court explained its holding, as follows:

> *40. The Court recalls that Article 14 of the Convention has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols. However, the application of Article 14 does not presuppose a breach of one or more of such provisions and to this extent it is autonomous. For Article 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols. [Citations omitted]*
>
> *41. The Court notes that the applicant was not appointed a chartered accountant as a result of his past conviction for insubordination consisting in his refusal to wear the military uniform. He was thus treated differently from the other persons who had applied for that post on the ground of his status as a convicted person. The Court considers that such difference of treatment does not generally come within the scope of Article 14 in so far as it relates to access to a particular profession, the right to freedom of profession not being guaranteed by the Convention.*

42. However, the applicant does not complain of the distinction that the rules governing access to the profession make between convicted persons and others. His complaint rather concerns the fact that in the application of the relevant law no distinction is made between persons convicted of offences committed exclusively because of their religious beliefs and persons convicted of other offences. In this context the Court notes that the applicant is a member of the Jehovah's Witnesses, a religious group committed to pacifism, and that there is nothing in the file to disprove the applicant's claim that he refused to wear the military uniform only because he considered that his religion prevented him from doing so. In essence, the applicant's argument amounts to saying that he is discriminated against in the exercise of his freedom of religion, as guaranteed by Article 9 of the Convention, in that he was treated like any other person convicted of a serious crime although his own conviction resulted from the very exercise of this freedom. Seen in this perspective, the Court accepts that the "set of facts" complained of by the applicant – his being treated as a person convicted of a serious crime for the purposes of an appointment to a chartered accountant's post despite the fact that the offence for which he had been convicted was prompted by his religious beliefs – "falls within the ambit of a Convention provision", namely Article 9.

43. In order to reach this conclusion, the Court, as opposed to the Commission, does

not find it necessary to examine whether the applicant's initial conviction and the authorities' subsequent refusal to appoint him amounted to interference with his rights under Article 9 § 1. In particular, the Court does not have to address, in the present case, the question whether, notwithstanding the wording of Article 4 § 3 (b), the imposition of such sanctions on conscientious objectors to compulsory military service may in itself infringe the right to freedom of thought, conscience and religion guaranteed by Article 9 § 1.

44. The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification [Citations omitted] However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.

45. It follows that Article 14 of the Convention is of relevance to the applicant's complaint and applies in the circumstances of this case in conjunction with Article 9 thereof.

46. The next question to be addressed is whether Article 14 of the Convention has been complied with. According to its case-law, the Court will have to examine whether the failure to treat the applicant differently from other persons convicted of a serious crime pursued a legitimate aim. If it did the Court will have to examine whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised [Citations omitted]

47. The Court considers that, as a matter of principle, States have a legitimate interest to exclude some offenders from the profession of chartered accountant. However, the Court also considers that, unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession. Excluding the applicant on the ground that he was an unfit person was not, therefore, justified. The Court takes note of the Government's argument that persons who refuse to serve their country must be appropriately punished. However, it also notes that the applicant did serve a prison sentence for his refusal to wear the military uniform. In these circumstances, the Court considers that imposing a further sanction on the applicant was disproportionate. It follows that the applicant's exclusion from the profession of chartered accountants did not pursue a legitimate aim. As a result, the

> *Court finds that there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a serious crime.*

Just as in the *Thlimmenos* case, Respondents acting under color of their Nondiscrimination Policy are violating Petitioner's religious freedoms and discriminatorily excluding it from recognition without any objective and reasonable justification for treating Petitioner differently than Respondent has treated other student groups. For this reason alone, as set forth in Petitioner's Brief, Petitioner's First Amendment rights have been violated. As adjudicated in the European Court's *Thlimmenos* decision, ECHR, Article 11, only serves to support and confirm this just conclusion.

III. Reversal of the Decision Below Can Only Have a Beneficial Judicial Influence on the Rights of Religious Organizations Around the World to Freely Associate Without State Discrimination Based upon their Religious Identity

Amicus write to inform the Court that this case presents an issue of common concern to people all over the world who, like Petitioner, face growing state denials or impermissible conditions perniciously designed to muzzle the exercise of their freedoms of speech, association and religion in cases analogous to the instant case where private religious fellowships who otherwise pose no threat to public health or

safety are discriminatorily denied registration or recognition because of their disfavored religious ideals or commitments.

If the decision below is not reversed, this Court's well-respected decisions protecting student equal access, expressive association, and viewpoint nondiscrimination, fully set forth in Petitioner's Brief, will be lost or compromised not only to the detriment of religious American students, but also to the detriment of religious people and organizations, including students, who are being persecuted for their exercise of these rights all over the world.

The universally acknowledged freedoms of speech, association and religion set forth in the UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR), the INTERNATIONAL COVENANT ON CIVIL & POLITICAL RIGHTS (ICCPR) and the EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (ECHR), as adjudicated in analogous cases by the European Court of Human Rights, confirm the juris prudential wisdom of the applicable First Amendment cases upon which Petitioner relies in asking this Court to reverse the judgment below. *Amicus* join in this request.

CONCLUSION

Amicus request that this Court affirm the applicable constitutional principles set forth in its well-established First Amendment jurisprudence, with the confidence that these principles are only confirmed and supported by the applicable international and foreign law. Applying these principles to the undisputed facts in this case, *Amicus* urges this Court to reverse the judgment below.

Respectfully submitted,

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APPENDIX A

ADVOCATES INTERNATIONAL CORE VALUES

VISION

A WORLDWIDE FELLOWSHIP OF ADVOCATES BEARING WITNESS OF JESUS CHRIST THROUGH THE LEGAL PROFESSION.

MISSION

ENCOURAGING AND ENABLING ADVOCATES TO MEET LOCALLY, ORGANIZE NATIONALLY, COOPERATE REGIONALLY AND LINK GLOBALLY TO PROMOTE JUSTICE, RULE OF LAW, RELIGIOUS FREEDOM, RECONCILIATION AND INTEGRITY.

STATEMENT OF FAITH, COMMITMENT AND PRACTICE

- WE ACKNOWLEDGE GOD'S REVELATION IN THE LORD JESUS CHRIST.
- WE CONFESS JESUS AS GOD AND SAVIOR ACCORDING TO THE OLD AND NEW TESTAMENT SCRIPTURES.
- WE BELIEVE THE SCRIPTURES AS ORIGINALLY GIVEN BY GOD ARE DIVINELY INSPIRED, TRUSTWORTHY AND ENTIRELY AUTHORITATIVE IN ALL MATTERS OF FAITH AND CONDUCT.
- WE COMMIT OURSELVES, IN OBEDIENCE TO GOD'S WILL AND IN THE POWER OF THE HOLY SPIRIT, TO BEAR WITNESS TO JESUS CHRIST THROUGH THE LEGAL PROFESSION BY WORKING FOR JUSTICE, PEACE, TRUTH, MERCY AND INTEGRITY.

- We commit ourselves to be advocates for the poor, vulnerable and oppressed.
- We shall endeavor to encourage and enable lawyers to meet locally, organize nationally, cooperate regionally and link globally.
- We shall seek to do all to the glory of the one God, Father, Son and Holy Spirit.

AMICUS CURIAE BRIEF

No. 08-1371

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

V.

LEO P. MARTINEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AGUDATH ISRAEL OF AMERICA IN SUPPORT OF PETITIONER

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FEBRUARY 4, 2010

QUESTION PRESENTED

Does the United States Constitution permit a state to relegate a religious group to second-class status because that group requires its officers and voting members to profess, and live in accordance with, the religion's core religious beliefs?

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INTEREST OF *AMICUS CURIAE* AGUDATH ISRAEL OF AMERICA[1]

Agudath Israel of America ("Agudath Israel") is an 87-year-old Orthodox Jewish organization, with constituents and constituent religious bodies – including a national network of some 40 Agudath Israel-affiliated synagogues – across the United States. In its capacity as an advocate on behalf of the approximately 700 Orthodox Jewish day schools across the country, Agudath Israel is a member of the Council for American Private Education, a coalition of national organizations and state affiliates serving private elementary and secondary schools.

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[1] All parties have consented in writing to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part; and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members or its counsel made such a monetary contribution.

Agudath Israel regularly intervenes at all levels of government – federal, state and local; legislative, administrative and judicial (including through the submission of or participation in *amicus curiae* briefs in this Court) – to advocate and protect the interests of the Orthodox Jewish community in the United States. Agudath Israel is particularly assiduous in seeking to prevent any government action that, inadvertently or otherwise, might restrict the ability of Orthodox Jews to practice our religion freely, or to participate fully and equally in the public life of our country.

In this case, the courts below ruled that a state entity, Hastings College of the Law ("Hastings"), may treat a religious group, the Christian Legal Society ("CLS"), as a second-class group, ineligible to participate equally in public life, because that religious group restricts its voting

membership and leadership to individuals who both profess and live in accordance with its core religious beliefs. The state entity deems these restrictions a violation of its prohibition against religious discrimination.

Agudath Israel respectfully submits this *amicus curiae* brief in support of the Christian Legal Society, because the decisions below point a judicial dagger at the heart of the Orthodox Jewish community in the United States. As we explain below, based upon millennia-old Jewish laws and traditions, Orthodox Jewish institutions, especially our schools and synagogues, regularly differentiate between Jews and non-Jews, and between men and women, in ways that would be deemed "discrimination" on the basis of religion and sex if the panoply of federal, state and local anti-

discrimination laws were applicable to these institutions.

The lower court decisions here raise concern that by applying these laws to Orthodox Jewish schools and synagogues, federal, state or local governments could relegate Orthodox Jews and our institutions to second-class status, ineligible to participate equally in society. Such a result cannot be reconciled with our nation's foundational concept of religious freedom as embodied in the Free Exercise Clause, and runs afoul, as well, of expressive association rights and the Equal Protection Clause.

There are over 700 Orthodox Jewish primary and secondary schools in the United States, with over 200,000 students. Each school devotes roughly half or more of the school hours to religious studies, and the rest to secular studies. Every one of these schools restricts admission to Jewish children.

The vast majority -- well over 95% -- restrict admission to only boys or only girls. Many of the co-ed schools separate boys and girls for all classes, and nearly all the rest separate boys and girls for at least some classes (e.g., religious studies in middle school or high school). Thus, based upon millennia of Jewish law and tradition, virtually every Orthodox Jewish school in the United States differentiates between Jews and non-Jews, and between boys and girls, in ways that would violate Hastings' anti-discrimination policy.

Also based upon millennia of Jewish law and tradition, every Orthodox synagogue requires men and women to sit separately during prayer services. Orthodox synagogues also limit membership to Jews. These practices, too, would violate Hastings' anti-discrimination policy.

We recognize that these policies and practices may be out of sync with the contemporary zeitgeist, at least at Hastings. Today, however, none of this "discrimination" by Orthodox Jewish schools and synagogues violates any anti-discrimination law, because, in keeping with the Free Exercise Clause, those laws have been deliberately crafted not to challenge these policies and practices of religious institutions.

As a result, Orthodox Jewish schools and synagogues are fully able – within constitutional limits imposed by the Establishment Clause – to take advantage of governmental programs and services available to similar non-sectarian institutions, and thereby provide vital services to children, the elderly and the needy in their communities. For example, Orthodox Jewish schools are eligible to participate in federally-funded

programs to provide hot, nutritious breakfasts and lunches for children from low-income families. Orthodox Jewish schools are also eligible to participate in various state-funded programs, which include (depending upon the state) transportation for students to and from school, textbooks for secular studies classes, special education support, after-school programs, and a host of others. Orthodox Jewish institutions also participate in federal- or state-funded programs to provide hot, nutritious meals for low-income senior citizens, and often rent public-owned facilities.[2]

The decisions below suggest that all this could be ended if a state entity were to declare that

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[2] Not far from this Court, in Montgomery County, Maryland, the Melvin J. Berman Hebrew Academy in Rockville rents the former Peary High School from the County; the Torah School of Greater Washington and the Yeshiva of Greater Washington, Girls Division, in Silver Spring jointly rent the former Montgomery Hills Junior High School from the County; and at least three synagogues in Wheaton -- Chabad of Silver Spring, Kemp Mill Synagogue and Silver Spring Jewish Center -- have rented the E. Brooke Lee Middle School for High Holiday Services.

a religious organization which discriminates on the basis of religion is a second-class group, ineligible to participate in any state-supported program.

This is not merely a hypothetical fear. One respected jurist has already posited that the case law of this Court suggests that "there is a constitutional requirement that religious meetings conducted on public school property 'be open to the public,'" and thus a religious organization which restricts its membership to those who espouse the religion may therefore be denied access to the school property. *Bronx Household of Faith v. Bd. of Educ. of the City of New York*, 492 F.3d 89, 121-22 (2d Cir. 2007) (Leval, J., concurring).[8]

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[8] The decisions below do not necessarily permit governments to exclude religious organizations from all programs simply because they discriminate on the basis of religion. For example, there could be distinctions between programs which primarily support an organization and programs which primarily support individuals. Nonetheless, the proper response to the decisions below is that differentiation on the basis of religion by a religious organization is constitutionally protected, and may not be used by any government to restrict that religious group's

No Orthodox Jew could be a voting member of CLS, and no child of CLS members could attend an Orthodox Jewish school. There is nothing improper or invidious about this. To the contrary, this is inherent in the constitutionally protected free exercise of the religious beliefs of Orthodox Jews and CLS members.

SUMMARY OF ARGUMENT

The district court and the Ninth Circuit have things backwards. Hastings promulgates a policy as to what is, in Hastings' view, non-discrimination. Yet, in so doing, Hastings effectively discriminates against adherents to mainstream religions.

This nation was founded on principles of both pluralism *and* religious freedom, as expressed in our Constitution. Curtailing access to public

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participation in public life.

programs or arenas on the basis of a group's religious viewpoint is impermissible viewpoint discrimination in violation of the First Amendment. The decision of the Court of Appeals for the Ninth Circuit should be reversed.

ARGUMENT

The regulation at issue in this case is not viewpoint neutral. Rather, it specifically stigmatizes as illegitimate the viewpoints of mainstream religious organizations.

As we have previously argued to this Court, in the aftermath of *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Free Exercise clause offers little if any comfort to any religious body whose faith demands that it engage in conduct deemed to be unlawful religious discrimination under generally applicable provisions

of secular law if a state may sanction the religious body for practicing its faith. *See Boy Scouts of Am. v. Dale* (No. 99-699), Brief of Agudath Israel of America as Amicus Curiae in Support of the Petition, Nov. 26, 1999).

In this case, the district court held that the regulation at issue regulates conduct not speech. *See Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane*, No. C 04-04484, 2006 WL 997217 at *5-*8 (N.D. Cal. May 19, 2006) ("*Kane*"). In the alternative, the district court found the regulation valid as a speech-regulation because the court determined that it is viewpoint neutral, that is, the regulation does not express preference for certain viewpoints over others. *See id.* at *10-*14. The district court erred in both respects.

The conduct at issue here – CLS' exclusion from voting membership and leadership of

those who do not profess and practice the group's religious doctrines – is inseparably linked to CLS' religiously-inspired viewpoints. Admitting as full members students who do not share CLS' religious beliefs would undermine CLS' message, and would be fundamentally inconsistent with CLS' religious convictions. As such, the regulation in this case is unlike the viewpoint-neutral regulations this Court has upheld, and is instead akin to the viewpoint-discriminatory viewpoints which this Court has determined are unconstitutional. Compare *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding state statute prohibiting certain types of expression within 100 feet of entrance to polling place); *City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding local ordinance prohibiting posting of signs on public property) with *Good News Club v. Milford Sch. Dist.*, 533 U.S. 98 (2001) (holding that

public school's exclusion of Christian children's club from meeting after hours at school based on its religious nature was unconstitutional viewpoint discrimination); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (holding that public university's denial of funds to student publication with a religious viewpoint was unconstitutional viewpoint discrimination); and *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding that school board's denial of access to public school's premises to church to show film from a religious viewpoint was impermissible viewpoint discrimination).

In enforcing its anti-discrimination regulation against CLS, Hastings was expressing its disapproval of CLS' religious convictions, and was effectively punishing CLS for acting upon its religious beliefs. CLS' religious beliefs may not be

popular or in vogue at Hastings, but the Free Exercise Clause means nothing if Hastings may therefore punish CLS.

Moreover, contrary to the lower courts' conclusions, this viewpoint-motivated regulation is not viewpoint neutral. This Court has stated that "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 390 (1992). In this case, Hastings specifically targeted CLS *because* CLS' policy expresses an unpopular viewpoint -- one which Hastings deems discriminatory. Such expressive conduct is protected by the First Amendment.

The district court claims that "Hastings has not excluded CLS because it is a religious group

but rather because it refuses to comply with the prerequisites imposed on all student organizations." *Kane*, 2006 WL 997217 at *11. This is specious, and elevates the policy's facially-neutral form over its non-neutral substance. CLS' conduct expresses CLS' religious viewpoint -- a viewpoint that is at odds with the viewpoint of Hastings' administrators. By adopting the regulation at issue in this case, those administrators certainly knew that the impact of their policy would fall disproportionately, if not exclusively, on those who disagree with their viewpoint.

> [The] conclusion that the restrictions imposed here were viewpoint neutral is patently flawed. As a practical matter, the speech suppressed by restrictions such as those involved [here] will almost invariably carry an implicit, if not explicit, message in favor of more relaxed sexual mores. Such restrictions, in other words, have a potent viewpoint-differential impact. . . . To treat such restrictions as viewpoint-neutral seems simply to ignore reality.

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 56 (1986) (Brennan, J., dissenting) (quoting Stone, RESTRICTIONS OF SPEECH BECAUSE OF ITS CONTENT: THE PECULIAR CASE OF SUBJECT-MATTER RESTRICTIONS, 46 U.Chi.L.Rev. 81, 111-12 (1978)) (internal quotation marks omitted) (emphasis added).

For millennia, Jews have professed and lived by beliefs out of sync with, and often anathema to, those of society at large. Over three thousand years ago, the very first Jews, Abraham and Sarah, rejected the contemporary notion that statues of clay were gods to be worshipped. When a large part of the world in which we lived officially accepted Jesus as the messiah, we dissented; and when another large part of the world officially accepted Mohammed as a new prophet, we dissented again.

Jews also have millennia of experience with paying a high price for holding fast to our religious beliefs. Indeed, by the standards of the Twentieth Century, merely having our institutions relegated to second-class status might be considered relatively benign.

But this country has been exceptional from its inception. The Massachusetts Bay Colony was founded by Puritans who fled second-class status in England because their core religious beliefs conflicted with contemporary mores. Even before the First Amendment was ratified, in 1790, President George Washington wrote to the Orthodox Jewish congregation in Newport, Rhode Island:

> The Citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy . . . . All possess alike liberty of conscience and immunities of citizenship. . . .

> . . . . May the children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other Inhabitants; while every one shall sit in safety under his own vine and figtree, and there shall be none to make him afraid.

George Washington, *Letter To Touro Synagogue* (1790).[4] And the First Amendment, of course, guarantees free exercise to people of all religions. This has given Orthodox Jews and our institutions opportunities and protection unprecedented in a non-Jewish society.

The courts below disregarded these foundational principles, and would permit a state to punish a religious group because it insists that its members and leaders must profess and adhere to the group's core religious beliefs. This suggests that Orthodox Jews and our institutions, and all other traditional faith-based communities and their

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[4] Available at http://www.pbs.org/georgewashington/collection/other_hebrew_congregation.html.

institutions, may be relegated to second-class status wherever our beliefs and practices conflict with the contemporary zeitgeist. We implore this Court to reject this evisceration of the First Amendment.

CONCLUSION

Agudath Israel of America respectfully urges the Court to reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

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CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,
Petitioner,

v.

LEO P. MARTINEZ, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF FOR AMICUS CURIAE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association (the "ABA"), as amicus curiae, respectfully submits this brief in support of Respondents and asks the Court to affirm.

[1] Pursuant to Rule 37.6, amicus certifies that no counsel for a party authored this brief in whole or in part, and that no person or party, other than amicus, its members, or counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of nearly 400,000 spans all 50 states and other jurisdictions, and includes attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and law students.[2]

For decades, the ABA has worked to eliminate discrimination from our society. The ABA itself and its divisions and sections broadly prohibit discrimination in their operations. For example, Bylaw Section 1.5 of the ABA's Law Student Division[3] provides: "The Division shall not discriminate on the basis of ancestry, color or race; cultural or ethnic background; economic disadvantage; ideological, philosophical or political belief or affiliation; marital or parental status; national or regional origin; physical disability; religion, or religious or denominational affiliation; sex; sexual orientation; or age. The Division shall not encourage or condone discrimination, either implicitly or explicitly, and shall actively discourage discrimination on any such basis." And

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No member of the Judicial Division Council participated in the adoption of or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

[3] Available at http://www.abanet.org/lsd/governance/bylaws/bylaws.pdf (last visited Mar. 10, 2010).

among the ABA's many nondiscrimination policies[4] is a resolution urging its members not to hold business or professional gatherings at clubs that discriminate.[5]

The ABA also has long opposed "the provision of federal financial assistance for institutions which discriminate in any of their operations on the basis of sex, race, color, national origin, age, or disability."[6] And, the ABA has encouraged governmental entities at all levels to enact legislation "prohibiting discrimination on the basis of sexual orientation in employment, housing, and public accommodations."[7]

At the same time, the ABA has recognized that government financial assistance may carry a potential for suppression or discouragement of particular points of view, and has opposed governmental efforts to use funding to curtail freedom of expression. The ABA thus "opposes the use of governmental funding programs as a vehicle to suppress or discourage speech ac-

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[4] The ABA's House of Delegates ("HOD"), with more than 500 delegates, is the ABA's policymaking body. Recommendations may be submitted to the HOD by ABA delegates representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, ABA members and the Attorney General of the United States, among others. Recommendations that are adopted by the HOD become ABA policy. *See* ABA General Information, *available at* http://www.abanet.org/leadership/delegates.html (last visited Mar. 10, 2010).

[5] *ABA Report with Recommendation #10G* (Policy adopted Aug. 1988), available from the ABA.

[6] *ABA Report with Recommendation #102* (Policy adopted Feb. 1986), available from the ABA.

[7] *ABA Report with Recommendation #08* (Policy adopted Feb. 1989), available from the ABA.

tivities by government grantees based on the government's disapproval of the particular content of the speech."[8] As this case demonstrates, public institutions are sometimes challenged to find a way both to make clear that they will not lend assistance to forms of discrimination that are inconsistent with their principles and to respect free speech rights, including rights of religious expression. The ABA believes that the policy challenged in this case successfully does so.

SUMMARY OF ARGUMENT

This case involves an effort by a public law school to balance two deeply held values that are central to the ABA's mission and the mission of our Nation's public institutions of higher education, but are sometimes in tension: combating discrimination, and protecting students' First Amendment rights. In striking that balance, the University of California, Hastings College of the Law, like other public institutions of higher education, is called on to reconcile two well-established principles: first, that government may elect not to subsidize organizations that discriminate in ways that undermine the government's identified mission or conflict with its own messages, and, second, that government may not use its financial assistance to suppress or discourage disfavored speech. Hastings' student-organization policy strikes a sound and constitutional balance between these values and conforms to both of these principles.

This Court has long recognized the constitutionality of nondiscrimination policies applied in a neutral

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[8] *ABA Report with Recommendation #104* (Policy adopted Aug. 1993), available from the ABA.

fashion. It has likewise recognized that the government may condition the provision of subsidies and other forms of assistance on compliance with neutral and generally applicable nondiscrimination policies. Even when public institutions are not compelled by the Constitution or statutes to insist that their grantees not discriminate, they may nonetheless decline to render such assistance to those who would discriminate. In so doing, they take a strong stance against discrimination and make clear that they do not wish to be associated with or lend assistance to discrimination. And public institutions need not lag behind public opinion; the government may prohibit discrimination in its own operations and decline assistance to those that would discriminate, even on bases that are not universally adopted into law.

At the same time, the fact that an organization receives benefits from the government does not mean that it waives its First Amendment rights. This point is particularly salient in the setting of a public university, where diversity of opinion is essential to a university's mission. Thus, universities must ensure that their nondiscrimination and other policies, as applied to student organizations, do not abridge the right of those organizations to communicate a particular message, even though universities may insist that organizations not close their doors to students on discriminatory bases if the organizations are to receive assistance from the school. Public universities may therefore decline to assist or extend official recognition to organizations that choose to discriminate in their membership practices, though universities may not directly compel such organizations to change their viewpoint or prevent them from organizing or participating in university life.

ARGUMENT

I. PUBLIC UNIVERSITIES HAVE A SUBSTANTIAL AND JUSTIFIED INTEREST IN UNIFORMLY ENFORCING THEIR NONDISCRIMINATION POLICIES

Public institutions of higher education are crucibles for cultivation of two values at the heart of the ABA's mission and squarely at issue in this case—combating discrimination and promoting free speech. This Court has "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter* v. *Bollinger*, 539 U.S. 306, 331 (2003). "[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders." *Id.* at 332. As this Court explained in *Sweatt* v. *Painter*, 339 U.S. 629 (1950), law school is a "proving ground for legal learning and practice," in which students are exposed to "the interplay of ideas and the exchange of views with which the law is concerned." *Id.* at 634. As Justice Frankfurter succinctly put it in 1927, "the law and lawyers are what the law schools make them." Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 34 n.1 (1992) (quoting a May 13, 1927 letter from then-Professor Felix Frankfurter).

While public universities have a unique interest in protecting free speech, they also have a substantial and justified interest in enforcing neutral nondiscrimination policies by refusing to subsidize student organizations that discriminate against members of the school community on bases that the school deems inconsistent with its own mission of creating an educational envi-

ronment characterized by equality and fairness. The university's decision not to actively assist such organizations furthers objectives that are critical to the school itself and to society more broadly. As this Court has repeatedly recognized, the government has a compelling interest in combating discrimination. *See Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 628 (1984); *see also Board of Directors of Rotary Int'l* v. *Rotary Club*, 481 U.S. 537, 549 (1987) (state nondiscrimination laws "plainly serv[e] compelling state interests of the highest order" (alteration in original)).

This is particularly the case in higher education, and even more so in law schools, which prepare many of our Nation's future leaders. As Justice Powell noted in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), "it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 313 (Powell, J., concurring) (quoting *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967)); *see also Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954) (public education is "a principal instrument" in the development of "cultural values").

To further that interest, public universities and law schools often promulgate comprehensive nondiscrimination policies that require, among other things, that student organizations not discriminate in their membership or programs if they are to obtain official recognition or school funding. These policies serve as an extension of the universities' undertakings not to discriminate in their own operations, as well as advancing the university's own message about the equal availability of educational and community opportunities to students—that is, that the university will not be associ-

ated with forms of discrimination that the school views as inconsistent with its deeply held principles of equality and fairness.

The university's refusal to provide official sanction to an organization that chooses not to comply with the university's nondiscrimination policies has two important components. First, public universities encourage compliance with their nondiscrimination policies by making that compliance a condition of student organizations' receipt of official recognition and subsidy. Second, a university has a strong interest in choosing to avoid any appearance that it supports or endorses—by the use of its logo, or the provision of financial or other subsidies—organizations that discriminate in ways inconsistent with the university's mission or that contradict its message to current, past, and future students, professors, and the public. A public university could not communicate a message about its commitment to nondiscrimination with credibility and at the same time foster an environment conducive to active participation in student activities if the university were given no choice but to subsidize all student organizations, including those that discriminate on bases the university deems inconsistent with its core values. *See Christian Legal Soc'y* v. *Walker*, 453 F.3d 853, 875 (7th Cir. 2006) (Harlington Wood, J., dissenting) ("[T]he indirect impact of CLS's recognition of a student group maintaining such a policy is that [the law school], intentionally or not, may be seen as tolerating such discrimination. Given that universities have a compelling interest in obtaining diverse student bodies, requiring a university to include exclusionary groups might undermine their ability to attain such diversity.").

Implementation of these nondiscrimination policies thus falls well within "a university's authority to im-

pose reasonable regulations compatible with that mission [of education] upon the use of its campus and facilities." *Widmar* v. *Vincent*, 454 U.S. 263, 268 n.5 (1981). The Court, quite rightly, has not questioned "the continuing validity of cases that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education." *Id.* at 276-277 (internal citation omitted). As Chief Justice Burger explained in *Healy* v. *James*, 408 U.S. 169 (1972), "student organizations seeking the privilege of official campus recognition must be willing to abide by valid rules of the institution applicable to *all* such organizations." *Id.* at 195 (Burger, C.J., concurring) (emphasis added).

Public universities' ability to implement these nondiscrimination policies turns in large measure on their ability to decline to provide official recognition and subsidies to student organizations that choose not to comply with neutrally enforced prohibitions on discrimination. The constitutionality of such conditions and the absence of any coercion in the way they are typically implemented is a well-recognized aspect of this Court's government-subsidy case law. *See Grove City Coll.* v. *Bell*, 465 U.S. 555, 575-576 (1984) ("Requiring [a college] to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the [tuition subsidy] program infringes no First Amendment rights of the College or its students."); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 602-604 (1983) (government may constitutionally

withhold subsidy in the form of tax-exempt status based on university's racial discrimination).[9]

In this case, Hastings provides subsidies and benefits to registered student organizations, including permission to use the school logo and space on designated bulletin boards, access to student activity funds, and reimbursement for travel expenses. The law school's interest in providing these benefits only to organizations that comply with its nondiscrimination policies is

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[9] This latter interest—of government entities not being linked to and not effectively lending support to discrimination through financial assistance and other forms of official recognition—finds expression in an array of federal, state, and local antidiscrimination laws that deny funding to organizations that discriminate on various bases. For example, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race by entities receiving federal financial assistance. 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); *see* 110 Cong. Rec. 6543 (1964) (statement of Sen. Humphrey) ("'Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination'" (quoting President Kennedy's message of June 19, 1963)). Title IX of the Education Amendments of 1972 similarly prohibits discrimination on the basis of sex by educational institutions receiving federal funding. 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]"). These statutes, like Hastings' nondiscrimination policy, are predicated on the principle that public institutions may limit their assistance to organizations that do not engage in discrimination that is inconsistent with the public institution's deeply held values.

manifest. Hastings' uniform and neutral implementation of its nondiscrimination policy demonstrates that public universities can combat discrimination while taking care not to trench upon students' First Amendment rights of freedom of speech and association.

II. The Uniform And Neutral Enforcement Of A University's Nondiscrimination Policy Does Not Offend First Amendment Rights

The ABA agrees that in the "marketplace of ideas" that characterizes the university campus, student groups have a recognized interest in maintaining the integrity of their message. *See Healy*, 408 U.S. at 180 ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'"); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995) (underscoring the need for protection of "free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses"); *ABA Report with Recommendation #102* (Policy adopted Feb. 1986), available from the ABA.

The First Amendment encompasses a "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends," *Roberts*, 468 U.S. at 622, and this right does not "apply with less force on college campuses than in the community at large," *Healy*, 408 U.S. at 180. As this Court has made clear, government may not "force[]" an organization "to accept members it does not desire" and who would substantially alter the desired identity or message of the organization. *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648 (2000); *see Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572-573 (1995). The ABA is keenly aware

that, under a long line of Supreme Court precedent, university nondiscrimination policies are constitutionally sound only so long as the restrictions they impose are content- and viewpoint-neutral. *See, e.g.*, *Dale*, 530 U.S. at 659.

Hastings' application of its nondiscrimination policy to CLS complies with the mandates of the First Amendment because it is content- and viewpoint-neutral, and because it leaves open numerous alternative channels for the activities of groups that cannot, or will not, comply with the policy's requirements. It strikes a sound and constitutional balance between the law school's interest in promoting its antidiscrimination message and the student groups' interests in maintaining the integrity of their own message. Even recognizing student organizations' right to freedom of association, this Court's precedents recognize beyond peradventure that the "decision not to subsidize the exercise of a fundamental right does not infringe the right." *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 553 (2001) (internal quotation marks omitted). Notably, Hastings' policy does not resemble the challenged conduct in *Dale* and *Hurley*, which did not concern compliance with a neutral nondiscrimination regulation as a condition to receipt of subsidies. The coercion question at the center of those cases is absent here. *See Grove City Coll.*, 465 U.S. at 575-576; *cf. Dale*, 530 U.S. at 659 (analysis applies only to a regulation that "*directly and immediately affects* associational rights" (emphasis added)).

As this Court's government-funding cases make plain, even though organizations that receive governmental financial assistance have a protected interest in the integrity of their message, public institutions may impose reasonable regulations on receipt of financial and other assistance. *See Rumsfeld* v. *Forum for Aca-*

demic & Institutional Rights, 547 U.S. 47, 58 (2006) ("The Solomon Amendment gives universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds."). Among these permissible regulations is compliance with neutral nondiscrimination policies. *See Grove City Coll.*, 465 U.S. at 575-576 ("Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept. Grove City may terminate its participation in the [tuition subsidy] program and thus avoid the requirements of [Title IX]." (internal citation omitted)). Hastings' policy—which prohibits discrimination on the basis of broad classifications that are recognized in many other public university nondiscrimination policies—is valid both facially and as applied to CLS.

The test for content discrimination is whether an ordinance is justified with reference to the content of the speaker's—in this case CLS's—speech. This Court has repeatedly recognized that nondiscrimination policies, like the one in place at Hastings, are typically content- and viewpoint-neutral. *See Hurley*, 515 U.S. at 572 (finding an antidiscrimination statute typical in that "it does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the *act* of discriminating against individuals" (emphasis added)); *id.* ("[Antidiscrimination p]rovisions like these are well within the State's usual power to enact ... and they do not, as a general matter, violate the First or Fourteenth Amendments."); *Roberts*, 468 U.S. at 623 (ruling that a state antidiscrimination law did not "aim at the suppression

of speech"). Hastings' nondiscrimination policy complies with these holdings.[10]

To be sure, there may be situations where a public university applies a facially neutral nondiscrimination policy in a non-neutral way. For example, in *Christian Legal Society* v. *Walker*, 453 F.3d 853 (7th Cir. 2006), the plaintiff alleged that the law school permitted other religious student groups to violate the nondiscrimination policy with impunity. *Id.* at 866; *see also Truth* v. *Kent Sch. Dist.*, 542 F.3d 634, 648 (9th Cir. 2006) (remanding for a determination whether the school district had selectively enforced its nondiscrimination policy). But, in this case, on the basis of facts stipulated to by the parties, the district court found that Hastings applied its nondiscrimination policy in a neutral manner. Indeed, there is no suggestion that Hastings has used its nondiscrimination policy to target unpopular groups or to coerce anyone into changing their viewpoints or messages. *See, e.g., Christian Legal Soc'y of Univ. of Cal.* v. *Kane*, No. C 04-4484, 2006 WL 997217, at *25 (N.D. Cal. May 19, 2006) ("CLS has not demonstrated that Hastings has provided exemptions to the Nondiscrimination Policy to other student organizations while refusing to grant CLS an exemption.").

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[10] The disparate *impact* of a nondiscrimination policy on, for example, religious groups does not transform a content-neutral rule into viewpoint discrimination. "[V]iewpoint disparity, standing alone, does not constitute proof of viewpoint discrimination." *Boy Scouts of Am.* v. *Wyman*, 335 F.3d 80, 93-94 (2d Cir. 2003); *see, e.g., Madsen* v. *Women's Health Ctr.*, 512 U.S. 753, 763 (1994) (policy's disproportionate effect on groups with a particular viewpoint "does not itself render the [policy] content or viewpoint based"); *id.* at 762-763 (injunction against protestors was not viewpoint discriminatory because "none of the restrictions imposed by the court were directed at the contents of petitioner's message").

Moreover, Hastings' nondiscrimination policy, as applied to CLS, left open numerous alternative avenues for the group's activities: after it chose not to comply with the nondiscrimination policy, CLS was able to meet during the academic year without any significant impediment to its activities or its ability to communicate as a group. *Christian Legal Soc'y*, 2006 WL 997217, at *18 ("[I]t is undisputed that despite Hastings' refusal to grant CLS recognized status, the group continued to meet and hold activities throughout the 2004-2005 academic year.... Moreover, there is no evidence that the restrictions to certain forms of communication at Hastings, such as through the Law School newsletter, hindered CLS's ability to communicate with other students."). CLS was permitted to participate in the student organization fair; to reserve Hastings' rooms for meetings and events; and to post announcements about the organization and its activities. *Id.* ("Furthermore, even though CLS was not a recognized student organization at Hastings, Hastings still provided access to bulletin and chalk boards to make announcements, allowed CLS to meet on campus as an organization, and offered CLS use of Hastings' rooms and audio-visual equipment for such meetings and activities."). Thus, on the basis of undisputed, stipulated facts, the district court correctly found that "Hastings' denial of official recognition was not a substantial impediment to CLS's ability to meet and communicate as a group." *Id.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In the

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,
Petitioner

v.

LEO P. MARTINEZ, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* AMERICAN CENTER FOR LAW AND JUSTICE, BRIDGET MERGENS, JONATHAN WILLIAMS, WIDE AWAKE PRODUCTIONS, CHOOSE HIM, FELLOWSHIP OF CHRISTIAN ATHLETES, CAMPUS CRUSADE FOR CHRIST, INTERVARSITY CHRISTIAN FELLOWSHIP, CAMPUS BIBLE FELLOWSHIP INTERNATIONAL, CHI ALPHA CAMPUS MINISTRIES, YOUNG LIFE, THE NAVIGATORS, REJOYCE IN JESUS MINISTRIES, INC., FELLOWSHIP OF CATHOLIC UNIVERSITY STUDENTS, ALPHA DELTA CHI, AND ALPHA GAMMA OMEGA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Ninth Circuit erred when it held, directly contrary to the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), that the Constitution allows a state law school to deny recognition to a religious student organization because the group requires its officers and voting members to agree with its core religious viewpoints.

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INTEREST OF *AMICI CURIAE*[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared frequently before the Court as counsel for parties or for *amici* in cases involving a host of constitutional issues, primarily under the First Amendment. In particular, ACLJ Chief Counsel Jay Alan Sekulow argued before this Court the equal access cases of *Board of Education v. Mergens*, 496 U.S. 226 (1990), and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). ACLJ attorneys have also litigated a number of equal access cases in the lower courts.

Bridget Mergens was one of the plaintiffs in the *Mergens* case. Pastor Jonathan Williams was a plaintiff in the *Widmar v. Vincent*, 454 U.S. 263 (1981), equal access case.

Wide Awake Productions ("WAP") produces Wide Awake, the journal at issue in *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 (1995), and was a plaintiff in that case. CHoosE Him (Christian Hoos Exalt Him) is a Christian a capella singing group at the University of Virginia, founded in 1995, that combines evangelism with

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[1] The parties have consented to the filing of this brief in letters being filed herewith. Pursuant to Sup. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

singing. Recognizing the importance to its ministry of having members not only embrace but personally witness to Gospel values in their lives, CHoosE Him limits membership to professing Christians. The University of Virginia has a non-discrimination policy that generally prohibits certain student groups (CIOs or FOs) from discriminating on the basis of, *inter alia*, religion, but also includes a proviso: "Notwithstanding these requirements, the CIO or FO may restrict its membership based on an ability to perform the activities related to the organization's purpose." Policy: Terms and Conditions for Contracted Independent Organizations and Fraternal Organizations, Part II(6) (available at https://policy.itc.virginia.edu/policy/policydisplay?id=STAF-002). *See also* SAF Guidelines, at 3 (available at https://atuvanet.student.virginia.edu/files/saf_guidelines.pdf). Under that proviso, WAP limits editorial positions to those who share its Christian viewpoint, and CHoosE Him enforces its religious restrictions on its membership.

The Fellowship of Christian Athletes, Campus Crusade for Christ, the InterVarsity Christian Fellowship, Campus Bible Fellowship International, Chi Alpha Campus Ministries, Young Life (through its Young Life College program), the Navigators, ReJOYce IN JESUS Ministries, Inc., and the Fellowship of Catholic University Students (FOCUS) each operate Christian campus ministries across the nation.

Alpha Delta Chi is a national Christian sorority. Alpha Gamma Omega is a national Christian fraternity.

Amici have encountered resistance, at various public school campuses, to organizational recognition or equal benefits based upon their supposed violation, by insistence upon religious standards, of official non-discrimination policies. Each of the *amici* recognize the importance of having leadership, and the authority to select leadership, vested in individuals who personally share the principles that guide a religious ministry.

INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly thirty years, this Court has recognized and enforced a fundamental right of religious groups to enjoy equal access to public forums created by government entities. Despite that case law, the University of California, Hastings College of the Law ("Hastings") denied access to the Christian Legal Society ("CLS") because CLS requires its officers and members to adhere to the *religious* principles that define CLS as a *religious* group. By upholding Hastings' exclusion of CLS, the Ninth Circuit has set forth a formula for educational institutions to deny equal access to religious groups and evade this Court's precedents.

Religious groups by their nature embrace religious principles and, as a matter of organizational identity and coherence, will normally require adherence to such principles as a criterion for membership and certainly for leadership. This is not "discrimination" but rather part and parcel of what defines them as religious groups. Wooden application of religious "non-discrimination" policies therefore forces religious groups to choose between their religious identity and access to the forum. That "choice" is an unconstitutional one between yielding to government intermeddling and no access at all. Far from a permissible condition on benefits, this is a choice that the government, under the Religion Clauses, has no business imposing on religious groups.

A religious non-discrimination policy necessarily disfavors religious expression and religions that depend on meaningful membership and leadership criteria. Indeed, it makes adherence to *religious* principles the only illegitimate belief basis for group organization. By definition, that constitutes viewpoint discrimination.

The Court's precedents make clear that non-discrimination policies plainly implicate First Amendment associational rights, even for non-religious groups. But government intrusion into leadership and membership qualifications for *religious* groups, especially imposition of a government condition of religious "non-discrimination," raises constitutional concerns beyond associational rights. A policy of non-discrimination *by the government* on the basis of religion preserves the neutrality required by the Religion Clauses. The government, after all, has no legitimate basis for imposing a religious test. But that same policy becomes a violation of the Religion Clauses if it is imposed on *private* religious groups. The government simply has no legitimate basis for denying religious groups the ability to impose their own religious standards.

ARGUMENT

I. The Ninth Circuit's Reasoning Would Allow Non-discrimination Policies To Eviscerate This Court's Landmark Equal Access Decisions.

In no fewer than five cases, this Court has held that state-run educational institutions must provide religious groups the same access to school

facilities received by groups with secular interests. Equal access promotes virtually every clause of the First Amendment. It protects the free speech rights of religious groups while serving the constitutional requirement of government neutrality toward religion. The Ninth Circuit's reasoning threatens to undermine this longstanding jurisprudence by allowing schools to require student religious groups to comply with religious non-discrimination policies as a condition of receiving access to campus facilities. Religious organizations, by their nature, "discriminate" in the realm of religious *ideas*. If the group's leaders and members do not in turn embrace those *ideas*, the group has no coherent identity. Making a Jewish group welcome Muslim officers, for example, simply denies the group's identity. It follows that a religious non-discrimination policy, by its nature, constitutes forbidden discrimination against religion. The same holds true for policies requiring non-discrimination as to conduct incompatible with the group's religious norms. Requiring a Jewish kosher group not to discriminate on the basis of diet obviously nullifies the group's religious standards. Far from being neutral, such policies burden religious groups by prohibiting membership criteria essential to expressing a religious message and preserving religious identity.

A. A Long Line Of This Court's Cases Recognize A Fundamental Right to Equal Access.

1. Religious groups have always enjoyed a right to equal access to traditional public forums, such as public parks. *See Niemotko v. Maryland*,

340 U.S. 268, 272-73 (1951). And it has been clear for nearly thirty years that the principle of equal access for religious groups extends to nontraditional public forums created by state-run educational institutions. *Widmar v. Vincent*, 454 U.S. 263 (1981). In *Widmar*, the University of Missouri at Kansas City ("UMKC") encouraged an active campus life by opening its facilities to over 100 registered student groups. *Id.* at 265. One of those student groups, an evangelical Christian group known as Cornerstone, initially received the same access to facilities accorded to all students. *Id.* But in 1977, citing a university ban on the use of facilities "for purposes of religious worship or religious teaching," UMKC denied Cornerstone access to campus facilities. *Id.* at 265.

This Court struck down UMKC's ban on religious activities and speech in campus facilities. By "creat[ing] a forum generally open for use by student groups," UMKC "assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Id.* at 267. Cornerstone's proposed use of the forum—for religious worship and discussion—constituted "forms of speech and association protected by the First Amendment." *Id.* at 269. As a result, UMKC's content-based singling out of Cornerstone could be justified only if "necessary to serve a compelling state interest and [if] narrowly drawn to achieve that end." *Id.* at 269-70. The Court rejected the notion that compliance with the Establishment Clause supplied this compelling state interest. Instead, the Court held that equal access to a public forum does *not* suggest

government favoritism for religion or have a primary effect of advancing religion. *Id.* at 273-74.

Widmar was a landmark decision, and its principles have been reaffirmed time and again. Indeed, Congress endorsed *Widmar*'s equal access principle in passing the Equal Access Act in 1984. *See* 20 U.S.C. §§ 4071-4074. The Act prohibits public secondary schools from foreclosing access to a "limited open forum" by discriminating on the basis of a student group's religious or other speech. *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 235 (1990) (citing 20 U.S.C. § 4071(a), (b)). This Court applied the Act to uphold a high school student's right to form a Christian club and to meet on school premises, *id.* at 247, and repeated *Widmar*'s holding "that an 'equal access' policy would not violate the Establishment Clause," *id.* at 235; *see also id.* at 253. Indeed, the Court underscored that the fundamental distinction between speech the school permits and speech the school itself sponsors was readily grasped by high school students. *Id.* at 250.

2. But while the principle of equal access is easily stated, and its compatibility with the Establishment Clause easily understood, ensuring compliance with this principle has required this Court's continuing involvement. While both this Court and the Congress have readily embraced this principle, many institutions of public education have been slow to accept this Court's teaching. The resulting line of this Court's cases has reinforced the basic guarantee of equal access and extended it to churches, religious publications, and students from kindergarten through the university.

In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), a local New York school district made its facilities available to the community, not just to students. Lamb's Chapel, an evangelical church, applied for access to school premises for purposes of exhibiting a film series addressing family and child-rearing issues from a religious perspective. *Id.* at 387. The school district denied the application under a local rule forbidding use of school facilities for religious purposes. *Id.* at 388-89. Accepting the lower courts' assessment that the school district had created a limited public forum, this Court analyzed the exclusion of Lamb's Chapel only for reasonableness and viewpoint neutrality. *Id.* at 392-93. The Court rejected the school district's assertion that the policy was facially neutral because "all religions and all uses for religious purposes are treated alike." *Id.* at 393. The Court stressed that merely treating all religions the same "does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Id.* Accordingly, the exclusion of the film display because of its religious perspective was neither viewpoint neutral nor constitutional. *Id.* at 393-94.

Similar factors were at play in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), in which the University of Virginia had denied funding for a student magazine with a Christian perspective. The Court acknowledged

that content discrimination "may be permissible if it preserves the purposes of that limited forum" but that viewpoint discrimination "is presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* at 829-30. Following *Lamb's Chapel*, the Court held that the university had discriminated against the magazine's Christian viewpoint: "Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831.

The Court reaffirmed these principles once again in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). As in *Lamb's Chapel*, a local New York school district opened its facilities to the community, not solely to student groups. *Id.* at 102. The school district nonetheless denied access to the Good News Club, a private Christian group for children between 6 and 12 years old, because the group engaged in religious instruction. *Id.* at 103-04. The Court held the exclusion of the Good News Club to be unconstitutional viewpoint discrimination, indistinguishable from *Lamb's Chapel* and *Rosenberger*. *Id.* at 107.[2]

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[2] In *Lamb's Chapel*, *Rosenberger*, and *Good News Club*, the Court reiterated *Widmar*'s key holding that affording equal access to religious and non-religious institutions simply does not expose the government to any risk of violating the Establishment Clause. *Lamb's Chapel*, 508 U.S. at 395; *Rosenberger*, 515 U.S. at 837-46; *Good News Club*, 533 U.S. at 119.

B. The Ninth Circuit's Reasoning Permits An End Run Around This Court's Equal Access Jurisprudence.

From *Widmar* to *Good News Club*, this Court has firmly established religious groups' right to equal access to public forums. The Ninth Circuit, however, has created a loophole. It has held that educational institutions may deny access to religious groups if they "discriminate" on the basis of religion. *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 649-50 (9th Cir. 2008). Should this approach prevail, it would dismantle this Court's equal access jurisprudence.

1. As an initial matter, under the Ninth Circuit's reasoning, the public educational institutions in this Court's cases almost certainly could have thwarted equal access by the simple expedient of relying on a non-discrimination policy. This takes no great imagination. UMKC could have excluded the worship in *Widmar* based not on exaggerated Establishment Clause fears but on Cornerstone's refusal to allow atheists to hold leadership positions. Likewise, the University of Virginia could have denied funding to the Christian student magazine in *Rosenberger* based on a refusal to permit non-Christians to obtain editorial positions. And the school in *Good News Club* could have prevailed by requiring the club to open its doors to non-Christian instructors.

The potentially pervasive effect of the Ninth Circuit's reasoning is most clearly revealed in *Lamb's Chapel*. There can be no doubt that the evangelical Lamb's Chapel church required at least

some minimal religious adherence by its pastor and other leaders. Had the school district in that case imposed a religious non-discrimination condition on access to the forum, neither Lamb's Chapel nor any other church could have obtained access. That reality conflicts sharply with the basic principle of *Widmar* and subsequent cases that religious institutions cannot be excluded because of their religious nature.

2. More generally, the Ninth Circuit's reasoning provides a formula for denying access to religious groups. Religions, by their nature, exert control over religious doctrine and the conduct of adherents. *See Watson v. Jones*, 80 U.S. 679, 729 (1871) ("It is of the essence of . . . religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance . . . ."). Obedience to a non-discrimination policy would compromise these innate aspects of religion and, as a result, would necessarily impose unique and dramatic burdens on religious groups.

It is in the nature of religions to make claims of transcendent truth and to require adherence to such truths. "Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria." *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 714-15 (1976) (footnote omitted). If ordinary followers are expected to believe in and follow religious dogma, the demand for religious leaders to do so is all the more central. Religious

leaders are entrusted to interpret and communicate religious teachings, both to edify adherents and to convert non-adherents. *See, e.g., id.* at 717. It is indisputable that religions *do not* open the ranks of leadership to everyone, including non-believers. In this respect, religions "exclude" non-adherents on religious grounds. While this can be described as "discrimination" on the basis of religion, government efforts to stamp out such discrimination threaten values at the heart of the Religion Clauses. *See infra* pp. 17-19.

It is also in the nature of religions to prescribe behavioral codes and to demand that adherents refrain from certain conduct inconsistent with such codes. The examples are endless. Kosher and halal dietary laws require abstinence from pork. The Religious Society of Friends has a lengthy tradition of pacifism. Many religious sects insist upon attendance at weekly religious observances and impose codes of sexual morality. These behavioral codes embody religious beliefs and are therefore essential to preserving and propounding a religious message.

3. Because of these inherent characteristics of religion, membership and leadership selectivity are critical pieces of the message espoused by religious organizations. *Cf. Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 574-75 (1995). Moreover, some religions and religious groups will place greater or lesser emphasis on such criteria, often as a matter of religious doctrine. While one group might limit leadership, but not membership, based on a profession of faith, others might insist that

membership be strictly limited to adherents (especially where, as with CLS, members have the power to select the leadership). By eliminating religion as a legitimate leadership or membership criterion, a non-discrimination policy interferes with religious groups and denies the group control over its message. A policy prohibiting student groups from restricting leadership or membership based on religious views therefore has an obvious, powerful, and unique impact on religious groups—an impact that cannot be squared with the concept of equal access.

Applying a *religious* non-discrimination policy to *religious* groups interferes with those groups in ways that are both unique and forbidden by the Religion Clauses.

First, it impermissibly forces the group to serve as a mouthpiece for dissenting or heretical leaders. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts."); *Hurley*, 515 U.S. at 576 ("[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."). An organization cannot be compelled to act as a conduit for speech where the speech will be attributed to the organization. *See, e.g.*, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87-88 (1980). But a religious non-discrimination policy will have precisely this effect on religious groups alone. The religious views of leaders of a

religious group will be attributed to the group, precisely because it is a religious group. By contrast, the religious views of the presidents of the chess club or motorcycle enthusiast chapter would not be attributed to those organizations.

Second, and related, a religious non-discrimination policy impermissibly limits the ways in which religious groups can respond to dissenting voices. Leaders, once selected, may have a change of heart regarding certain tenets espoused by the group. Non-discrimination policies confound efforts to restore leadership to members who espouse core ideals. In other words, the student Hillel group would not be able to relieve Paul of Tarsus of his chapter leadership after his change of heart during a semester abroad in Damascus. And the student Catholic group would have to sit idly by as Luther nailed his 95 theses to the student lounge door. By preventing a religious group from removing a dissenting leader, the University disables the religious group from defending its beliefs and identity.

4. The inherent need for religious organizations to maintain some degree of religious unity demonstrates exactly why non-discrimination policies run afoul of this Court's equal access jurisprudence. Since *Widmar*, this Court has made clear that educational institutions (and other government entities) may not exclude religious groups because of their religious character or because they engage in religious worship. But it makes no more sense to allow a university to discriminate against religious groups because they engage in religious "discrimination" or impose

religious discipline or apply religious standards. To have any real impact, the overriding principle of *Widmar* and its progeny—that religious groups cannot be excluded on the basis of *espousing* a religious perspective—must also mean that religious groups may not be excluded on the basis of requiring *adherence* to that perspective, for the two are insolubly linked.

It is not a sufficient response to hold up religious non-discrimination as a laudable goal. *See Truth*, 542 F.3d at 649. Preventing the *government* from discriminating on the basis of religion is a laudable goal, one enshrined in multiple clauses of the Constitution. But when the government seeks to prevent religious groups from making distinctions on the basis of religion, it veers into unconstitutional territory. Religious "discrimination" by religious groups is not invidious; it is inherent. And allowing universities to exclude religious groups that insist upon criteria rooted in religion is not meaningfully different from allowing universities to discriminate against religious groups. Simply put, the government has no legitimate interest in ensuring religious indifference by religious groups: "It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference." *Lee v. Weisman*, 505 U.S. 577, 589 (1992); *see also Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First

Amendment protection."). Thus, the government has no legitimate reason to compel religious organizations to abandon the distinction between orthodoxy and heresy.

C. Imposing A Non-discrimination Policy On Religious Groups Amounts To Forbidden Discrimination Against Religion.

1. The Religion Clauses reflect two sides of the same coin, working together to "mandate[] accommodation, not merely tolerance, of all religions, and forbid[] hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); *see also McDaniel v. Paty*, 435 U.S. 618, 636 n.9 (1978) (Brennan, J., concurring in judgment) ("[U]nder the Religion Clauses government is generally prohibited from seeking to advance or inhibit religion."). At a deeper level, these clauses declare "that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee*, 505 U.S. at 589. At bottom, the Religion Clauses mandate neutrality with respect to religion and forbid religious coercion.

It is therefore well settled that the government may not discriminate based on religious status or belief. For example, the government may not require officeholders to declare a belief in the existence of God, *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961), or foreclose the clergy from serving as a delegate to a constitutional convention, *McDaniel*, 435 U.S. at 629 (plurality opinion). The former impermissibly advances religion; the latter impermissibly inhibits it.

This Court's equal access cases make the same point. Although the schools invoked the Establishment Clause to justify excluding religious groups, it is equal access, not exclusion, that evinces government neutrality toward religion. *Lamb's Chapel*, 508 U.S. at 395; *Rosenberger*, 515 U.S. at 837-46; *Good News Club*, 533 U.S. at 119. Indeed, the educational institutions had it exactly backward: it was the *exclusion* of religious groups due to their religious nature that "risk[ed] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Rosenberger*, 515 U.S. at 845-46.

Hastings, likewise, gets it backward. Imposing non-discrimination requirements on religious groups does not foster neutrality. While adoption of a policy of *government* non-discrimination against individuals and groups on the basis of religion produces the neutrality that the religion clauses demand, imposing a non-discrimination policy on *private* groups that organize around religious precepts amounts to forbidden discrimination against religion. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 n.15 (1987). "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission." *Lee*, 505 U.S. at 589. A non-discrimination policy obstructs the "preservation and transmission of religious beliefs" in the private sphere, thereby disfavoring religious groups. Precisely for this

reason, government restrictions on the membership criteria of religious groups have *never* found constitutional favor. *See infra* pp. 27-31.

2. In this regard, religion is quite different from race, and constitutional principles inform that difference. Certainly, imposing non-discrimination policies on the basis of immutable characteristics, such as race, can implicate associational interests. *See, e.g., Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548-49 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. . . . Freedom of association . . . plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623.

But even though racial non-discrimination requirements raise associational concerns, they do so while serving equal protection interests. When it comes to imposing non-discrimination policies on the basis of religion on religious organizations, however, there is no constitutional counterweight. The government policy implicates associational interests while directly offending the Religion Clause values discussed above. *See supra* pp. 17-18. In contrast to the government's legitimate interest in ensuring racial equality, the government simply has no legitimate interest whatsoever in seeing to it that Jewish groups admit Hindus to membership or leadership positions, that Protestants admit Catholics, that Baha'i admit Eastern Orthodox, or any other conceivable example. *See Watson*, 80 U.S. at 730 ("We cannot

decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church." (citation and quotation marks omitted)).

Government intrusion into church membership and leadership does not reflect the neutrality required by the Religion Clauses. To the contrary, any government effort to require a church to open its leadership ranks to non-believers would exhibit disrespect, if not antipathy, toward religion. More dangerously, the surest way to marginalize a religious group—particularly a minority group—would be to prevent it from defending its theological integrity. *See Goldman v. Weinberger*, 475 U.S. 503, 524 (1986) (Brennan, J., dissenting) ("A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar.").

D. Applying A Non-discrimination Policy To All Groups Does Not Make The Non-discrimination Policy Neutral.

It is no answer for Hastings to suggest that its policy is just a neutral limit that treats all student groups alike. In the first place, the policy is not neutral—religion is one of the stated bases for the policy, and religion is thus singled out without consideration of the unique difficulties a religious non-discrimination principle causes religious groups. More broadly, the policy of non-

discrimination *über alles* is not neutral, but exposes a decided skepticism about the need to differentiate on any basis, including religion, and imposes distinct burdens on religious groups.

1. There is some debate about the extent to which Hastings' non-discrimination policy is limited to a few forbidden grounds for "discrimination," including on the basis of religion, or if it extends more broadly to prohibit all "discrimination" in membership so that no group can maintain coherent membership requirements. *See* Pet. Br. at 12-15. Even if the latter description is accepted, it does not save Hastings' policy.

Presumably, Hastings expects market forces to prevail for most groups such that even a broad non-discrimination policy would have no practical impact. Indeed, absent unusual circumstances, the average student will not attend—let alone seek a leadership role in—the meetings of a group out of line with his or her personal interests or beliefs. Moreover, out of self-interest, the voting membership of a group would almost certainly resist any leadership bid by a person opposed to the group's core ideals. It strains the imagination to believe the rank-and-file membership of the College Republicans would elect to leadership a Democrat.

These market forces expose a serious hole in Hastings' logic. Where such forces prevail, a non-discrimination regulation on membership is at best a facade. It is entirely possible, even likely, that a religious group—like any other idea-oriented group—would maintain a homogeneous leadership simply by not voting non-adherents into leadership

positions. The same is true for any other club; chess club members surely would not elect leaders dedicated to eliminating chess in favor of Chinese checkers.

If market forces simply replicate a world without a non-discrimination policy, the question then becomes why Hastings has an interest in forcing organizations to promise to admit prospective members who have no interest in applying. Such a policy has a practical effect in only two situations. First, it prevents a religious organization with doctrinal reasons for limiting membership and leadership to adherents from signing, as a matter of principle, a non-discrimination pledge and accepting funds, even though the pledge if made would have no practical effect. Second, it may allow opponents of a minority group to exercise a heckler's veto by overwhelming groups with "fake" members. Neither scenario reflects well on the policy.

The market forces fallacy also brings to the fore the fact that Hastings' non-discrimination policy has a particularly destructive impact on some groups. Groups that take their membership criteria seriously face exclusion, unlike groups that rely on collective interest to maintain a cohesive identity. While one religious group may welcome non-adherents to worship as part of an interest in proselytization, other religions may feel limiting membership to adherents is central. Moreover, the policy has a debilitating impact on minority and controversial viewpoints. Small groups are far more vulnerable to infiltration and takeover when lacking the ability to maintain enforceable

organizational boundaries. As applied to small religious clubs, this danger raises historically familiar concerns for minority religious viewpoints: "A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar." *Goldman*, 475 U.S. at 524 (Brennan, J., dissenting).

2. Hastings' supposedly neutral approach also fails at a more fundamental, theoretical level. The policy of non-discrimination *über alles* is not viewpoint neutral. It reflects an official rejection—at the expense of private groups—of the viewpoint that adherence to organizational principles matters. This is a distinct viewpoint, and the Religion Clauses have a different one. For private groups organized around an expressive message, membership criteria may be essential to the effective advocacy of the group's "desired *viewpoints*" because each member and especially each leader necessarily shapes that message. *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988) (emphasis added); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000); *Hurley*, 515 U.S. at 572. The message of religious groups depends directly on the fealty of members to certain religious beliefs and codes of conduct. *See, e.g.*, *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 848 (2d Cir. 1996) (prohibiting application of non-discrimination policy where Christian affiliation of club officers was "essential to the

expressive content of the meetings and to the group's preservation of its purpose and identity").

Hastings' policy also fails because it "proscribe[s] more religious conduct than is necessary to achieve" not only religious neutrality but also viewpoint neutrality. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 538 (1993) (plurality opinion). Both kinds of neutrality are better served by the possibility of forming other groups as alternatives to CLS. Hastings students may form groups affiliated with other religions or espousing agnosticism or atheism. Likewise, Hastings students who are so inclined may form a religious group committed to open membership and no religious restrictions on leadership. Permitting access to CLS does nothing to prevent students from exploring these other options. Such an approach would not only encourage a diversity of viewpoints but would also be neutral. By contrast, a non-discrimination policy that permits only groups with no religious membership requirements has plainly taken a non-neutral stance.

II. State Efforts To Regulate The Membership And Leadership Criteria Of Religious Organizations Raise Problems Under The Religion Clauses Above And Beyond More General Associational Interests.

The First Amendment protects a "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622. Interference with the membership criteria of private groups plainly implicates those

associational rights. State regulation of the leadership and membership qualifications for *religious* groups, especially on religious grounds, runs afoul of constitutional church-state barriers above and beyond those groups' associational rights. Because the government may not directly interfere with leadership and membership criteria of religious groups, neither may it condition access to public benefits on compliance with a religious non-discrimination policy.

A. The Imposition Of Non-discrimination Requirements Raises Associational Concerns Even When They Are Imposed On Non-religious Groups.

"Freedom of association . . . plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623. When the government regulates the membership criteria of private groups, it impedes associational rights. It follows that requiring private groups to comply with a non-discrimination regulation inherently impinges on the "freedom not to associate."

This Court has twice struck down non-discrimination laws that interfered with *non-religious* private groups' right of expressive association. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, the Court held that Massachusetts could not require the private organizer of Boston's St. Patrick's Day parade to allow a group of homosexuals to participate in the parade. Because "every participating unit affects the message conveyed by the private organizers," 515 U.S. at 572, mandating

participation by an unwelcome group unconstitutionally deprived the parade organizer of its "autonomy to choose the content" of its message, *id.* at 573. The Court reaffirmed these principles in *Boy Scouts of America v. Dale*. In *Dale*, the Boy Scouts asserted a First Amendment right of expressive association in the removal of an openly homosexual scoutmaster. 530 U.S. at 645. The Court agreed because the presence of a homosexual scoutmaster "would, at the very least, force the organization to send a message" that it accepts homosexual conduct. *Id.* at 653.

Even in cases where the Court has upheld non-discrimination laws that applied to private groups, it has acknowledged that the groups possessed associational interests. *See, e.g.*, *Roberts*, 468 U.S. at 628; *Duarte*, 481 U.S. at 549. Religious groups have at least the speech-related associational rights possessed by other private organizations. *Widmar*, 454 U.S. at 273 n.13. Even for non-religious speakers, the government may not force a speaker to propound a message with which it disagrees, lest "the government . . . require speakers to affirm in one breath that which they deny in the next." *Hurley*, 515 U.S. at 575-76. That principle surely has greater force when the speaker is a religious group espousing a belief about ultimate reality. If anything, religious groups have additional associational rights, deriving from the Religion Clauses. *See Roberts*, 468 U.S. at 622. At a minimum, the Religion Clauses clarify the nature of the associational rights held by religious groups and the scope of the government's latitude to interfere with those rights.

For this reason, a state effort to prevent religious organizations from reserving leadership positions to co-religionists or limiting membership to adherents would manifestly interfere with associational interests and independently run afoul of the Religion Clauses. And while in other contexts the government may have a freer hand in conditioning benefits on an agreement to adopt a non-discrimination policy than it would have to impose the condition directly, that proposition avails Hastings not at all. Hastings has no legitimate interest in interfering with the leadership criteria of religious groups. That proposition is underscored by the lengths to which the government goes in other contexts to avoid entanglement in such matters.

B. Even Beyond Associational Interests, There Are Distinct Concerns Under The Religion Clauses When The State Attempts To Interfere With The Membership And Leadership Criteria Of Religious Organizations.

1. The free exercise of religion entails the freedom to associate (or not) around certain religious principles. Moreover, the Religion Clauses, more broadly, prohibit government action that interferes with religious associational interests and grant religious groups a degree of autonomy. Religious organizations hold "an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*,

344 U.S. 94, 116 (1952); *see also Watson*, 80 U.S. at 720-21. This "independence from secular control" requires the government to accommodate a degree of autonomy for religious groups to define not only doctrine but also membership and leadership criteria. And as a corollary to the associational right, "[f]reedom to select the clergy, . . ., must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." *Kedroff*, 344 U.S. at 116; *see also id.* at 123 (Frankfurter, J., concurring) ("A legislature is not free to vest in a schismatic head the means of acting under the authority of his old church . . . .").

For that reason, leadership qualifications for religious organizations are generally immune from government interference. These constitutional limitations reflect the common-sense notion that "questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern." *Serbian E. Orthodox Diocese*, 426 U.S. at 717; *see also id.* at 721 (matters of internal governance are "issue[s] at the core of ecclesiastical affairs"). "[I]t is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929). Accordingly, it was improper for the Supreme Court of Illinois to attempt to reinstate a defrocked bishop of the Serbian Orthodox Church. *Serbian E. Orthodox Diocese*, 426 U.S. at 708-09. And the Court struck down a New York statute that "passe[d] the control of matters strictly

ecclesiastical from one church authority to another." *Kedroff*, 344 U.S. at 119.

General membership, too, is a matter outside the reach of civil authorities. As early as the 1870s, this Court held that courts "cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church." *Watson*, 80 U.S. at 730 (citation and quotation marks omitted). Religious adherents become church members "upon the condition of continuing or not as they and their churches might determine . . . ." *Id.* at 731 (quoting *Ferraria v. Vasconcelles*, 23 Ill. 456, 459 (1860)). The government has no place in those membership decisions.

2. Nor are concerns about intermeddling in religious membership and leadership criteria limited to affirmative government attempts to interfere. The government instead goes to great lengths to ensure that even facially neutral government programs do not have the effect of entangling the government in such issues. For example, courts refrain from adjudicating disputes concerning internal religious governance even when the claim would be justiciable according to otherwise neutral jurisdictional principles. This abstention principle manifests itself frequently in property disputes between church factions. *See, e.g.*, *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969) ("[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes."). Where

ecclesiastical authorities recognize one faction as the legitimate adherents, civil courts will not question that decision. *See Serbian E. Orthodox Diocese*, 426 U.S. at 709 ("[W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them."). The danger is that "the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs." *Id.*

Courts are particularly hesitant to second-guess a religious body's determination of its leadership. In *Gonzalez*, this Court found no role for civil courts in adjudicating the rights to a testamentary gift that depended upon an individual's appointment to a chaplaincy in the Catholic Church. The appointment depended directly on "the essential qualifications of a chaplain . . . and whether the candidate possesses them"—the domain of church authorities. 280 U.S. at 16. Accordingly, "although affecting civil rights," those ecclesiastical determinations regarding *religious* leadership qualifications controlled the outcome of the *civil* case. *Id.*

The same principles apply in other contexts, and are not limited strictly to questions of church leadership. The Court applied the doctrine of constitutional avoidance to hold that lay teachers

in church-operated schools fall outside the jurisdiction of the National Labor Relations Board. *Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). That the NLRB applying facially neutral labor-law principles might interfere with the church-teacher relationship raised "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Id.* at 507. The Court's hesitance stemmed directly from wariness about intervening in church governance, and it refused to "open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions." *Id.* at 503.

In the same vein, the Court upheld Title VII's exemption for religious organizations from the "prohibition against discrimination in employment on the basis of religion" even for non-religious jobs. *Amos*, 483 U.S. at 329. Although the Court framed its holding in terms of what the Religion Clauses *permit* government to do, it suggested "that the Free Exercise Clause *required*" Congress to exempt religious organizations at least for religious discrimination in "religious activities." *Id.* at 335-36 (emphasis added).

C. For This Reason, It Makes No Difference Whether The Interference Comes In The Form Of A Direct Imposition Or A Condition On Benefits.

Hastings undoubtedly will fall back on its authority, as the creator of the public forum, to condition access to the forum on compliance with regulations that apply to all student groups. But

whatever additional authority Hastings enjoys over conditional policies, as opposed to direct mandates, it does not enjoy authority to interfere with the membership and leadership criteria of religious groups, especially on religious grounds. The autonomy accorded religious organizations by the Religion Clauses greatly restricts the conditions that can be applied to them. Religious non-discrimination policies pose exactly the kind of "state interference" with internal religious affairs forbidden by the Religion Clauses.

1. Generally speaking, a government entity that creates a public forum has the authority to establish conditions on access to the forum. *Lamb's Chapel*, 508 U.S. at 390-91. Some benefit conditions could be described as neutral restrictions on a public forum that would apply equally to religious groups. For example, schools may condition access to a public forum on after-hours use, on lawful use, or on a maximum amount of available funds. *Widmar*, 454 U.S. at 276. Indeed, Hastings characterizes its non-discrimination as a permissible condition on access to university facilities and funds.

But it is one thing for a school to condition a Catholic church's ability to use a public school classroom on the condition that meetings occur after school hours, and quite another to condition access on the Catholic church agreeing to have female priests or Lutheran ones. The former condition is perfectly reasonable; the latter is *ultra vires*. The meddling in the membership criteria of the religious groups in the latter example is independently problematic whether it comes in the

form of a direct imposition or a condition on benefits. Governments do not have unfettered discretion in the conditions they can attach to benefits, just because they are conditions. The government has no legitimate interest in squelching dissent and so it cannot condition benefits on a loyalty oath. *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Hastings has no more legitimate interest in conditioning benefits on an oath that religious organizations will allow non-adherents to join the organization.

It is indisputable that infringements upon the liberties of religion and expression may come in the form of "the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Conditioning "the availability of benefits upon . . . willingness to violate a cardinal principle of . . . religious faith effectively penalizes the free exercise" of religion. *Id.* at 406. Non-discrimination policies force religious groups to make an inherently coercive choice between adhering to their religious tenets and accessing the forum. The Court has already held that government may not force an *individual* "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Sherbert*, 374 U.S. at 404. The same must be true for religious *groups*, where the condition not only compromises the religious group's private adherence to religious precepts but also gives the government a seat at the decisionmaking table that the Religion Clauses expressly forbid. Such a

policy intrudes into a religious group's membership standards and, hence, improperly invades its constitutionally protected sphere of choosing its religious message and leadership.

Moreover, the Court has recognized that its equal access cases dealt with a species of unconstitutional conditions. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 680 (1996) (plurality opinion) (citing *Lamb's Chapel*, 508 U.S. at 390-94). Educational institutions may not condition access to a public forum on censorship of religious speech. Surely, those institutions may not condition access on accepting the government as de facto membership czar to determine who *must* be accepted as a leader or member by the group.

2. Moreover, as a practical matter, Hastings' policy is much more than a mere condition on benefits. The regulatory interference is coextensive with the political jurisdiction occupied by the regulated entity. In other words, a university-wide condition applies to the entire universe in which religious student groups operate. The adoption of a non-discrimination policy is thus in effect a police power regulation that forces noncomplying groups underground. This is far more than a condition on a marginally relevant forum or benefit.

That Hastings' policy operated as a direct, police-power regulation is borne out by CLS's options. CLS could either permit non-adherents as members and leaders, or it could *cease to exist* as a student organization. Certainly, students could continue to gather on their own, but in so doing, they would be no different from any other

community organization with no relationship to the university or its jurisdiction. This reality makes the situation facing CLS far worse even than that facing the community groups in *Lamb's Chapel* and *Good News Club*, which faced no similar comprehensive regulatory interference. As a consequence, to the extent the Court perceives greater latitude to impose religious non-discrimination policies as a condition on benefits in those cases, the same latitude could not apply here.

III. The Threats of Exclusion And Interference With Membership And Leadership Criteria Are Real.

CLS's conflict with Hastings is not some isolated phenomenon. CLS and organizations with similar religious orientation have faced numerous threats of exclusion or interference with leadership qualifications by a host of educational institutions. In many cases, religious organizations have for years enjoyed the equal access guaranteed by this Court's cases only to be ousted for refusing to pledge adherence to a non-discrimination policy that conflicted with church teachings. In effect, CLS and other religious organizations must re-fight battles already waged and won to secure equal access for religious groups. *See supra* pp. 5-10. The prospect that non-discrimination policies could be used to re-impose *un*equal access is a real one.

A. Litigation Experiences In Other Cases Confirm The Threats.

1. CLS itself has faced numerous similar confrontations regarding its membership and leadership criteria. The Seventh Circuit correctly

held that Southern Illinois University's School of Law could not revoke recognition of its CLS chapter under a non-discrimination policy. *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). But other cases have not ended so favorably. The District Court for the District of Montana, for example, upheld the decision by the University of Montana School of Law to deny recognition to a student CLS chapter. *Christian Legal Society v. Eck*, 625 F. Supp. 2d 1026, 1033 (2009). And CLS has had to fight to retain or to restore its existing access to campus facilities in law schools around the country. *See, e.g., Christian Legal Society Chapter of Washburn Univ. School of Law v. Farley*, No. 04-4120 (D. Kan. Sept. 16, 2004); *Christian Legal Society Chapter of the Ohio State Univ. v. Holbrook*, No. 04-197 (S.D. Ohio 2004).

2. Of course, CLS is not the only student religious organization that has faced this type of exclusion. In the high school context, a student Bible Club had to litigate to maintain its right to require officers to be Christian. *See Hsu*, 85 F.3d at 848. At the collegiate level, the Christian fraternity Beta Upsilon Chi received recognition at the University of Florida only after the school revised its non-discrimination policy during litigation. *Beta Upsilon Chi v. Machen*, 586 F.3d 908, 910 (11th Cir. 2009); *see also Beta Upsilon Chi v. Adams*, No. 06-104 (M.D. Ga. 2006) (similar facts at University of Georgia); *Alpha Iota Omega Christian Fraternity v. Moeser*, No. 04-765, 2006 WL 1286186 (M.D.N.C. 2006) (similar facts at University of North Carolina). And for every successful effort, it is likely that other groups have

had their speech chilled and acquiesced rather than pursue costly and time-consuming litigation.

B. Threats Of Exclusion Are Widespread And Do Not Always Result In Litigation.

1. Not all disputes over non-discrimination policies result in litigation. Universities frequently issue initial rejections for religious student groups before reversing after persistent student efforts. The InterVarsity Christian Fellowship ("IVCF"), for example, has faced several threats from universities that have sought to ban the group under a non-discrimination policy. Harvard University, Rutgers University, and the University of North Carolina at Chapel Hill have all endeavored to exclude IVCF from campus facilities because it requires members to share basic religious convictions. IVCF was able to resolve its disputes with Harvard and North Carolina through negotiation and public debate, but it was forced to pursue litigation against Rutgers before reaching an out-of-court settlement. *See, e.g.*, Press Release, Foundation for Individual Rights in Education, Victory for Religious Liberty at the University of North Carolina-Chapel Hill (Jan. 7, 2003), *available at* http://www.thefire.org/index.php/article/4912.html (last visited Feb. 3, 2010). IVCF chapters have faced numerous similar threats, including at Montclair State University and Castleton State College.

2. Finally, discrimination against religious groups is not solely a Christian phenomenon. Louisiana State University derecognized its Muslim Student Association in 2003 even though

the group had existed for three decades on campus. The University restored recognition to the group only after more than a year of negotiation, during which the group could not enjoy its campus privileges. Press Release, Foundation for Individual Rights in Education, Victory for Religious Freedom at Louisiana State University (Mar. 17, 2005), *available at* http://www.thefire.org/index.php/article/5436.html (last visited Feb. 3, 2010).

CONCLUSION

A policy of non-discrimination *by the government* promotes a wholesome neutrality. But when the government extends that same policy to *private religious groups* and directs them not to discriminate on religious grounds, it strays into forbidden territory. Such a policy inevitably undermines the Court's equal access cases, discriminates against religion, and injects the government into matters—the leadership and membership criteria of religious groups—that the Religion Clauses put squarely out of bounds. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,
Petitioner,

—v.—

LEO P. MARTINEZ, *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AND THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Northern California is a regional affiliate of the national ACLU. Since its founding in 1920, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. In this case, Petitioner claims that its freedom of association has been infringed by Respondents' policy of refusing to provide official recognition and public funding to student clubs that discriminate. As organizations that have long been dedicated to preserving First Amendment rights and opposing discrimination, the ACLU and the ACLU of Northern California have a strong interest in the proper resolution of this controversy. We submit this brief in support of Respondents for reasons stated more fully below.

The National Education Association ("NEA") is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges and

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

universities. NEA has long opposed discrimination on the basis of sexual orientation, particularly in our Nation's schools, colleges, and universities. NEA policy provides that, "Discrimination and stereotyping based on sexual orientation must be eliminated." To this end, NEA believes that institutions of public education should not be compelled to subsidize student organizations that engage in invidious discrimination.

STATEMENT OF THE CASE

Petitioner, the Christian Legal Society Chapter at the University of California, Hastings College of the Law ("CLS"), is a student organization at the University of California, Hastings College of the Law ("Hastings"). Hastings allows non-commercial student organizations that agree to abide by its policies to register with the school as "registered student organizations," which are eligible for limited funding and certain other benefits, including the use of Hastings's name, preferential access to classroom space for meetings, and access to Hastings's student activity fair. There were approximately 60 registered student organizations during the time at issue in this case, representing a broad array of views and interests, including three religious groups. *See* Joint Appendix ("JA") 215-16.

From 1994 through 2004, Hastings recognized the predecessor student group to CLS, the Hastings Christian Fellowship. JA 222-23. During that time,

the group agreed to comply with Hastings's nondiscrimination policy, which provides that registered student organizations "shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation." JA 220. The parties stipulated below that Hastings has interpreted this policy as requiring registered student organizations to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs." JA 221.

During the 2004-05 academic year, however, Petitioner affiliated itself with the national CLS, and subsequently decided to restrict its membership and officer positions to only those students who sign its "Statement of Faith." JA 226-27. This precludes students who do not share all of CLS's religious beliefs, or who engage in "unrepentant homosexual conduct," from serving as members or officers. JA 226.

Because Petitioner's new exclusionary membership bylaws were inconsistent with Hastings's policy, it was denied registered student organization status in September 2004. JA 228. Hastings, however, offered Petitioner the opportunity to meet on campus, use campus facilities, and use bulletin boards and other means of communicating with students. JA 232-33. And in fact, CLS has continued to exist as an unofficial student

organization at Hastings, holding regular meetings and other events on campus. JA 230.

Nonetheless, CLS filed suit in 2004, claiming that Hastings's nondiscrimination policy impermissibly infringed its freedom of speech, association and religion, under the First Amendment.

The district court rejected Petitioner's arguments, holding that Hastings's policy was neither viewpoint discriminatory nor an impermissible burden on its freedom of association, and that Hastings had a compelling interest in refusing to subsidize and grant official recognition to those student organizations that would not abide by its nondiscrimination policy. *Christian Legal Society v. Kane*, No. C 04-04484 JSW, 2006 WL 997217 (N.D. Cal. May 19, 2006)

The Ninth Circuit affirmed the district court's decision in an unpublished summary decision, citing *Truth v. Kent School District*, 542 F.3d 634, 649-50 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2889 (2009). This Court granted *certiorari*.

SUMMARY OF ARGUMENT

This case presents the question whether a public university may constitutionally apply an even-handed policy that requires all student organizations that wish to be eligible for university funding and certain other benefits to refrain from discriminatory conduct. Petitioner argues that it and other religious organizations are entitled to avail themselves of the

benefits of recognition as official student organizations at Hastings including access to funding, without following this rule. The courts below correctly held that the Constitution does not require a public educational institution, like Hastings, to fund and lend its name to discriminatory acts.

It would be an odd constitutional rule that prohibited public educational institutions from discriminating but required them to subsidize discrimination by student groups using the university's name. Exclusionary student clubs have a long history in this country and the impact of their exclusionary policies often extends well beyond graduation. Hastings, like other public universities, has a compelling interest in not promoting such discrimination, including discrimination based on religion and sexual orientation. A contrary result would have far-reaching consequences for the enforcement of civil rights laws generally.

ARGUMENT

I. HASTINGS HAS A COMPELLING INTEREST IN ENSURING THAT STUDENT ORGANIZATIONS THAT ENGAGE IN DISCRIMINATORY CONDUCT DO NOT RECEIVE THE BENEFIT OF THE SCHOOL'S NAME AND FINANCIAL SUPPORT.

At the outset, it is important to clarify what is and is not at stake in this case. The issue here is not whether the government is required to fund speech with which it disagrees. Student groups at Hastings, including CLS, are entitled to meet and say what they wish, as official student groups, and are not denied recognition or the opportunity to meet because of their ideology, even if that ideology conflicts with official school positions. Contrary to Petitioner's assertions, therefore, this is not a case about traditional speech rights in a public forum. CLS may advocate for whatever it wants as an official student club, and it is undisputed that Hastings could not deny CLS official recognition or student activity funding based on disagreement with its views. *Cf. Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). Nor is this a case about whether CLS members are allowed to associate – or disassociate – as they wish, while continuing to meet on campus and recruit members.

They can, and Hastings will allow CLS to use campus facilities for its meetings.

CLS, however, claims more than the right to speak and meet on campus. It claims that it is entitled under the First Amendment to an exemption from Hastings's non-discrimination policy and thus to receive university funding on the same basis as other student groups that, unlike CLS, do not exclude student members from participation because of their religion and sexual orientation.[2] Thus, the issue here is whether Hastings is required to fund and lend its name to discriminatory *conduct* by campus groups that are otherwise free to pursue their own agenda. This Court's cases have never suggested that such complicity is required, and there

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[2] While CLS previously stipulated that Hastings's policy required all student organizations to make their membership open to all students, *see* JA 221, it belatedly now characterizes Hastings's policy as a more traditional non-discrimination policy, which prohibits Hastings and any "Hastings-sponsored programs and activities" from excluding students on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. Pet. Br. at 9. Under either policy, however, the exemption sought by CLS would require Hastings to fund and lend its resources to discrimination based on religion and sexual orientation. Accordingly, *amici* here address whether Hastings has a sufficient interest to justify its denial of that exemption.

are compelling reasons why the government should not be required to do so.[3]

Indeed, if CLS were to prevail on its novel theory that its free-association and free-speech rights to exclude others in turn require the government to subsidize its discrimination, Hastings and other public universities would have no choice but to subsidize racially discriminatory groups, student groups that restrict membership based on gender, or groups that bar students with disabilities, so long as these groups articulate some way in which their ideology or expression theoretically might be impaired by requiring them to comply with a non-discrimination rule. In light of the pernicious history of discrimination in education and related opportunities, public universities like Hastings have a compelling interest in not lending their

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[3] *A fortiori*, the state interests in this case are sufficient to satisfy the *O'Brien* test applied by the lower courts on the ground that the challenged regulation addresses conduct, not expression. As this Court explained in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." While expressive conduct may not be banned because of its message or viewpoint, "acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 390 (1992).

sponsorship and resources, including funding, to groups that exclude other members of the university community.

A. Exclusion From Educational Opportunities Is Among The Most Pernicious Forms Of Discrimination.

Because of the central role that access to education plays in personal and professional development, eliminating discrimination in education has long been recognized as a government interest of the utmost importance. *See, e.g., Norwood v. Harrison*, 413 U.S. 455, 469 (1973) (holding that Mississippi could not give textbooks to students attending racially segregated private schools because "discriminatory treatment exerts a pervasive influence on the entire educational process"); *see also, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) ("[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education."). Indeed, this Court recently reaffirmed that "ensuring that public institutions are open and available to all segments of American society . . . represents a paramount government objective," and that "nowhere is the importance of such openness more acute than in the context of higher education." *Grutter v. Bollinger*, 539 U.S. 306, 331-32 (2003) (internal citations and quotations omitted).

The exclusion of minorities, women, and others from officially recognized and quasi-private student organizations has, for decades, served as a powerful vehicle for perpetuating such discrimination at colleges and universities across the country. For example, until the 1950s and 1960s, racially discriminatory fraternities operated to exclude African-American students not just from the fraternities themselves, but from campus life at many universities. *See, e.g.*, Allen B. Ballard, *The Education of Black Folk: The Afro-American Struggle for Knowledge in White America*, 4, 29 (1973) (describing life as one of the first two Black students at Kenyon College and noting that "racially discriminatory fraternities and athletics were the actual center of life on most campuses" in the 1940s and 50s). Similar restrictions also limited the opportunities of Jewish students to participate fully in university life. *See, e.g.*, Dan Oren, *Joining the Club: A History of Jews at Yale*, 24-26, 80-82, 87 (1st ed. 1985), and *id.* 74-75 (noting example of a private club at Yale that excluded Jewish members, but "served as the chief center for aesthetic criticism on the campus of the 1930s . . . . Therefore, Jews who had hoped to share in the intellectual social life of the campus often found themselves left high and dry."). Not surprisingly, then, students who belonged to historically disfavored groups were less likely to be integrated into the intellectual and social heart of the university at those schools with an entrenched exclusionary system of fraternities and

social societies. *See, e.g.*, Harold Wade Jr., *Black Men of Amherst* 97-98 (1976).

Even after many universities prohibited discrimination by official student organizations, ostensibly private student clubs that actually functioned as integral parts of the universities continued to exclude certain students on discriminatory grounds. For example, Princeton University's prestigious "eating clubs" were not required to admit women until 1990, after the New Jersey Supreme Court found that the university and the quasi-private clubs "have an integral relationship of mutual benefit." *Frank v. Ivy Club*, 576 A.2d 241, 260 (N.J. 1990).

This type of discrimination in the context of higher education is particularly pernicious because participation in student organizations is a significant way that students obtain meaningful leadership opportunities, personal and professional contacts, and other important benefits. Thus, exclusion from student organizations can substantially harm students, denying them access to class information, study-group opportunities, professional contacts, and alumni associations. *See* Daniel L. Schwartz, *Discrimination on Campus: A Critical Examination of Single-Sex College Social Organizations*, 75 Cal. L. Rev. 2117, 2119-20 (1987); Sally Frank, *The Key to Unlocking the Clubhouse Door: The Application of Antidiscrimination Laws to Quasi-Private Clubs*, 2 Mich. J. Gender & L. 27, 72 (1994) (hereinafter

"Frank, *The Key*") ("Prestigious [college student organizations] provide entry into business and government opportunities upon graduation."); *see also Board of Regents v. Southworth*, 529 U.S. 217, 222-24, 229-32 (2000) (recognizing the importance of student organizations on public university campuses).[4]

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[4] Historically, the social club structure at universities has often mirrored the social club structure outside the university setting, where the exclusion of women, religious minorities and people of color from such clubs has often led to their exclusion from employment and other positions of authority. *See, e.g., Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) ("[T]he State's compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business contacts as well as tangible goods and services.") (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984)); *see also* Michael M. Burns, *The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 Harv. C.R.-C.L. L. Rev. 321, 329 n. 23 (1983) (hereinafter "Burns, *The Exclusion of Women*") ("[I]neligibility for club membership has been cited in some cases as a reason for not promoting women to executive positions."); N.C. Belth, *Discrimination and the Power Structure* in *Barriers: Patterns of Discrimination Against Jews*, 10-11 (N. C. Belth ed., 1958) (citing the following example of a justification for refusing to employ Jewish executives: "'[O]ur plant managers maintain a certain status in their communities. They must join the country club and the leading city club. Today, that's where the big deals are discussed and made. They must be socially acceptable to the banking and business leaders of the town.'"); *see also* Burns, *The Exclusion of Women*, 18 Harv. C.R.-C.L. L. Rev. at 323 ("The final door to professional advancement [for women and minorities] remains closed because they are denied

It is in this historical and sociological context that Hastings's interest in enforcing its nondiscrimination policy must be understood: The university's policy serves to remediate and prevent pervasive discrimination against historically disadvantaged groups by ensuring that university resources support groups that offer an opportunity to participate in campus life to all students.

B. The Government Has A Compelling Interest In Declining To Subsidize Private Discriminatory Conduct.

The overriding purpose of non-discrimination legislation is to make it possible for those protected by the laws to participate in the "almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Stated more broadly, civil rights laws protect basic human

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membership in the most prestigious 'social' clubs, either explicitly in club bylaws or implicitly by custom and practice."); Frank, *The Key*, 2 Mich. J. Gender & L. at 38 ("When people are barred from these organizations, they are also barred from cultivating business opportunities, and from influencing policy through informal contact with policymakers. Being in the 'right' club can be crucial to one's career."); Belth, *Discrimination and the Power Structure* at 10-11 (discussing a sociological study finding that, to a very high degree, "basic decisions affecting the community – its business, its politics, its very life – are reached at informal social gatherings, private clubs and after-business-hours associations").

dignity. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964). Consistent with this purpose, this Court has declared that a state's "commitment to eliminating discrimination" is a "goal . . . [that] plainly serves compelling state interests of the highest order." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). *Accord E.E.O.C. v. Mississippi Coll.*, 626 F.2d 477, 488 (5th Cir. 1980) ("[T]he government has a compelling interest in eradicating discrimination in all forms.").

When a public university seeks to ensure that the advantages associated with official recognition, including financial subsidy, are granted to those organizations that do not deny the full benefits of membership and leadership on the basis of race, sex, religion, or sexual orientation, for example, it furthers a compelling interest in preventing government resources from being used to perpetuate inequality. In spite of this compelling interest – borne out of the long and pervasive history of discrimination in the higher education context – CLS argues that Hastings's policy is unconstitutional because it may affect the group's ability to associate. But if CLS were correct, Hastings would be required to fund any otherwise qualified student organization that discriminated on the basis of race, religion, gender, or sexual orientation so long as the group could plausibly claim that its exclusionary policies were related to its core purposes. While CLS claims that its discriminatory membership rules reflect its core religious beliefs, the exemption it seeks would

presumably also apply to student organizations formed to promote a philosophy of racial supremacy.[5] Thus, because Hastings does not grant official recognition to *any* groups that discriminate, regardless of the reasons they exclude other students, the challenged policy is not targeted at religion, *cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), nor does it place a unique burden on religion, *cf. Employment Div. v. Smith*, 494 U.S. 872, 877-78 (1990). Rather, it is a neutral policy targeted against discrimination that applies equally to all student groups that discriminate.[6]

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[5] Indeed, under Petitioner's reasoning, it is difficult to see how *any* university policies that impinge upon freedom of association could be upheld. If CLS's argument were correct, the fact that a hypothetical university policy restricting membership in official student organizations to students might impose a burden on the associational rights of students who wished to meet with non-students, such as religious leaders, would be sufficient to require the university to alter its reasonable rules. This is plainly not required. *See Healy v. James*, 408 U.S. 169, 189 (1972) (noting that universities may require student organizations to comply with "reasonable campus rules").

[6] This is thus unlike *Rosenberger v. Rector and Visitors of the University of Virginia.*, 515 U.S. 819, 844-45 (1995), which addressed governmental support of expression, rather than conduct, and held that the government could not create a limited public forum for the purpose of facilitating students' expression of ideas and then deny support or participation in that forum on the basis of students' expressed viewpoints.

It is well-settled that the government has a compelling interest in refusing to subsidize private discriminatory conduct, and indeed, in some circumstances, a constitutional obligation to do so. Accepting CLS's argument would overturn long-standing precedent, and significantly alter the balance this Court has previously struck between the important rights of expression, association, religious freedom, and equality. [7]

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[7] Such a result would be particularly incongruous here, where the university's policy is carefully targeted at avoiding government support of discrimination in educational opportunities, and has nothing to do with the suppression of expression. Indeed, Hastings went out of its way to ensure that CLS had the opportunity to meet and express itself as a non-registered organization: After CLS announced its refusal to comply with the non-discrimination policy, the record shows that Hastings specifically offered to allow CLS to meet on campus, use campus facilities, and communicate with students. JA 294, 300; *see also Christian Legal Soc'y v. Kane*, No. C 04-04484 JSW, 2006 WL 997217, at *17 (N.D. Cal. May 19, 2006) ("CLS was not prohibited from meeting on campus. (Joint Stip, ¶¶ 9, 10, 62.) In fact, CLS was permitted to use campus facilities to meet and its members were permitted to communicate amongst themselves and with other students. (Id., ¶¶ 10, 58.) As a non-registered group, CLS still had access to bulletin boards and chalk boards on campus to make announcements."). While CLS complains that "Hastings [has] made clear to the students that this privilege . . . may be revoked at any time," Pet. Br. at 25, this is beside the point as Hastings similarly reserves the right to modify any element of the forum of official recognition to which CLS seeks admission.

In *Norwood*, the Court considered and rejected a central argument advanced by CLS and its *amici*: that a private group engaging in constitutionally protected activities has the right to compel public support notwithstanding its discriminatory behavior. *Norwood* involved a challenge to a Mississippi program that loaned textbooks to private schools, including schools that engaged in racial discrimination. The parents of private school pupils argued that their constitutionally protected right to send their children to those schools would be undermined if the state, which provided textbooks to non-discriminatory private schools, did not also provide textbooks for private, discriminatory schools. Firmly rejecting that argument, the Court held that a state is forbidden from granting aid even in the form of textbook loans "if that aid has a significant tendency to facilitate, reinforce, and support private discrimination." *Norwood v. Harrison*, 413 U.S. 455, 466 (1973). The Court emphasized that the right of discriminatory institutions to exist under other constitutional protections does not carry with it the right to a claim on the "state largesse, on an equal basis or otherwise." *Id.* at 462. Far from suggesting that freedom of association requires government support, *Norwood* holds that such support is, at least in some circumstances, constitutionally *prohibited*.[8]

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[8] Indeed, even where government funding has not been involved, this Court has ruled that while parents may have a protected First Amendment right to send their children to

Similarly, in *Grove City College v. Bell*, 465 U.S. 555 (1984), the Court rejected the argument by a private college and four of its students challenging the denial of federal financial assistance to students at the college because of the college's refusal to execute an assurance of compliance with Title IX's prohibition on sex discrimination in any educational program receiving federal financial assistance. This Court held that Grove City's argument that "conditioning federal assistance on compliance with Title IX infringes First Amendment rights of the College and its students . . . warrants only brief consideration. Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." *Id.* at 575 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Because the college could terminate its participation in the federal program and retain the right to discriminate, and the students could choose to decline federal financial assistance, "[r]equiring Grove City to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the . . . program infringes no First Amendment rights of the College or its

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schools that promote the belief that racial segregation is desirable, "it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle." *Runyon v. McCrary*, 427 U.S. 160 (1976) (holding that 42 U.S.C. § 1981 bars private schools from denying admission to non-white students).

students." *Id.* at 575-76. *Cf. Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297, 1307 (2006) ("The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds . . . . It affects what law schools must *do* – afford equal access to military recruiters – not what they may or may not *say*.").

The fact that CLS is a religious organization does not alter this balance or outweigh the government's compelling interest in distancing itself from discriminatory educational practices. In *Bob Jones University v. United States*, 461 U.S. 574 (1983), private religious schools with racially exclusive admissions policies challenged an IRS ruling denying them tax exempt status because of their discriminatory practices. Although the schools' discriminatory policies were grounded in religious beliefs – which they have a firmly established constitutional right to maintain – this Court held that denial of tax exempt status did not violate their free exercise rights, citing the government's compelling interest in non-discrimination in education. *Id.* at 603. The Court did not deny that withholding tax exempt status would have a "substantial impact" on the private schools, but found that the state's interest in non-discrimination in education "substantially outweighs whatever

burden denial of tax benefits places on petitioners' exercise of their religious beliefs." *Id.* at 603-04.

Thus, while Petitioner claims that Hastings cannot have a legitimate interest in requiring a religious group to admit non-believers or unrepentant gay and lesbian members, Pet. Br. at 44, this argument is a red herring. As discussed above, Hastings's interest is not in requiring CLS to associate with non-believers (CLS is free to do so as an unofficial student organization); it is in ensuring that government funding and recognition does not go to discriminatory groups. Public universities have a compelling interest in ensuring that students have access to publicly subsidized educational opportunities regardless of their race, religion, age, or sexual orientation, or any other characteristic that historically has been the basis of invidious discrimination.

Relatedly, the fact that Petitioner's discriminatory membership rules may reflect their religious views does not mean that the university's non-discrimination policy is itself viewpoint-based. *See Madsen v. Women's Health Ctr.*, 512 U.S. 753, 763 (1994) (holding that an injunction prohibiting abortion protesters from picketing outside a clinic was not viewpoint discriminatory because "the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based"); *Boy Scouts of America v. Wyman*, 335 F.3d 80, 93-94 (2d Cir. 2003) (holding

that, while "all anti-discrimination laws that govern organizations' membership or employment policies have a differential and adverse impact on those groups that desire to express through their membership or employment policies viewpoints that favor discrimination against protected groups," if the purpose of the law is not to "impose a differential adverse impact upon a viewpoint," application of the non-discrimination law to exclude a discriminatory group from a nonpublic forum does not violate the First Amendment).

Petitioner's reliance on *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), is equally misplaced. *Dale* does not suggest that Hastings lacks a compelling interest in refusing to subsidize and support private discrimination. Rather, *Dale* held that New Jersey could not apply its non-discrimination law to require the Boy Scouts, meeting on private property, to admit an openly gay scout leader. Here, by contrast, the question is not whether the government has a sufficiently compelling interest to require the group of students involved with CLS to associate privately with those whom they do not wish to admit (to which *amici* would answer: no), or to force them off campus entirely if they exercise their right to disassociate (again: no). The question is whether Hastings has sufficient interest in restricting its imprimatur and the benefits of recognition, including funding, to student groups that do not discriminate. As discussed above, the answer to that question is yes

under this Court's existing precedents, and nothing in *Dale* alters that balancing.[9]

"Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Norwood*, 413 U.S. at 470. Just as the parents in *Norwood* had no claim to public resources to advance segregationist schooling, CLS has no claim to force Hastings to provide sponsorship and funding. Hastings's determination that denying official recognition and funding to groups that discriminate on the basis of religion and sexual orientation furthers a compelling interest is fully consistent with the government's long-standing interest in avoiding public financing of private discrimination. A ruling for CLS would imperil the government's ability to distance itself from

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[9] Lower courts have recognized the same distinction between the associational freedom of groups like the Boy Scouts to decide on their membership, on the one hand, and government's continuing ability to restrict its funding to groups that do not discriminate, on the other. *See, e.g.*, *Wyman*, 335 F.3d at 91-92 (holding that Connecticut's requirement that all participants in the state charitable campaign fund agree not to discriminate based on sexual orientation did not violate the Boy Scouts' right of expressive association or free speech); *Evans v. City of Berkeley*, 129 P.3d 394, 400 (Cal. 2006) (holding that the City of Berkeley was entitled to deny a subsidy to the Sea Scouts after they refused to comply with Berkeley's non-discrimination ordinance).

discriminatory conduct and ensure that public funds are not used to perpetuate barriers to full participation in civic life.

C. The Denial Of Funding And Recognition In This Case Was Justified By The Government's Compelling Interest In Not Subsidizing Student Groups That Discriminate On The Basis Of Religion And Sexual Orientation.

The Christian Legal Society at Hastings exists to promote certain religious values. Students at Hastings cannot join CLS unless they endorse those religious values. Likewise, gay and lesbian students at Hastings cannot join CLS unless they endorse the view that homosexuality is sin. CLS is entitled to adopt whatever membership rules it chooses. But having adopted membership rules that exclude fellow students based on religion and sexual orientation, CLS is not entitled to university funding or official recognition in the face of Hastings's determination that public support of such discrimination is damaging to all its students.

As reported by the United States Commission on Civil Rights, the pursuit of religious tolerance has been a long-fought battle: "Discrimination based on religious belief or practice, although more subtle than in the past, continues in housing, employment, and memberships in private clubs . . . ." U.S. Comm'n on Civil Rights, *Religion in the Constitution:*

A Delicate Balance 17 (1983). Consistent with these findings, it is well-established that the government has a compelling interest in prohibiting discrimination based on religion. *See, e.g., Jews for Jesus, Inc. v. Jewish Cmty. Relations Council, Inc.*, 968 F.2d 286, 295 (2d Cir. 1992) ("New York has the constitutional authority to prohibit, and a substantial, indeed compelling, interest in prohibiting . . . religious discrimination in obtaining public accommodations."); *Meltebeke v. Bureau of Labor & Indus.*, 120 Or. App. 273, 279 (Or. Ct. App. 1993) ("The state has an overriding interest in preventing religious discrimination."); *Koire v. Metro Car Wash*, 707 P.2d 195, 198 n.8 (Cal. 1985) (approving the appellate court's determination that the government has a "compelling interest in eradicating discrimination in all forms, including discrimination based on religious creed") (internal quotations omitted).

Similarly, the gay and lesbian community has faced a long history of discrimination. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State . . . [it] is an invitation to subject homosexual persons to discrimination."); *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) ("[Colorado's Amendment 2] raise[s] the inevitable inference that . . . [it was] born of animosity . . . . We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."); *Tanner v. Or. Health Sci.*

Univ., 971 P.2d 435, 447 (Or. Ct. App. 1998) ("[C]ertainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice."). The government's compelling interests in abolishing sexual orientation discrimination include "the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her potential to contribute to and benefit from society, and equal protection of the life, liberty and property that the Founding Fathers guaranteed to us all." *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 37 (D.C. 1987). Thus, as this Court has observed, regulations banning sexual orientation discrimination "are well within the State's usual power to enact . . . ." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 572 (1995); *see also Presbytery of New Jersey v. Florio*, 902 F. Supp. 492, 521 (D.N.J. 1995) (finding state interest in eliminating discrimination on the basis of sexual orientation, was "not only substantial but also [could] be characterized as compelling").

In light of the nation's unfortunate history of religious and sexual orientation-based discrimination, the government's interest in ensuring that when it uses its resources, it does so in a way that does not perpetuate such discrimination, is even stronger than its interest in eradicating such discrimination by private actors.

Finally, it is no answer to suggest, as CLS's *amici* do, that the government has a less compelling interest in refusing to subsidize religious and sexual-orientation based discrimination than it does other forms of invidious discrimination. It is well-settled that the government can have a "compelling interest" in eradicating discrimination based on a particular characteristic even if the government's own discrimination based on that characteristic has not been held to trigger strict scrutiny under the U.S. Constitution. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (holding that Minnesota's interest in preventing sex-based discrimination is "compelling" even though sex-based classifications are not subject to strict scrutiny); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990) (characterizing the government's interest in eradicating sex discrimination as an interest of the "highest order"); *Department of Fair Employment & Hous. v. Superior Ct.*, 121 Cal. Rptr. 2d 615, 620 (Cal. Ct. App. 2002) (eliminating marital status discrimination serves a compelling government interest). *Cf. also Romer*, 517 U.S. at 628-29 (noting that because of the limits of the common law rules protecting access to public accommodations, states have chosen to extend non-discrimination protections to enumerated groups that have not "so far been given the protection of heightened equal protection scrutiny under [this Court's] cases").

II. PETITIONER'S CLAIM TO A RELIGIOUS EXEMPTION FROM A NEUTRAL NON-DISCRIMINATION RULE INVOLVING GOVERNMENT FUNDING AND OFFICIAL RECOGNITION HAS POTENTIALLY FAR-REACHING CONSEQUENCES.

As noted earlier, the argument advanced by CLS in this case has no obvious limiting principle. The proposition that government must provide funding to groups that discriminate – so long as the discrimination is rooted in religious belief – reaches far beyond the facts of this case. In the past, religious beliefs have supported differential treatment on the basis of race,[10] gender,[11] disability,[12] and national origin,[13] in addition to sexual orientation and gender identity. While some of these beliefs may no longer be commonly held, there is no doubt that these beliefs were once as sincerely held as those that CLS holds today.

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[10] For example, racial segregation was long justified by religious convictions. *See, e.g., State v. Gibson*, 36 Ind. 389 (Ind. 1871) (holding that segregation laws derive not from "'prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts'") (quoting *West Chester & P.R. Co. v. Miles*, 55 Pa. 209, 214 (Pa. 1867)); *Loving v. Virginia*, 388 U.S. 1, 3 (1967) ("Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for

such marriages. The fact that he separated the races shows that he did not intend for the races to mix.'") (quoting trial court opinion). Indeed, "Christianity, Islam, and Judaism relied on the Old Testament for the justification of slavery." Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices That Discriminate Against Women*, 12 Colum. J. Gender & L. 154 (2003); *see also* Forrest G. Wood, *The Arrogance of Faith* 43 (1990) ("[I]n the second quarter of the nineteenth century . . . southern whites, largely in response to the attacks by abolitionists, began to invoke the scriptures in a *systematic* defense of slavery."); David Brion Davis, *Slavery and Human Progress* 86 (1984) (citing Biblical justifications for slavery). Religion was also used to negate American Indians' claims to their land, as some Europeans believed that "the absence of Christianity meant there was no legitimate recognition of [their] jurisdiction." Wood, *The Arrogance of Faith* 33.

[11] *See, e.g.*, *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 132 (1872) (quoting the state supreme court decision upholding the exclusion of women from practicing law because "'God designed the sexes to occupy different spheres of action, and . . . it belonged to men to make, apply, and execute the laws'"); Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter*, 35 Colum. J. Transnat'l L. 271, 273 (1997) (describing ways in which various world "[r]eligions have traditionally promoted, or even required, differentiated roles for women and men").

[12] *See, e.g.*, K. Walter Hickel, *Medicine, Bureaucracy, and Social Welfare: The Politics of Disability Compensation for American Veterans of World War I*, in *The New Disability History* 236, 241 (Paul K. Longmore & Lauri Umansky eds., 2001) ("Until the late nineteenth century, disability and its economic effects of unemployment, poverty, and dependence were often regarded as a preordained fate, a divine stigma incurred at birth, or a

For example, religious beliefs about the appropriate roles of men and women have at times conflicted with laws prohibiting sex discrimination. In resolving these conflicts, courts generally have held that religious beliefs may not override the government interest in ensuring equal treatment of men and women. *See, e.g., Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990) (holding that a religious school that gave extra payments to married male teachers, but not married women, based on the religious belief that men should be "heads of households" could be held liable under equal pay laws); *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (holding that a religious school that gave male employees family health benefits but denied such benefits to similarly situated women because of the sincerely held belief that men are the "heads of households" violated Title VII); *E.E.O.C. v. Tree of Life Christian Schs.*, 751 F. Supp. 700 (S.D. Ohio 1990) (holding that a private

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result of individual moral flaws and self-destructive habits such as criminality, alcoholism, and sexual promiscuity."); Michele Goodwin, *The Black Woman in the Attic: Law, Metaphor and Madness in Jane Eyre*, 30 Rutgers L. J. 597, 649 (1999) (noting that "the earliest misdiagnoses of mental illness were explained as demonic possessions").

[13] *See, e.g.*, John Higham, *Strangers in the Land: Patterns of American Nativism 1860-1925*, 6 (2d ed. 1975) (Protestant "Nativists, charged with the Protestant evangelical fervor of the day, considered the immigrants minions of the Roman despot, dispatched here to subvert American institutions.").

school could not pay women less than men to reflect their religious belief that men and women occupy different family roles); *Bollenbach v. Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist.*, 659 F. Supp. 1450 (S.D.N.Y. 1987) (public school district that granted male bus drivers with less seniority preference over female bus drivers on certain routes because of the religious belief held by Hasidic families within the district that boys should not be in contact with women violated Title VII). [14]

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[14] Contrary to CLS's claims, the fact that Title VII of the Civil Rights Act of 1964 and other employment discrimination statutes provide certain exemptions for religious institutions to permit some employment discrimination on the basis of religion does not suggest that the government is constitutionally required to subsidize and give its official imprimatur to an organization that discriminates on the basis of sexual orientation or religion. Instead, those exemptions illustrate a policy determination that sectarian organizations should not be subjected to civil penalties when they, for example, demand that those employed to be religious leaders be members of their faith. *See Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337-38 (1987). There is a world of difference between forcing a religious institution to hire someone who does not share that institution's beliefs, and denying public funding and official student organization status to a religious student group club that wishes to discriminate on the basis of identity. As discussed above, Hastings has not forbidden the students of CLS from gathering to discuss their faith or from excluding anyone they wish. Instead, CLS claims an entitlement to all the benefits of official recognition, including government subsidy.

Similarly, during the early years of the HIV epidemic, religious beliefs led many to view HIV and AIDS as divine punishment.[15] As in other contexts, however, courts generally rejected attempts to justify disability discrimination against people with HIV based on religious convictions. *See, e.g., Stepp v. Review Bd. of Ind. Employment Sec. Div.*, 521 N.E.2d 350, 352 (Ind. Ct. App. 1988) (holding that a lab worker who refused to perform analysis of specimens that contained HIV warnings because of her religious belief that "'AIDS is God's plague on man and performing the tests would go against God's will'" could be properly dismissed from her job).

A doctor in Kentucky recently argued that, because of his religious beliefs, he could not be required to work with anyone who was gay or lesbian, notwithstanding a city ordinance that prohibited employment discrimination on the basis of sexual orientation. The court correctly held that his beliefs did not entitle him to violate the nondiscrimination law. *Hyman v. City of Louisville*, 132 F. Supp. 2d 528 (W.D. Ky. 2001) (holding that application of the ordinance did not violate the

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[15] *See, e.g.*, Miriam G. Waltzer, *Acquired Immune Deficiency Syndrome and Infection with Human Immunodeficiency Virus*, 36 Loy. L. Rev. 55, 57 & n.7 (1990) (citing religious leaders who described AIDS as God's retribution for sinful behavior); Raymond C. O'Brien, *Discrimination: The Difference with AIDS*, 6 J. Contemp. Health L. & Pol'y 93, 94 n.4 (1990) (43 percent of respondents to a 1987 Gallup poll indicated that AIDS is "divine punishment for moral decline").

doctor's freedom of association, expression or religion), *vacated on other grounds*, 53 Fed. Appx. 740 (6th Cir. 2002).

And, just forty years ago, a restaurant owner in South Carolina argued that his religious beliefs conflicted with the civil rights law that required him to serve African-American customers in his restaurant. *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944-45 (D. S.C. 1966), *aff'd in part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968). While the court and others considering similar defenses held that religious objections to desegregation were not sufficient to allow discrimination, those beliefs nonetheless were sincerely held by many. *See, e.g., id.* ("This court refuses to lend credence or support to [the plaintiff's] position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs."); *Bob Jones Univ. v. United States*, 468 F. Supp. 890, 897 (D. S.C. 1978) ("The religious belief involved is plaintiff's conviction that the Bible forbids interracial dating and marriage and that God has cursed any acts in furtherance thereof."), *rev'd in part*, 461 U.S. 574 (1983) (holding that a religious school that excluded unmarried black students because of religious beliefs about interracial relationships was appropriately denied a federal tax benefit offered to charitable organizations).

CLS's position that religiously motivated discrimination is somehow different than other forms of invidious discrimination, Pet. Br. at 43, fundamentally misinterprets the purpose of non-discrimination laws, which are designed to ensure that all people have an opportunity for inclusion in civic life *regardless* of the reasons that some might have for wanting to exclude them. Just as a female employee is harmed whether she is paid less than her male counterparts because of either a religious or a secular belief that women are inferior to men, gay and lesbian students interested in participating in a university-funded activity are harmed whether they are excluded because others believe being gay is religiously immoral, or because of a secular belief that gay people are inferior.

In assessing the strength of Hastings's interest in denying recognition and funding to those student organizations that exclude other students based on their sexual orientation and religion, the proper focus is therefore on the consequences of differential treatment, not the reasons for the discrimination. In light of the extensive evidence supporting its determination that exclusion from student activities causes significant harms, Hastings's determination that it will not fund or grant official recognition to those student organizations that do not comply with the non-discrimination mandate serves a substantial and compelling interest.

Contrary to CLS's suggestion that a victory for Hastings in this case would "mean, in essence, that when sexual orientation is added to the list of forbidden grounds under nondiscrimination laws, religious and other groups that adhere to traditional moral views could be driven from the public square in the name of enforcing nondiscrimination," Pet. Br. at 58, a victory for CLS could well imperil the government's ability to enforce non-discrimination mandates not just with respect to sexual orientation, but in any clash between religious beliefs and civil rights. Just as in the commercial cases summarized above, where religious or associational beliefs were deemed insufficient to outweigh the government's compelling interest in eradicating the harmful consequences of private discrimination, so too the government has never before been required to subsidize private discrimination simply because such exclusion is consistent with the group's religious or philosophical ideology.

Accordingly, a ruling for CLS would not only upset long-settled law recognizing the government's interest – indeed, at times, its obligation – not to support private discrimination with public funds, but accepting the argument advanced by CLS could considerably weaken our civil rights protections.

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, PETITIONER,

v.

LEO P. MARTINEZ, ET AL., RESPONDENTS.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION AND THIRTEEN OTHER HIGHER EDUCATION ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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American Association of Community Colleges

American Association of State Colleges and Universities

American College Personnel Association

American Dental Education Association

American Indian Higher Education Consortium

Association of American Universities

Association of Jesuit Colleges and Universities

Association of Public and Land-grant Universities

Association of Research Libraries

Council of Graduate Schools

Hispanic Association of Colleges and Universities

NASPA—Student Affairs Administrators in Higher Education

National Association for College Admission Counseling

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STATEMENT OF INTEREST[1]

The American Council on Education, The American Association of Community Colleges, The American Association of State Colleges and Universities, The American College Personnel Association, The American Dental Education Association, The American Indian Higher Education Consortium, The Association of American Universities, The Association of Jesuit Colleges and Universities, The Association of Public and Land-grant Universities, The Association of Research Libraries, The Council of Graduate Schools, The Hispanic Association of Colleges and Universities, NASPA—Student Affairs Administrators in Higher Education, and The National Association for College Admission Counseling respectfully submit this brief as *amici curiae* in support of respondents.

Founded in 1918, The American Council on Education (ACE) is the nation's unifying voice for higher education. Its more than 1,800 members include a substantial majority of colleges and universities in the United States. ACE represents all sectors of American higher education—public and private, large and small, denominational and nondenominational. It serves as a consensus leader on key issues and seeks to influence public policy through advocacy, research, and program initiatives.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici* certify that no part of this brief was authored by counsel for any party, and no person or entity other than *amici* or their members made a monetary contribution to the preparation or submission of the brief. The brief is filed with the consent of the parties, and copies of the consent letters have been filed with the Clerk.

The American Association of Community Colleges (AACC) is the primary advocacy organization for the nation's community colleges at the national level. The AACC works closely with directors of state offices to inform and affect state policy. Founded in 1920, the AACC represents nearly 1,200 two-year, associate degree-granting institutions and more than 11 million students.

The American Association of State Colleges and Universities (AASCU) represents more than 400 public colleges, universities, and systems of higher education throughout the United States and its territories. AASCU schools enroll more than three million students, which is roughly 55 percent of the enrollment at all public four-year institutions.

The American College Personnel Association (ACPA) is the leading comprehensive student affairs association that advances student affairs and engages students for a lifetime of learning and discovery. Founded in 1924, ACPA has nearly 8,500 members representing 1,500 private and public institutions from across the United States and around the world. Members include organizations and companies that are engaged in the campus marketplace. Members also include graduate and undergraduate students enrolled in student affairs/higher education administration programs, faculty, and student affairs professionals, from entry level to senior student affairs officers.

The American Dental Education Association (ADEA) is the voice of dental education. Its members include all U.S. dental institutions and many allied and postdoctoral dental education programs, corporations, faculty, and students. The mission of

ADEA is to lead the dental education community to address contemporary issues influencing education, research, and the delivery of oral health care for the health of the public. ADEA's activities encompass a wide range of research, advocacy, faculty development, meetings, and communications, including the Journal of Dental Education.

The American Indian Higher Education Consortium (AIHEC), established in 1972, consists of 36 Tribal Colleges and Universities in 14 states and one in Canada. These tribally-chartered institutions were established to addressed the unmet education needs of American Indians, many of whom live on rural Indian reservations. AIHEC provides leadership and influences public policy on American Indian higher education issues through advocacy, research, and program initiatives. AIHEC also promotes and strengthens Native American languages, cultures, communities, and tribal nations.

The Association of American Universities (AAU) is an organization of leading research universities devoted to maintaining a strong system of academic research and education. It consists of 60 U.S. universities and two Canadian universities, divided about evenly between public and private. AAU member universities are on the leading edge of innovation, scholarship, and problem-solving, contributing significant value to the nation's economy, security, and culture.

The Association of Jesuit Colleges and Universities (AJCU) is a voluntary federation of the 28 Jesuit institutions of higher education in the United States. Formed in 1970, AJCU seeks to improve the educational effectiveness of the institutions; articulate the

mission and characteristics of Jesuit higher education and implement them in policy and practice; collaborate with national and international organizations; provide an educational forum for the exchange of experiences; and help members participate in federal and other programs.

The Association of Public and Land-grant Universities (A·P·L·U) is an association of 186 public research universities and 27 state university systems, including 74 land-grant institutions. Founded in 1887, and formerly known as the National Association of State Universities and Land-Grant Colleges, A·P·L·U member campuses enroll more than 3.5 million undergraduate and 1.1 million graduate students, employ more than 645,000 faculty members, and conduct nearly two-thirds of all academic research, totaling more than $34 billion annually. As the nation's oldest higher education association, A·P·L·U is dedicated to excellence in learning, discovery and engagement.

The Association of Research Libraries (ARL) is a nonprofit organization of 124 research libraries in North America. Its mission is to influence the changing environment of scholarly communication and the public policies that affect research libraries and the diverse communities they serve.

The Council of Graduate Schools (CGS) is the only national organization in the United States dedicated solely to the advancement of graduate education and research. CGS works to promote an environment that cultivates rigorous scholarship. CGS members include more than 500 universities in the United States and Canada and 16 universities outside North America. Collectively, CGS institutions annually

award more than 95 percent of all U.S. doctorates and over 78 percent of all U.S. master's degrees.

The Hispanic Association of Colleges and Universities (HACU), founded in 1986, represents more than 400 colleges and universities committed to Hispanic higher education success in the U.S. and Puerto Rico. Hispanics are the nation's youngest and fastest-growing population. HACU is the only national educational association that represents Hispanic-Serving Institutions (HSIs). Today HSIs represent less than 8 percent of all higher education institutions nationwide, but enroll more than fifty percent of all Hispanics in postsecondary education.

NASPA—Student Affairs Administrators in Higher Education (NASPA) is the leading voice for student affairs administration, policy, and practice. With more than 11,000 members at 1,400 campuses in 29 countries, NASPA is the foremost professional association for student affairs administrators, faculty, and graduate and undergraduate students. NASPA members are committed to serving college students by embracing the core values of diversity, learning, integrity, collaboration, access, service, fellowship, and the spirit of inquiry.

The National Association for College Admission Counseling (NACAC) is an Arlington, Virginia-based education association of more than 11,000 secondary school counselors, independent counselors, college admission and financial aid officers, enrollment managers, and organizations that work with students as they make the transition from high school to postsecondary education. The association, founded in 1937, is committed to maintaining high standards that foster ethical and social responsibility among those involved in the transition process.

Amici have a strong interest in this case—and in affirmance of the decision below—because petitioner's proposed rule would strip our member institutions of the discretion to make important academic judgments. Registered student organization (RSO) programs exist to enhance the educational process. In deciding how best to maximize the educational value of RSOs, some institutions have judged that every RSO should be open to all students, so that students may experience the broadest diversity of ideas. Others have permitted certain RSOs—such as those formed around a particular religious faith—to limit membership to students who share the views of the organization. Still others have taken a middle ground by requiring open-access as to general membership positions but permitting an RSO to restrict its leadership positions to students who share the views of the organization. But no matter which approach a school chooses, it does so quite deliberately, with the conviction that its choice best suits its educational mission. The First Amendment provides colleges and universities the discretion to make those sorts of academic judgments.

SUMMARY OF ARGUMENT

A college or university may condition a student group's voluntary decision to apply for and receive RSO status, and the benefits that come with that status, on the group's agreement to comply with nondiscrimination and/or open-access policies because such policies are reasonable, generally applicable, and viewpoint neutral regulations of on-campus conduct that further a school's educational mission.

A reasonableness test applies to nondiscrimination

and open-access policies, whether the Court views such policies under the rubric of *Healy* and *Widmar*, as "reasonable rule[s] governing conduct"; or under the rubric of *O'Brien*, as viewpoint-neutral rules with an incidental effect on speech; or under *FAIR*, as conditional subsidies. And such policies—which are in place at colleges and universities nationwide—are reasonable. Studies demonstrate that students learn better and faster, and mature more rapidly, when they participate in extracurricular student groups and are exposed to new and different views. In light of that body of knowledge, an institution is entitled to make the educational judgment that its students are best served by policies prohibiting discrimination in membership by RSOs and making such student groups open to all comers.

The judgment of a college or university that a non-discrimination and/or open-access policy will further the educational mission of its RSO program is a judgment protected by an institution's First Amendment right of academic freedom. While the Christian Legal Society (CLS) makes much of its own First Amendment associational rights, it gives short shrift to the concomitant academic-freedom rights enjoyed by colleges and universities to decide how they can best educate their students. That latter right requires that federal courts exercise great caution before invalidating an institution's educational judgment. And in this circumstance, it requires the conclusion that policies such as those in place at Hastings College of the Law (Hastings)—eminently reasonable even absent discretionary review—comport with the First Amendment.

ARGUMENT

I. THE FIRST AMENDMENT GIVES COLLEGES AND UNIVERSITIES LEEWAY IN STRUCTURING THEIR REGISTERED STUDENT ORGANIZATION PROGRAMS.

Colleges and universities, including *amici*'s member institutions, have adopted varying approaches when it comes to designing programs for the official recognition or registration of student groups. Many institutions have programs, similar to the Hastings program, that require RSOs to comply with nondiscrimination and/or open-access policies. Others exempt religious RSOs from prohibitions against discrimination on the basis of religion when it comes to membership. Still others have adopted different approaches. A college or university is free to choose how it will structure its RSO program—or to have no program at all. The First Amendment does not require one approach. On the contrary, this Court has made clear that the First Amendment provides colleges and universities with the leeway to structure programs to suit their needs and educational mission.

1. A primary mission of colleges and universities is the education of their students. Because that education occurs not only in the classroom but in extracurricular settings as well, many colleges and universities encourage the formation of recognized student organizations. *See, e.g.*, *Widmar* v. *Vincent*, 454 U.S. 263, 265 (1981) ("It is the stated policy of the [university] to encourage the activities of student organizations.") (footnote omitted). Indeed, this Court has recognized that a university "may determine that its mission is well served if students have the means to

engage in dynamic discussion of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall." *Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 233 (2000); *see also Board of Ed. of Indep. Sch. Dist. No. 92 of Pottawatomie County* v. *Earls*, 536 U.S. 822, 831 n.4 (2002) (participation in extracurricular activities, including student organizations, "is a significant contributor to the breadth and quality of the educational experience"); *Beta Upsilon Chi Upsilon Chapter* v. *Machen*, 586 F.3d 908, 911-912 (11th Cir. 2009) (quoting the University of Florida's student handbook: "[s]tudent organizations are an essential part of the University of Florida community and are an integral part of the total academic program. Such organizations foster valuable experiences for students that lead to significant learning and development and create a sense of belonging.").

2. Many colleges and universities, like Hastings, require their student organizations to comply with nondiscrimination and/or open-access policies.[2] Indiana University's RSO policy, for example, provides that "[p]articipation in the proposed organization and prerogatives of membership must be without regard to arbitrary consideration of such characteristics as age, color, disability, ethnicity, gender, marital status, national origin, race, religion, sexual

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[2] The characterizations we offer of specific colleges' and universities' RSO policies constitute solely *amici*'s interpretations. The institutions in question have not reviewed or endorsed *amici*'s characterizations. Nor have we inquired into how the cited institutions apply their policies on campus.

orientation, or veteran status."[3] Likewise, San Jose State University's policy provides that "[m]embership in the [student] organization will not be denied to anyone on the basis of" the same list of characteristics, including "religion."[4] Additional examples are too numerous to list, but they include both colleges and universities, and public and private institutions, nationwide.

Other institutions, meanwhile, have chosen—either of their own accord or in the face of objections from affected groups—to offer religious and other exemptions from their policies. At Florida State University, for example, the RSO nondiscrimination policy contains nearly identical language to those quoted above. However, the Student Organization Handbook elsewhere explains: "In cases where the nondiscrimination policy conflicts with the organization's religious beliefs, tenets, or doctrines * * * the organization may request in writing an exemption from the part of the policy that is in conflict."[5] Similarly, at Wright State University, the Student Handbook explains:

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[3] Indiana Univ., *Registered Student Organization Policies available at* http://studentlink.iupui.edu/Community?action=downloadDocument&docID=1805&hash=(last checked Mar. 5, 2010).

[4] San Jose State Univ., *University Policies & Expectations for Student Organizations*, http://www.sjsu.edu/getinvolved/soal/org_recognition/starting/University_Policies_and_Procedures_for_Student_Organizations.pdf (last checked Mar. 5, 2010).

[5] Florida State Univ., *Student Organization Handbook* 11, 21 (2009), *available online at* http://union.fsu.edu/saac/sos/wp-content/themes/student_organizations/pdfs/RSO_Handbook_v9.pdf (last checked Mar. 5, 2010).

> An organization that excludes persons from membership on the basis of criteria relating to their [list of characteristics, including religion] is considered to be in conflict with university policy * * * . However, it is understood that some organizations may be created for the purpose of deepening the religious faith of students within the context of a denominational or interdenominational grouping or for the purpose of perpetuating a national cultural tradition. These purposes are consistent with university policy * * * .[6]

See also Alpha Iota Omega Christian Fraternity v. *Moeser*, No. 04-765, 2006 WL 1286186, at *3 n.8 (M.D.N.C. May 4, 2006) (quoting the policy of the University of North Carolina at Chapel Hill, which provides in part that "[s]tudent organizations that select their members on the basis of commitment to a set of beliefs (*e.g.*, religious or political beliefs) may limit membership and participation in the organization to students who, upon individual inquiry, affirm that they support the organization's goals and agree with its beliefs").

An institution may also take an intermediate approach and prohibit discrimination by an RSO with respect to its general members but allow an RSO to require that its leaders share the views of the organization. *See, e.g.*, *Beta Upsilon Chi*, 587 F.3d at 912 (noting that, under the University of Florida's nondiscrimination policy, "when an RSO selects its leaders it may consider whether the views of an

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[6] Wright State Univ., *2009-2010 Student Handbook* 116-17, *available at* http://www.wright.edu/students/handbook/documents/Handbook2009-20109.23.09.pdf (last checked Mar. 5, 2010).

officer candidate reflect those of the organization.").[7]

3. That different institutions have chosen different approaches to RSO membership simply reflects the fact that each makes its own educational judgments. There is no reason to foreclose such judgments by forcing colleges and universities nationwide to adopt a one-size-fits-all approach to RSO membership. *See Board of Ed. of Westside Cmty. Schools (Dist. 66)* v. *Mergens*, 496 U.S. 226, 240 (1990) (schools retain "a significant measure of authority over the type of officially recognized activities in which their students participate"). The question, instead, should be whether any particular institution's educational judgments are reasonable.

That is so not just because of the tests this Court has articulated, *see* Part II, *infra*, but because the First Amendment provides colleges and universities breathing room for their educational judgments. "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.); *see also Southworth*, 529 U.S. at 237 n.3 (Souter, J., concurring in the judgment) ("We have long recognized the constitutional importance of academic freedom."); *Healy*

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[7] The University of Florida's policy was subsequently revised. It now states: "A student organization whose primary purpose is religious will not be denied registration as a Registered Student Organization on the ground that it limits membership or leadership positions to students who share the religious beliefs of the organization. The University has determined that this accommodation of religious belief does not violate its nondiscrimination policy." *Beta Upsilon Chi*, 586 F.3d at 915 (quoting the revised policy).

v. *James*, 408 U.S. 169, 180-181 (1972); *Keyishian* v. *Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

Academic freedom means "[t]he freedom of a university to make its own judgments as to education." *Bakke*, 438 U.S. at 312. *See Widmar*, 454 U.S. at 276 (university has a right to make "academic judgments" about how it can best educate its students and allocate scarce resources). It includes "the idea that universities and schools should have the freedom to make decisions about how and what to teach." *Southworth*, 529 U.S. at 237 (Souter, J., concurring in the judgment). "Academic freedom thrives * * * on autonomous decisionmaking by the academy itself." *Regents of Univ. of Mich.* v. *Ewing*, 474 U.S. 214, 226 n.12 (1985). This Court has referred to its "responsibility to safeguard th[e] academic freedom" of educational institutions. *Id.* at 226.

4. A policy that all students should have access to all RSOs—which is the policy of Hastings and many other institutions—is a "decision[ ] about how and what to teach." *Southworth*, 529 U.S. at 237 (Souter, J., concurring in the judgment). Moreover, the decision is an eminently reasonable one: The conclusions that student activities enhance learning, and that exposure to varied viewpoints is crucial for students' development, are supported by decades of empirical study.

As one recent academic paper observed: "[E]xtracurricular activities are considered to be valuable student experiences * * * . [R]esearch provides theoretical and empirical support for the argument that extracurricular engagement positively affects even more narrowly defined academic goals and

formal standards of educational achievement." M. Klimmek & A. Richter, *Extracurricular Activities & Academic Performance in Business Education* (Feb. 23, 2007) (citing studies).[8] *Accord* A. Astin, *Student Involvement: A Developmental Theory for Higher Education*, p. 518 (J. of College Student Development, Sept./Oct. 1999) ("[S]tudents who * * * participate in extracurricular activities of almost any type are less likely to drop out"). And exposure to new and different views is a key part of the benefit: "[A]pproaches [encouraging involvement in student activities] are linked with * * * outcomes such as promoting openness to diversity, social tolerance, and personal and interpersonal development." C. Zhao & G. Kuh, *Adding Value: Learning Communities and Student Engagement*, p. 119 (Research in Higher Education 2004).[9]

The understanding that nondiscrimination and open-access policies effectively foster learning undergirds such policies nationwide. At Grand Valley State University, for example, the RSO Handbook states that the mission of the RSO program is "[t]o enhance student development through involvement

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[8] Accepted for presentation at the 9th Workshop der Kommission Hochschulmanagement des Verbandes der Hochschullehrer für Betriebswirtschaft, University of Munster, Germany. Abstract *available online* at http://www.wiwi.uni-muenster.de/27/wk-hsm//Tagungsprogramm%202007/Klimmek%20Richter%20Abstract.pdf (last checked Mar. 4, 2010).

[9] Abstract *available online* at http://nsse.iub.edu/pdf/research_papers/Zhao_Kuh_Learning_Communities.pdf (last checked Mar. 4, 2010).

in diverse experiences."[10] The University of the Pacific, McGeorge School of Law's policy likewise states that the institution is "committed to maintaining an inclusive environment in which all people are respected and diversity is celebrated in all of its forms," and that that commitment "is an essential part of providing a high quality education that prepares graduates for the administration of justice in a multicultural world and for professional participation in a legal community that represents the interests of a diverse society."[11] Additional examples abound. *See, e.g.*, Kent State Univ., Student Organization Manual, *Policies and Procedures* (stating that the mission of the school's Center for Student Involvement is "to foster student growth and development through leadership, civic, cultural, and involvement opportunities," and that it does so through "mutual respect, which encompasses civility, and the acceptance of all individuals, inclusive of all beliefs, cultures, and differences").[12]

In short, student organizations are not the only ones with First Amendment rights at stake in this case. Hastings and many other institutions have made an academic judgment that membership in RSOs is an important opportunity for learning and

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[10] Grand Valley State Univ., RSO Handbook, *Mission, Values, & Beliefs*, *available at* http://www.gvsu.edu/rsohandbook/mission-values-beliefs-61.htm (last checked Mar. 4, 2010).

[11] McGeorge School of Law, *Statement of Diversity & Inclusion*, *available at* http://www.mcgeorge.edu/About_McGeorge/Diversity_and_Inclusion/Statement_of_Diversity_and_Inclusion.htm (last checked Mar. 11, 2010).

[12] *Available at* http://dept.kent.edu/csi/StudentOrganizations/forms/student_org_manual_06.pdf (last checked Mar. 4, 2010).

that this opportunity—created and funded with that specific purpose in mind—should be available to all. "Judgments of this kind should be made by academicians, not by federal judges." *Widmar*, 454 U.S. at 279 (Stevens, J., concurring in the judgment).

II. NONDISCRIMINATION AND OPEN-ACCESS POLICIES DO NOT VIOLATE THE FIRST AMENDMENT.

A. Such Policies Pass Muster Under *Healy* and *Widmar* as Reasonable Regulations of Conduct on Campus That Further a School's Educational Mission.

This Court has frequently explained that "First Amendment rights must be analyzed in light of the special characteristics of the school environment." *Widmar*, 454 U.S. at 268 n.5 (internal quotation marks omitted). *See also, e.g.*, *Morse* v. *Frederick*, 551 U.S. 393, 397, 403, 405, 406 n.2 (2007); *Healy*, 408 U.S. at 180, 189; *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). This principle applies to "all First Amendment rights accorded to students." *Board of Ed., Island Trees Union Free Sch. Dist. No. 26* v. *Pico*, 457 U.S. 853, 868 (1982) (plurality).

Healy and *Widmar* foreclose CLS's First Amendment claims because those cases hold that a student group seeking official recognition enjoys no constitutional right to violate "reasonable school rules governing conduct." *Healy*, 408 U.S. at 191. Despite CLS's claims to the contrary, nondiscrimination and open-access policies are "school rules governing conduct," and they are reasonable.

1. In *Healy*, the Supreme Court explained that, given the special characteristics of the university environment, "associational activities need not be tolerated where they infringe reasonable campus rules." *Id.* at 189. Student groups are free to speak out regarding such rules; they may express their views on "any or all campus regulations. They may not, however, undertake to flout these rules." *Id.* at 192. "A college administration may impose a requirement * * * that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law." *Id.* at 193. That requirement, explained the Court, raises no First Amendment issues:

> Such a requirement does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition.

Id. In short, *Healy* holds that a university "may have, among its requirements for recognition, a rule that prospective groups affirm that they intend to comply with reasonable campus regulations." *Id.*[13] *See also id.* at 195 (Burger, C.J., concurring)

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[13] Notably, the student group in *Healy* "filed an application in conformity with the requirements" for recognition. 408 U.S. at 184. One of the requirements was that recognized groups "may not discriminate on the basis of race, religion or nationality." *Id.* at 183 n.11. CLS refuses to abide by a similar requirement.

("[S]tudent organizations seeking the privilege of official campus recognition must be willing to abide by valid rules of the institution applicable to all such organizations."); *Papish* v. *Board of Curators of Univ. of Mo.*, 410 U.S. 667, 669-670 (1973) (*Healy* "recogniz[ed] a state university's undoubted prerogative to enforce reasonable rules governing student conduct").

The *Healy* doctrine was reaffirmed in *Widmar*, a case involving the rights of registered student groups at a public university. This Court stated: "we affirm the continuing validity of cases, *e.g.*, *Healy* v. *James*, 408 U.S., at 188-189, that recognize a university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education." *Widmar*, 454 U.S. at 276-277. The *Widmar* Court recognized that "[a] university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Id.* at 268 n.5. *See also Board of Trustees of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 488 (1989) (recognizing the right of students to engage in on-campus "expressive activities that are not inconsistent with the educational mission of the university").[14]

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[14] The rule that a college or university may reasonably regulate student conduct to further its educational mission is not inconsistent with Justice Alito's separate opinion in *Morse* v. *Frederick*, 551 U.S. at 422 (Alito, J., joined by Kennedy, J., concurring). There, Justice Alito rejected the notion that "the First Amendment permits public school officials to censor any student speech that interferes with the school's 'educational mission.'" *Id.* at 423. This case does not involve any censorship of student speech. CLS is free to say what it wants; it may

2. Under *Healy* and *Widmar*, a college or university may require a student group seeking RSO status to comply with nondiscrimination and/or open-access policies as a condition of registration because such policies are reasonable, generally applicable, and viewpoint neutral regulations of student conduct that further a school's educational mission.

First, nondiscrimination and open-access policies regulate conduct rather than speech. *See Rumsfeld* v. *Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 60 (2006) (*FAIR*) (law requiring federally funded higher education institutions to give equal access to military recruiters "regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.") (emphases in original). Such policies regulate the practice of selecting or excluding members on prohibited grounds—which is conduct. *See id.* at 62 (explaining that a ban on discrimination in hiring based on race is properly viewed as regulating an employer's conduct, not its speech). Nondiscrimination and open-access policies "neither limit[ ] what [RSOs] may say nor require[ ] them to say anything. [RSOs] remain free under [such policies] to express whatever views they may have." *Id.* at 60. Such policies would require CLS (if it chose to become registered) "to treat [non-Christian] students like [Christian students], but that regulation of conduct does not violate the First Amendment." *Id.* at 70. As the Court observed in *Hurley* v. *Irish-American Gay*

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express its Christian views whether it chooses to register or remain unregistered. The question here is whether CLS is entitled to RSO status *and* a special exemption from Hastings' nondiscrimination and open-access policies that would allow CLS to discriminate in membership based on religion.

Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995), while discussing a state antidiscrimination law: "this statute * * * does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals * * * on the proscribed grounds." *Id.* at 572.

Second, nondiscrimination and open-access policies are reasonable because they further a school's educational mission. *See* Part I, *supra*. An institution need not register student groups, fund such groups, or make priority use of facilities available to them. Many nonetheless permit and, indeed, encourage the formation of RSOs because student membership in them contributes to the learning process. Nondiscrimination and open-access policies further an institution's educational mission by ensuring that students cannot be denied these opportunities for learning and membership outside of the classroom. These educational judgments are entitled to substantial deference.

3. CLS and its *amici* offer, as one of their central themes, that open-access policies are unwise because such policies "seek[ ] a manufactured 'diversity' of beliefs within a group at the cost of a true diversity of beliefs among groups." Br. of *Amici Curiae* Foundation for Individual Right in Educational *et al.* 13 (emphases in original) ("FIRE Br."); *see* Pet. Br. 50 ("There can be no diversity of viewpoints in a forum if groups are not permitted to form around viewpoints."). This argument relies on spurious factual assumptions. Open-access policies are not about "manufacturing diversity of beliefs"; they are about allowing students who so choose to experience the

activities and beliefs of people different from themselves. Moreover, open-access rules do not bar groups from "form[ing] around viewpoints"—*unless* the groups are subjected to "hostile takeover" by those with opposing views. But on that point the briefs of CLS and its *amici* are long on rhetoric and short on facts. FIRE's brief offers no examples of such hostile takeovers, anywhere in the nation. *See* FIRE Br. 8-10. Also, university student-affairs officials can be counted on to step in if, as a result of such a takeover attempt, like-minded students are unable to form a group of the students' choice. There is no record evidence to suggest, or any reason to believe, that students groups like CLS will be hijacked by students hostile to CLS's viewpoint. *See Boy Scout of Am.* v. *Dale*, 530 U.S. 640, 653 (2000) (an expressive association cannot "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message"); *FAIR*, 547 U.S. at 69 (same); *cf. Roberts* v. *United States Jaycees*, 468 U.S. 609, 627 (1984) (finding "no basis in the record" for the claim that "admission of women as full voting members will impede the organization's ability to * * * disseminate its preferred views").[15]

The more important point, however, is that the argument advanced by CLS and its *amici* would require courts to parse the educational judgments of

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[15] FIRE's assertion that Hastings' policy is *ultra vires* because "public universities may not exclude minority viewpoints," FIRE Br. 39, suffers from the same flaw. No minority viewpoint is "excluded" as a result of Hastings' policy, unless one accepts FIRE's alarmist premise that majority groups will necessarily use the open-access rule to destroy groups with which they disagree.

colleges and universities to promote open access and debate "*within* groups as well as *among* them." Hastings Br. 36 (emphases in original). But those judgments are entitled to great deference. *See Southworth*, 529 U.S. at 235 (recognizing "the discretion universities possess in deciding matters relating to their educational mission"); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1995) (university "must have substantial discretion in determining how to allocate scarce resources to accomplish its educational mission"); *cf. Grutter* v. *Bollinger*, 539 U.S. 306, 328 (2003) ("The Law School's educational judgment that [student body] diversity is essential to its educational mission is one to which we defer."). And even putting that deference to the side, the judgment Hastings has made here is certainly reasonable. CLS and its *amici* are entitled, if they wish, to assume that students will exploit open-access rules to destroy their fellow students' organizations. But experience shows that colleges and universities can expect better of their students, and they are entitled to build those higher expectations into their educational approach.

4. CLS argues that *Healy* and *Widmar* support its position because those cases referred to the nonrecognition of student groups as a "prior restraint." Pet. Br. 17 (quoting *Healy*, 408 U.S. at 180). But CLS's argument misconstrues *Healy* and *Widmar* in two fundamental ways.

First, CLS fails to recognize that the disability imposed on the student groups in *Healy* and *Widmar* was of a different order of magnitude than that present here. The student groups in both of those cases were categorically banned from meeting any-

where on campus. *Widmar*, 454 U.S. at 265; *Healy*, 408 U.S. at 176. In *Healy*, when the student group members tried to meet at the campus coffee shop, they "were disbanded on the President's order." 408 U.S. at 176. Two Deans presented them with a memorandum from the President stating that the meeting "may not take place" on campus because theirs "is not a duly recognized college organization," and the memorandum directed them "to cease and desist from meeting on college property." *Id.* Additionally, the *Healy* group's "members were deprived of the opportunity to place announcements regarding meetings, rallies, or other activities in the student newspaper" and were precluded from using campus bulletin boards. *Id.* In the context of a college campus in 1972, denial of recognition "effectively excluded the [*Healy*] group from campus." Case Comment, *Christian Legal Society* v. *Walker*, 120 HARV. L. REV. 1112, 1117 (2007).

At Hastings, by contrast, non-registered groups like CLS may meet on campus, may use classrooms to conduct their meetings, and are given full access to the school's bulletin boards and chalkboards. *See* Hastings Br. 8. Non-registered groups have similar freedom at other colleges and universities as well. *See, e.g.*, *Beta Upsilon Chi*, 586 F.3d at 912 ("A student group may also choose to forgo the registration process and exist as a non-registered group. While not afforded the full range of benefits of an RSO, a non-registered group may nevertheless use campus facilities, distribute literature on campus, verbally express its views on campus, and recruit new members."); *Christian Legal Society* v. *Eck*, 625 F. Supp. 2d 1026, 1048 (D. Mont. 2009) ("With the exception of SBA funding, CLS-UM enjoys every

other benefit of recognition. CLS-UM is allowed to meet using the law school's facilities and has access to channels of communication with students, including the law school's website and bulletin boards."); *Iota Xi Chapter of Sigma Chi Fraternity* v. *Patterson*, 538 F. Supp. 2d 915, 932 (E.D. Va. 2008) (university's withdrawal of fraternity's official recognition did not deprive fraternity members of their right of expressive association: "Nothing in the University's sanction prevents the Chapter from continuing to exist. It may recruit current George Mason students as members, schedule meetings, and host social events."), *aff'd*, 566 F.3d 138 (4th Cir. 2009). We are not aware of any college or university—and CLS has cited none—that banishes non-recognized student organizations from campus or treats such groups essentially as *personae non gratae*.

Moreover, whether or not it chooses to be an RSO, CLS can reach out to students not only through in-person meetings on campus but also via text messaging, Facebook.com, and other social networking web sites—arguably more important communications media than email for the twenty-something generation. *See* Pew Internet & American Life Project, *Generations Online in 2009* (Jan. 28, 2009)[16] (finding email use declining and use of social networking sites on the rise among "Generation Y"). *See also* Case Comment, 120 HARV. L. REV. at 1118 (observing that today, "in a wired world, lack of access to campus bulletin boards is not anywhere near as paralyzing as it was in the Vietnam War era"). For example, in the *Beta Upsilon Chi* litigation, the record showed

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[16] *Available online at* http://pewresearch.org/pubs/1093/generations-online (last checked Mar. 4, 2010).

that Beta Upsilon Chi—a Christian student group that excluded non-Christians from membership—used Facebook to identify Christian students at the University of Florida and to send targeted recruiting messages directly to those students. *See Beta Upsilon Chi*, 586 F.3d at 914; *Beta Upsilon Chi Upsilon Chapter* v. *Machen*, No. 07-135 (N.D. Fla.) (Doc. 109-3 at pp. 33, 54, 57-59, 103-121) (testimony of Beta Upsilon Chi's vice president and copies of Facebook messages).

These are exactly the sorts of opportunities for mass communication and assembly that the Court thought crucial in *Healy*. The Court there found that "[d]enial of official recognition posed serious problems for the organization's existence and growth" because, among other things, group members were "precluded from using various campus bulletin boards; and—most importantly—nonrecognition barred them from using campus facilities for holding meetings." 408 U.S. at 176. Given that set of facts, the *Healy* Court's comment that "the College's denial of recognition was a form of prior restraint, *denying to petitioners' organization the range of associational activities described above*," *id.* at 184 (emphasis added), is quite inapposite to the case now presented.

Second, CLS's argument from *Healy* and *Widmar* fails to recognize the most important difference between those cases and this one: In both of those cases, the school engaged in viewpoint discrimination. *See Healy*, 408 U.S. at 175 (school found that "the organization's philosophy was antithetical to the school's policies"); *Widmar*, 454 U.S. at 265 (groups that engaged in "religious worship or religious teaching" were barred from using school property).

CLS, of course, argues that open-access policies are viewpoint discriminatory, but the Court's cases foreclose that argument. The Court has squarely held that statutes prohibiting discrimination "because of race, color, creed, religion, disability, national origin or sex" do "not distinguish between prohibited and permitted activity on the basis of viewpoint." *Roberts*, 468 U.S. at 614-615, 623. And in *Hurley*—another case on which CLS relies—the Court found a public accommodations law similar to Hastings' nondiscrimination policy to be entirely acceptable on its face. The *Hurley* Court explained that such nondiscrimination rules "do not, as a general matter, violate the First or Fourteenth Amendments," and that the statute at issue "does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on *the act of discriminating*." 515 U.S. at 572 (emphasis added). Just so here.

It is useful to contrast CLS's claim of viewpoint discrimination with the finding of viewpoint discrimination in *Rosenberger*, 515 U.S. 819. There, the university denied funding to a student-run newspaper precisely because of the publication's Christian viewpoint. *See* 515 U.S. at 825 (school excluded from funding any activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality") (alteration in *Rosenberger*). Hastings has done nothing of the sort here. Hastings has not denied registration or any benefit to CLS because of CLS's Christian views or speech. If the policy nonetheless affects CLS's speech, it does so only incidentally, despite the policy's neutrality. That is not viewpoint discrimination.

Notably, the student organization in *Rosenberger* had a status (called "CIO status") similar to RSO status that required it to "pledge not to discriminate in its membership." *Id.* at 823. To our knowledge, no one in the course of that litigation suggested that that rule was objectionable; certainly this Court did not. But CLS refuses to agree to the same reasonable rule. CLS is not similarly situated to the group in *Rosenberger*. It is CLS's *conduct*—its exclusion of members based on grounds prohibited by a nondiscrimination policy and in violation of an open-access policy—not CLS's Christian viewpoint, that has kept it from registering.

B. The Policies Likewise Meet the Test Articulated in *O'Brien*.

Even if a student organization's desire to bar would-be members constituted speech, as opposed to conduct, nondiscrimination and open-access policies would still easily pass muster under the test this Court has articulated.

1. As discussed above, nondiscrimination and open-access policies regulate conduct—namely, discrimination. They do not regulate speech. And CLS is not subject to those policies unless it chooses to become an RSO. However, if the policies have any effect at all on CLS's expression, that effect would be merely incidental to the policy's regulation of CLS's conduct and hence would be reviewed under the test announced by this Court in *United States* v. *O'Brien*, 391 U.S. 367 (1968). *See Healy*, 408 U.S. at 189 n.20 (explaining that *O'Brien* applies to a claimed restric-

tion of associational rights from non-recognition).[17]

In *O'Brien*, the Court explained that a governmental regulation of conduct that incidentally restricts expression is valid so long as (1) the regulation is within the government's constitutional power, (2) the regulation furthers an important or substantial government interest, (3) that interest is unrelated to the suppression of expression, and (4) the incidental restriction on expression is no greater than necessary to further that interest. 391 U.S. at 377. Hastings' policy passes that test with flying colors.

First, nondiscrimination and open-access policies "are well within" a state's power to enact. *Hurley*, 515 U.S. at 572; *see Roberts*, 468 U.S. at 625 ("A State enjoys broad authority to create rights of public access on behalf of its citizens."). And this Court "ha[s] never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Employment Div.* v. *Smith*, 494 U.S. 872, 878-879 (1990).

Second, nondiscrimination and open-access policies serve an interest that is not just "important" or "substantial," but compelling. This Court has explained that nondiscrimination policies "plainly serve[ ] compelling state interests of the highest order." *Roberts*, 468 U.S. at 624. That makes sense, given that "the diffusion of knowledge and opportu-

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[17] *O'Brien* also applies because nondiscrimination and open-access policies do not "directly and immediately affect[ ] associational rights." *Dale*, 530 U.S. at 659. At Hastings and elsewhere, student groups are not required to register as RSOs, and the decision to apply for RSO status is entirely voluntary.

nity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity," *Grutter*, 539 U.S. at 331—or religion.

Third, the interests served by nondiscrimination and open-access policies are "unrelated to the suppression of expression." *Roberts*, 468 U.S. at 624. As discussed above, such policies are aimed not at impairing expression but at achieving the school's educational mission. The policies apply to all RSOs and make "no distinctions on the basis of [an] organization's viewpoint." *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). And, of course, groups that do not fulfill a institution's educational mission can exist on campus without being registered.

A regulation satisfies the final *O'Brien* factor if the government's interest "would be achieved less effectively absent the regulation." *FAIR*, 547 U.S. at 67. Nondiscrimination policies are narrowly tailored: The least restrictive means of prohibiting discrimination in membership by RSOs is to prohibit discrimination in membership by RSOs. The same goes for open-access policies. Nor do these policies restrict any speech; an RSO and its members remain free to express their views. Finally, registration is completely voluntary. A student group need not be registered to exist, associate with whomever it pleases, and express its views on campus.

Nondiscrimination and open-access policies thus easily pass the *O'Brien* test. And although such policies are not subject to strict scrutiny, they would pass that test for the same reasons they pass the *O'Brien* test.

2. CLS relies upon *Dale*, 530 U.S. 640, and *Roberts*, 468 U.S. 609, for the proposition that open-access policies must meet strict scrutiny under the First Amendment. CLS fails to recognize that *Dale* and *Roberts* were forced-inclusion cases, not conditional funding cases.

Dale held that a state public accommodations law requiring the Boy Scouts to accept a gay-rights activist in a leadership position (scoutmaster) violated the First Amendment. But *Dale* reached that conclusion from the premise that "a regulation that *forces* the group to accept members it does not desire" is highly burdensome. *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623) (emphasis added; quotation marks omitted). And *Dale* concluded from that premise that "*forced inclusion* of an unwanted person in a group infringes on the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* (emphasis added). *Accord Roberts*, 468 U.S. at 623 (analyzing "a regulation that *forces* the group to accept members it does not desire") (emphasis added). The threshold trigger for *Dale* and *Roberts*—forced inclusion—is not present here. CLS, unlike the groups at issue in *Dale* and *Roberts*, need not choose between bowing to a jurisdiction's nondiscrimination policy or not existing in the jurisdiction at all. On the contrary, Hastings has merely conditioned CLS's registration—but not its on-campus existence or expression—upon its adherence to an open-access policy. If it does not wish to be registered, CLS is free to exist, go its own way, and avoid the requirements of the policy.

CLS's situation thus is vastly different from that of the Boy Scouts in *Dale* and the Jaycees in *Roberts*. And that is not even to mention that neither *Dale* nor *Roberts* arose in the university context, in which First Amendment claims "must be analyzed in light of the special characteristics of the school environment." *Widmar*, 454 U.S. at 268 (internal quotation marks omitted). For all of these reasons, CLS's attempt to analogize to *Dale* and its progeny, as opposed to the conditional-funding cases, should be rejected. *Cf. Grove City College* v. *Bell*, 465 U.S. 555, 575-576 (1984) ("Requiring [a college] to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in [a federal financial assistance] program infringes no First Amendment rights of the [c]ollege or its students.").

CONCLUSION

For the foregoing reasons, as well as those stated in Respondents' briefs, the Court should affirm the decision below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,
Petitioner,

v.

LEO P. MARTINEZ, et al.
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN HUMANIST ASSOCIATION, THE AMERICAN ETHICAL UNION, ATHEIST ALLIANCE INTERNATIONAL, FREEDOM FROM RELIGION FOUNDATION, INSTITUTE FOR HUMANIST STUDIES, MILITARY ASSOCIATION OF ATHEISTS AND FREETHINKERS AND SECULAR STUDENT ALLIANCE, IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE* [1]

This *amici curiae* brief in support of the Respondent is being filed on behalf of the American Humanist Association, The American Ethical Union, Atheist Alliance International, Freedom From Religion Foundation, Institute for Humanist Studies, Military Association of Atheists and Freethinkers and Secular Student Alliance, comprising a diverse array of secular and religious organizations that advocate on behalf of religious liberty and equal opportunity, and offers a unique viewpoint concerning the history of religious freedom and civil rights in the United States of America.

Amici feel that this case addresses core Humanist concerns about discrimination at public institutions. Many of *amici's* members have, are or will attend public institutions of higher education and be unfairly excluded from participating in student clubs that deny membership (or other privileges) on the basis of god-belief or sexual orientation.

Amici wish to bolster the principle of religious neutrality—that government may not prefer one

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[1] *Amici*, identified in Appendix 1, file this brief with the consent of all parties. A copy of the Petitioner's consent letter is being filed herewith. The Respondent has filed a general consent with the Court No counsel for any party in this case authored in whole or in part this brief. No person or entity, other than *amici*, their members or their counsel made a monetary contribution for the preparation or submission of this brief. The amici have no parent corporations, and no publicly held companies own 10% or more of their stock.

religion over another, or religion over nonreligion—by informing the Court that an adverse decision would have the constitutionally impermissible effect of advancing the Christian faith by granting the Christian Legal Society an exemption to Hastings' neutral policy of general applicability.

SUMMARY OF ARGUMENT

"WE THE PEOPLE" is more than a mantra, it is the foundation upon which the Constitutional Convention of 1787 built the Great American Experiment.[2] Equally a part of that experiment—and most relevant to this case—is the quintessential public policy that America is to be governed for the common benefit.

The Fourteenth Amendment (1868) rededicated America's commitment to this concept of "all" with its guarantee of "equal protection of the laws",[3] as did the Court's decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)[4] and the enactment of the Civil Rights Act of 1964.[5]

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[2] The Constitution of the United States of America established a representative form of government—of, by and for all the people The experiment is ongoing, there having been 27 amendments to the Constitution.

[3] Const , amend 14, sec. 1 (Equal Protection Clause): "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."

[4] "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal " At 495

[5] The Civil Rights Act of 1964 outlawed certain forms of discrimination (Pub.L. 88-352, 78 Stat. 241, July 2, 1964). For

This case raises the question of whether Hastings College of the Law ("Hastings")—part of the California system of higher education—may enforce its neutral and generally applicable nondiscrimination policy in a manner that results in the denial of official recognition to any student organization that does not adhere to the policy.

Conflicting constitutional rights are at stake here. On the one hand, there is the right of all students attending a public institution of higher education to have the opportunity to participate in student-funded activities. This right emanates from the Equal Protection Clause, as well as, the Establishment Clause[6] which prohibits government funding of religion. On the other hand, CLS asserts First and Fourteenth Amendment rights of free exercise of religion, expressive association and equal protection, including the right to be free from the prohibitions of Hastings' nondiscrimination policy.

Amici will argue below that while the Christian Legal Society has a fundamental constitutional right to select its members based on its core values,

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example, Title II (42 U.S.C. § 2000a, et seq.) prohibits discrimination in hotels, motels, restaurants, theaters, sports arenas and all other public accommodations engaged in interstate commerce on the basis "race, color, religion or national origin" and Title VII (42 U.S.C. § 2000e, et seq.) prohibits discrimination by covered employers on the basis of "race, color, religion, sex or national origin."

[6] Const., amend. 1: "Congress shall make no law respecting an establishment of religion ..." This provision is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

Hastings' nondiscrimination policy, as a neutral policy of general applicability in furtherance of its obligation to the entire academic community, does not violate CLS's free exercise of religion, expressive association and equal protection rights because the policy regulates conduct—invidious discrimination—not speech.[7]

Accordingly, *amici* respectfully request the Court affirm the decision of the court below.

ARGUMENT

I. CLS HAS A CONSTITUTIONAL RIGHT TO ASSOCIATE WITH WHOMEVER IT CHOOSES, BUT NOT TO BE PRIVILEGED BY THE STATE.

A. Private organizations have a right to determine their own membership.

This case presents the question of whether a public university may require student organizations to comply with a neutral and generally applicable nondiscrimination policy in order to receive access to school funding and other benefits. *Amici*

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[7] The District Court found that Hastings nondiscrimination policy "regulates conduct, not speech because it affects what CLS must *do* if it wants to become a registered student organization—not engage in discrimination—not what CLS may or may not say regarding its beliefs on non-orthodox Christianity or homosexuality." (Emphasis in original.) *Christian Legal Soc. v. Kane*, 2006 U.S. Dist. LEXIS 27347 at *23-*24.

acknowledge the Christian Legal Society's constitutional right to exist in precisely the form it wishes and do not dispute that if CLS did not wish to have priority access to Hastings' facilities or receive funds from student activity fees that it would be free to exclude any of Hastings' students that it wanted to. This issue is not before the Court, as "th[e] Court has long held the Free Exercise Clause[8] of the First Amendment to be an absolute prohibition against governmental regulation of religious beliefs." *Bob Jones v. United States*, 461 U.S. 574, 603 (1983) (quoting *Wisconsin v. Yoder*, 406 U.S 205, 219 (1972)). The Free Exercise Clause protects religious organizations from government interference as well as individuals from governmentally sanctioned religious interference. The Clause gives CLS the freedom to regulate membership based upon beliefs or sexual orientation as the organization finds appropriate.

This Court has repeatedly affirmed the right of privately funded groups, both religious and secular, to choose their own messages. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), found that forcing the Boy Scouts to allow gay men into the organization would significantly burden the organization's ability to communicate its message, and that the Boy Scouts have the right to exclude gay people. *See Boy Scouts*, 530 U.S. at 635 ("As we give deference to an association's assertions regarding the nature of its expression, we must also

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[8] *Amici* recognize that other clauses of the First Amendment have also contributed to the development of the right of expressive association.

give deference to an association's view of what would impair its expression.") This Court also allowed discrimination when a private college forbade interracial dating and marriage—*Bob Jones Univ. v. United States*, 461 U.S. 574 (1983)—and when parade organizers excluded a homosexual and bi-sexual community group from marching in the organizers' parade, *Hurley v. Irish Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

In these three cases, however, the Court protected only privately run and funded organizations from governmental interference: the Boy Scouts is a "private, not for profit organization." *Boy Scouts*, 530 U.S. at 644. Likewise, the court in *Bob Jones* affirmed the denial of tax exempt status to the school, rendering it a completely private organization. *Bob Jones*, 461 U.S. at 605. Finally, the parade at issue in *Hurley* was organized by private citizens without formal city sponsorship. *Hurley*, 515 U.S. at 558. Because these organizations were private and did not receive public benefits, the Court in each case upheld their right to discriminatory membership.

Precedent mandates a different result, however, when the organization wishing to discriminate is public or seeks funding and/or other benefits from a public institution.

B. The Free Exercise Clause does not confer the privilege of funding or official group status.

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969). However, the academic village is not a mere soapbox—it is a round conference table for the exchange of ideas by all members of the academic community.

CLS has no right to compel Hastings to recognize it or to provide funding or other privileges when its membership practices violate Hastings' nondiscrimination policy. As will be more fully discussed in section II, *infra*, the Free Exercise Clause[9] does not confer the privilege of public funding by a university. If this Court allows mandatory student activity fees to fund CLS activities, it would force non-theistic and homosexual students to fund their own discrimination and encourage them to feel like they must lie about their beliefs or sexual orientation in order to participate fully within the law school community.

Hastings' universally applicable nondiscrimination policy is based on a compelling interest to protect all of its students, including "on the basis of religion and sexual orientation"[10] and that interest "is particularly critical in the context of

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[9] Const., amend. 1: "Congress shall make no law *** prohibiting the free exercise [of religion]"; made applicable by the Due Process Clause of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S 296 (1940).

[10] "States have the constitutional authority and a substantial, indeed compelling, interest in prohibiting discrimination on the basis of religion and sexual orientation." *Christian Legal Society v. Kane*, 2006 U.S. Dist. LEXIS 27347 at *27-*28.

education."[11] Moreover, the District Court found Hastings' incidental restriction on CLS's alleged First Amendment freedoms and "was no greater than necessary."[12] If CLS wishes to continue limiting membership to people attesting to similar morals, without public funding from student activity fees and with limited access to the forum.

In *Locke v. Davey*, 540 U.S. 712 (2004), the Court held that a state providing college scholarships for secular instruction, could lawfully exclude from the program those students pursuing a degree in theology. The First Amendment's free exercise clause, the Court found, did not require it to fund religious instruction because the "State's interest in not funding the pursuit of devotional degrees is substantial, and the exclusion of such funding places a relatively minor burden on [students]." *Id.* at 713.

In the present case, then, CLS does not have a right to receive funding at all, as Hastings has no obligation to fund any student group or make its facilities available for their use. However, because Hastings has chosen to establish a limited public forum for (1) all Hastings' non-commercial student groups that (2) agree to adhere to its nondiscrimination policy, CLS's eligibility for access and funding do not begin until it agrees to abide by Hastings' viewpoint neutral nondiscrimination policy that is applicable to all other groups.

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[11] *Id.* at *28

[12] *Christian Legal Society v. Kane*, 2006 U.S. Dist. LEXIS 27347 at *55.

II. HASTINGS' NONDISCRIMINATION POLICY IS A VALID NEUTRAL REGULATION OF GENERAL APPLICABILITY AND CLS MUST ADHERE TO IT OR RISK LOSING SCHOOL RECOGNITION.

A. The Free Exercise Clause does not require Hastings to make an exception because its policy is neutral and generally applicable.

The freedoms of religion, speech and association are among the most fundamental and cherished freedoms in the United States. In order for a state actor to intervene with a private religious group's rules or policies, there must be a "compelling state interest[], unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). This is a high bar. However, the standard is not applicable in this case because Hastings' policy is a neutral rule of general applicability, and such rules "need not be justified by a compelling governmental interest [even if they happen to] "burden a particular religious practice." *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531 (1993). Additionally, even if the *Jaycees* standard did apply, Hastings' nondiscrimination policy, which seeks to protect all students from invidious discrimination, is compelling and important enough to justify the minor and

narrow means used by the school to prevent it. This is discussed more fully in Section III below.

In *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990), *superseded by* Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-11, 1993 U.S.C.C.A.N (107 Stat.) 1488, *applicability to the states invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997), employees of a private drug rehabilitation organization were fired for using hallucinogenic drugs as part of a religious ceremony. The Court declined to use the compelling governmental interest test and concluded that because the prohibition on the drug was constitutional and applied to all citizens, it did not warrant a religious exception. *Smith*, 494 U.S. at 892. The employees were not allowed to break the law for religious reasons. *Smith*, 494 U.S. at 895.

If this Court rules in CLS's favor, it would overturn precedent upholding the validity of laws and regulations of uniform applicability by permitting exemptions for certain groups. Exemptions allowing some student groups to avoid complying with laws "contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' . . . would permit . . . [an individual], by virtue of his beliefs, 'to become a law unto himself.'" *Employment Div.*, 508 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879)). This Court must not permit CLS to "excuse [itself] from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Employment Division*, 494 U.S. at 878-79.

Hastings Law School, therefore, does not need a compelling interest in order to enforce its nondiscrimination rule, so long as the rule is neutral and of general applicability.

A law is not neutral "if the object of a law is to infringe upon or restrict practices because of their religious motivation." *Church of Lukumi*, 508 U.S. at 523. First, the Court examines the text of the law, "for the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.*

In this case, Hastings' policy restricts "unlawful discrimination" and "covers admission, access and treatment in Hastings-sponsored programs and activities."[13] The word "discrimination" is not

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[13] Hastings' Policy on Nondiscrimination states as follows:

> The College is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, College-owned student residence facilities and programs sponsored by the College, are governed by this policy of nondiscrimination. The College's policy on nondiscrimination is to comply fully with applicable law.
>
> The University of California, Hastings College of the Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation This nondiscrimination policy covers admissions, access and treatment in Hastings-sponsored programs and activities.

inherently religious, unlike words such as "prayer," "worship" "sacrifice" and "ritual," or the words in the statute at issue in *Church of Lukumi*. *See, Church of Lukumi*, 508 U.S. at 521.

In addition to its facial neutrality, the Hastings' policy does not "target[] religious conduct for distinctive treatment" while "compl[ying] with the requirement of facial neutrality." *Church of Lukumi*, 508 U.S. at 535. There is no evidence that Hastings holds a secret agenda to target CLS because of its religion or religious viewpoints. To the contrary, Hastings inclusion of "religion" as a protected class in its nondiscrimination policy demonstrates just the opposite. This inclusion seeks to protect CLS and Christians from discrimination as much as it does any other student group or non-Christians students.

"Categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Church of Lukumi*, 508 U.S. at 542. "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 543.

The Hastings' nondiscrimination policy passes the generally applicable requirement test on its face:

Pet.App. 88a (Pet.Br. at 9). *Same Christian Legal Society v. Kane*, 2006 U.S. Dist. LEXIS 27347 at *7.

"all groups . . . sponsored by the college are governed by th[e] policy of nondiscrimination."[14] The policy prohibits discrimination universally by all groups without consideration of whether a given group is religious or secular. The policy prohibits discrimination "on the basis of . . . religion . . . or sexual orientation"[15] without regard to the viewpoints of a particular student organization. The policy seeks to protect students of a diverse spectrum of backgrounds against discrimination. CLS has offered no proof that Hastings enforcing its nondiscrimination policy is aimed at CLS's religious viewpoints. Hastings' policy simply does not single out orthodox Christian viewpoints as CLS argues.

Because Hastings' nondiscrimination policy is neutral on its face and applicable to all student groups seeking recognition, CLS cannot claim exception to it. Denial of recognition and financial benefits is a reasonable means of enforcing the important policy, and thus Hastings acted correctly in the present case.

B. Granting the exemption would require Hastings to violate the Establishment Clause.

A government action violates the Establishment Clause when it has the "purpose" or "principal or primary effect" of advancing religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). A government entity that gives preference to a group failing to

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[14] Hastings' nondiscrimination policy at footnote 12.

[15] *Id.*

comply with a school policy would be advancing the group's beliefs over the beliefs and policies of other groups.

In *Texas Monthly Inc v. Bullock*, 489 U.S. 1 (1989), the Court held that a state actor could not exempt religious publications from paying taxes because this promoted religion over non-religion. *Id.* at 15. Every dollar in tax that the publication did not pay was a subsidy that affected nonqualifying taxpayers, forcing them to become "indirect and vicarious 'donors.'" *Texas Monthly,* 489 U.S. at 14 (quoting *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983)). This is analogous to the current case, because allowing taxes and non-discretionary student activity fees to be used to fund religious groups, while exempting those groups from the discrimination policy, is essentially forcing students to fund these practices. Additionally, exempting groups from the nondiscrimination policy would be "a[n] endorsement of religion" and would "produce greater state entanglement with religion than the denial of an exemption." *Texas Monthly,* 489 U.S. at 20. *See also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710-11 (1985), (holding invalid a statute that provided Sabbath observers with an absolute right to not work on their Sabbath. The statute represented an unconstitutional governmental preference for Sabbath observers over others who may want a day off for a compelling but nonreligious reason.)

In the present case, allowing religious groups exemption from an otherwise neutral policy of general applicability, as with the taxes in *Texas*

Monthly, Hastings too would be impermissibly endorsing religion.

Texas Monthly found that it was not the act of exempting a publication that was unconstitutional, it was that the exemption was given only to religious publications. Had the state exempted all publications, regardless of topic, from paying taxes, the statute would be constitutional. *Id.* at 18. Similarly, Hastings could set up a policy and use a secular determination—for example, any club that required ownership of a particular item—to allow secular and religious groups the right to discriminate without violating the Establishment Clause, but this is not mandatory. Here it is Hastings' choice, and choosing to forbid all student groups from participating in discrimination against other students is not only the easier and more even handed choice; it maintains a policy more consistent with the ideals of a state organization dedicated to religion.

Because Hastings' nondiscrimination policy is both neutral and generally applicable to all student groups, granting CLS an exemption would have the effect of treating at least one religious group preferentially from the other complying and recognized groups. Granting an exemption to CLS would violate the Establishment Clause by having the effect of advancing one religion over all others and religion over nonreligion, and by excessively entangling itself with the group.

C. The present case is distinguishable from other cases where the court appears to have held for a religious group in a public institution.

One issue addressed in CLS's Petition for Writ of Certiorari at 18-20 is CLS's assertion that there is a circuit split between the Seventh Circuit—*Christian Legal Soc'y v. Walker*, 453 F3d 853 (7th Cir. 2006)—and the Ninth Circuit, in the present case. These cases are distinguishable in important respects and, therefore, the cases do not create a circuit split to be reconciled.

In *Walker*, Southern Illinois University ("SIU") derecognized a Christian group from official status as a result of the school having received a complaint that the group's "membership and leadership precluded active homosexuals from becoming voting members or officers." *Id.* at 858. Of relevance here is that the Seventh Circuit said "it is doubtful that CLS [chapter at SIU] violated either of the policies SIU cited as grounds for derecognition." *Id.* at 860. In the present case, Hastings' nondiscrimination policy is more specific and there is no substantial dispute regarding its applicability to its student organizations.

In addition, the consequences of denying recognition at the two schools were vastly different, possibly tipping the scales toward the Christian group in the Seventh Circuit case and Hastings in the present case. In *Walker*, the student group was virtually banned from the university as it was not

permitted to reserve law school rooms for private meetings and denied access to SIU's bulletin boards and other means of communications. *Id.* at 588. In the present case, the failure of CLS to comply with Hastings' nondiscrimination policy did not result in a total ban from use of the law school's facilities. Indeed, it was permitted to use Hastings' facilities on a non-priority basis and had access to some of Hastings' channels of communication. Given the totality of circumstances, the incidental burden put upon CLS by Hastings' nondiscrimination policy does not rise to the level of deprivation experienced by the student group in *Walker*.

In *Rosenburger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), the Court held that a university could not pay for a secular student newspaper's printing costs while denying religious publications the same opportunity for subsidy. *Id.* at 834-35. The problem in *Rosenburger* was the quite different of that in the present case. There, the university treated student publications differently based on viewpoint and religious content, *Id.* at 830, and the Court held that the University's assertion that the exclusion was necessary to avoid violating the Establishment Clause was incorrect because the funds were apportioned neutrally to any group meeting certain criteria that requested the funds. *Id.* at 828. Applying that reasoning to the present case, Hastings is treating everyone the same by holding them all to the nondiscrimination policy equally. To allow CLS to violate this policy and retain official status, along with receiving travel subsidies paid from student activity fees, Hastings would be treating different groups differently based

on viewpoint, which is forbidden by *Rosenburger* and numerous other decisions of this Court.

Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987), also mandates a ruling in favor of Hastings. In *Amos*, the Court upheld amended section 702 of the Civil Rights Act of 1964, which exempts religious organizations from the rest of the title's prohibition on discrimination based on religion. *Amos,* 482 U.S. at 327. The amended section exempted religious groups with all their hiring decisions, regardless of whether the position was religious or secular in nature. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241 *amended by* 42 U.S.C. § 2000e. The exemption was designed to reduce government interference and allow religious groups to effectively promote their religious purpose. *Id.* The distinction between *Amos* and the present case rests on funding. The Church in *Amos* was not a publicly funded institution and did not seek funding. *Id.* at 330.

As described above, if CLS was only interested in being a private group without access to funds from student activity fees or priority access to the use Hastings' facilities, Hastings' nondiscrimination policy would not have applied. But CLS asks for much more than the mere right to exclude members based on beliefs or to be permitted to spread their anti-homosexual message. CLS asks to do these things while receiving funding from the public school. This key fact distinguishes the present case from *Amos*.

In addition to funding, *Amos* is distinguishable because the statute at question did not "impermissibly entangle[] church and state . . . [but instead] effectuat[ed] a more complete separation of the two." *Amos*, 483 U.S. at 339. By upholding the exemption, the Court protected activities of the church from meddling by the state and prevented the state from having to decide what is and is not religious employment. In the present case, by refusing to fund or register CLS as an official group, Hastings too is keeping itself from becoming excessively entangled with religion.

III. HASTINGS HAS A COMPELLING INTEREST IN PREVENTING THE DISCRIMINATION AND STIGMATIZATION OF OUTSIDERS; ITS NONDISCRIMINATIOIN POLICY WORKS TO ACHIVE THIS PURPOSE.

Even if the Court were to go against precedent and employ a heightened scrutiny analysis under the Free Exercise Clause, Hastings' nondiscrimination policy should still be upheld.

This Court often applies a balancing test when there is a possible infringement on a personal right. *See generally*, *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (balancing public interest in fighting crime with privacy interest of individual); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (applying privacy interest balancing test in upholding checkpoints for detecting illegal aliens); *Barenblatt v. United States*, 360 U.S. 109 (1959) (balancing

First Amendment interest in not divulging associational relationships and governmental interest in investigating communist activities). In Free Association Clause cases the Court balances individual rights with governmental rights and has declared: "the state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *Bob Jones v. United States*, 461 U.S. 574, 603 (quoting *United States v. Lee*, 455 U.S. 252, 257-58 (1982)); *see also id.* at 602 (revoking tax exempt status for university that forbade interracial marriage because the "Government's fundamental, overriding interest in eradicating racial discrimination in education . . . substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs.").

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court held that Minnesota's "strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services" was compelling enough to justify forcing the private organization to admit previously excluded women. *Id.* at 624. The facts in *Jaycees* and the Court's decision are instructive in the present case. Both cases involve private organizations wishing to exclude certain people. As Hastings described in its merits brief, its open-membership policy "serves important educational and public policy objectives"[16] including that (1) "all Hastings students have equal access to all school-

[16] Resp.Br at 8.

recognized and school-funded activities,"[17] (2) "public funds and mandatory student activity fees as well as the School's facilities and own name and logo are not used to support groups that choose to engage in conduct that the School and the State of California do not wish to subsidize or lend their name to,"[18] (3) "a simple open-membership policy allows Hastings to avoid the difficulties, needless entanglement with RSOs' internal operations, and potential allegations of bias or favoritism that would be associated with undertaking to judge whether an RSO's particular reasons for excluding a particular student were legitimate or illegitimate (or, indeed, lawful or unlawful)"[19] and (4) "strives to bring together students of different backgrounds and viewpoints in order to foster discourse, cooperation, and learning."[20]

Similarly, the stated policy in *Jaycees* was to eliminate discrimination within the community. Jaycees, 468 U.S. at 623. In *Jaycees*, the Court found Minnesota's policy compelling enough to require the private group to admit the previously excluded women. In the present case, Hastings does not wish to compel CLS to admit atheists and homosexuals—rather its purpose is to refrain from endorsing discrimination with its public funds. This is a relatively minor intrusion on CLS's ability to associate as it desires. The group can still meet and spread its message as it wishes. "It is beyond dispute

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[17] *Id.* at 10.
[18] *Id.* at 11.
[19] *Id.* at 12.
[20] *Id.*

that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (O'Connor, J., plurality opinion). Here, therefore, Hastings has a compelling state interest to use its powers, including recognition of student groups, to ensure that all of its students are full and equal members of the law school community. Requiring organizations which it sanctions to have non-exclusionary membership ensures that all members of the law school community are treated with equal dignity. It is also consistent with the law.

Hastings' policy of non-exclusion of minorities is of particular interest to *amici*. In the United States, self-identifying Christians make up approximately 76% of the population. Trinity College, *American Religious Identification Survey (ARIS 2008), Summary Report March 2009*, available at: http://www.americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf (last visited March 11, 2010).[21] Most members of *amici* do not identify themselves as Christian and are therefore part of a minority. Additionally, people who identify themselves as homosexual also are members of *amici*. Young people are particularly vulnerable to the effects of being cast as outsiders and carrying a

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[21] *See* Table 1 – *Religious Self-Identification of the U.S. Adult Population 1990, 2001, 2008* at 3. The survey estimates 76.0% of U S adults self-identifying themselves as Christian (173,402,000), 3.9% as "other religions" (8,796,000) and 15.0% as "nones" (34,169,000 (Atheists, Agnostics or no religion)). 5.2% refused to reply to question (11,815,000)

stigma because others think they hold unconventional beliefs. If CLS is permitted to exclude non-Christians and homosexuals, members of *amici* would be barred from being voting members and officers. On the face, this exclusion stigmatizes *amici* members as outsiders—as unfit for membership.

Additionally, when exclusion is condoned by an institution that should be a neutral and safe place for learning, the impact is much greater. Government endorsement of religion "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring) (internal quotations omitted). These types of endorsements are "invalid." *Id.* at 690. If the school allowed CLS's discriminatory membership practices to continue, Hastings would, at minimum, appear to be sending the messages Justice O'Connor warned of. The school's approval would emphasize the harm of the stigma, forcing homosexual and atheist students to feel like outsiders within the law school community.

The Court has adopted Justice O'Connor's approach along with the *Lemon* standard to disallow the presentation of a Christian Nativity scene on public property, *County of Allegheny v. ACLU of Greater Pittsburgh*, 492 U.S. 573, (1989), prayers at public school graduations and football games, *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Indep. Sch.*

Dist. v Doe, 530 U.S. 290 (2000), as well as the presentation of the Ten Commandments in a courthouse absent integration with a secular message, *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005). Under the *Lemon* standard, a court must invalidate a governmental act challenged under the Establishment Clause if it lacks a secular purpose. *Lemon*, 403 U.S. at 612. The Court, then, has a history of protecting people outside the Christian religion through decisions that remove the appearance of favoritism. So here the Court should extend this reasoning to the present case and allow Hastings to remain neutral to all groups.

Santa Fe, which disallowed student-led and student-initiated prayer at extracurricular football games is particularly instructive here. By allowing students to pray before a school football game, the school was "explicitly and implicitly encourag[ing] public prayer." 530 U.S. at 309. It is true that students at Hastings could simply choose not to join CLS like the students in *Santa Fe* could choose not to attend football games. But a policy that allows for the endorsement of religious beliefs by allowing religious-based discrimination or by allowing public student prayer has the effect of endorsing religion. One need look only as far as the First Amendment to discover the strong policy against such an endorsement. Likewise a policy that ensures a religiously neutral, discrimination-free atmosphere for all should be vigorously protected by this Court.

CONCLUSION

For the foregoing reasons the *Amici Curiae* respectfully request that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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March 15, 2010

APPENDIX

IDENTIFICATION OF *AMICI CURIAE*

The American Humanist Association advocates for the rights and viewpoints of Humanists. Founded in 1941 and headquartered in Washington, D.C., its work is extended through more than 100 local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The Mission of the American Humanist Association is to promote the spread of Humanism, raise public awareness and acceptance of Humanism and encourage the continued refinement of the Humanist philosophy. Most recently, the American Humanist Association has filed *amicus* briefs with the Court in *Salazar v. Buono*, No. 08-472 (pending), and *Pleasant Grove City v. Summum*, No. 07-665, 555 U.S. ___ (2009).

The American Ethical Union is a federation of Ethical Culture/Ethical Humanist Societies and circles throughout the United States. Ethical Culture is a Humanistic religious and educational movement inspired by ideal that the supreme aim of human life is working to create a more humane society. The American Ethical Union has participated in a number of *amicus curiae* briefs in defense of religious freedom and church-state separation.

The Atheist Alliance International is an organization of independent religion-free groups and

individuals in the United States and around the world. Its primary goals are to help democratic, atheistic societies become established and work in coalition with like-minded groups to advance rational thinking through educational processes. Through the Alliance, members share information and cooperate in activities with a national or international scope.

The Freedom From Religion Foundation ("Foundation"), a national nonprofit organization based in Madison, Wisconsin, is currently the largest national association of freethinkers, representing atheists, agnostics and others who form their opinion about religion based on reason rather than faith, tradition or authority. The Foundation's two purposes are to educate the public about nontheism, and to defend the constitutional principle of separation between state and church. The Foundation has members in every state in the United States and in the District of Columbia and Puerto Rico. The Foundation's membership, which is dedicated to the principle of separation between state and church, includes college/university students across the country. Moreover, the Foundation offers annual scholarships to college students and college-bound high school seniors, which are awarded through an essay competition. This is one of the few scholarship programs in the country awarding freethinking and nonreligious students for their independent views. The Foundation receives thousands of applications for this program each year further demonstrating students' keen interest in keeping state and church separate.

The Institute for Humanist Studies (IHS) is a think tank whose mission is to promote greater public awareness, understanding and support for humanism. The Institute specializes in pioneering new technologies and methods for the advancement of humanism. In all its work, the Institute aims to exemplify the humanist values of reason, innovation, and cooperation. In our efforts to support humanism we seek to defend the constitutional rights of religious and secular minorities by directly challenging clear violations of the law where it relates to First Amendment's guarantee that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." It is our stance that the role of the government is to not show preference of one religion over another or to provide support of a religious idea when there is no identifiable secular purpose. As a non-membership organization, IHS is able to complement other humanist organizations and cooperates with other humanist groups to ensure that no member of society is discriminated against regardless of religion or lack thereof.

The Military Association of Atheists and Freethinkers is an independent 501(c)(3) project of Social and Environmental Entrepreneurs. MAAF is a community support network that connects military members from around the world with each other and with local organizations. In addition to community services, MAAF takes action to educate and train both the military and civilian community about atheism in the military and the issues that face military atheists. Where necessary, MAAF identifies,

examines and responds to insensitive practices that illegally promote religion over nonreligion within the military or unethically discriminate against minority religions or differing beliefs. MAAF supports the separation of church and state and First Amendment rights for all service members.

The Secular Student Alliance is a network of over 200 atheist, agnostic, Humanist and skeptic groups on high school and college campuses. Although it has a handful of international affiliates, the organization is based in the United States. The vast majority of the affiliates are at high schools and colleges in the United States. The mission of the Secular Student Alliance is to organize, unite, educate and serve students and student communities that promote the ideals of scientific and critical inquiry, democracy, secularism and human-based ethics.

AMICUS CURIAE BRIEF

No. 08-1371

In the Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, PETITIONER

v.

LEO P. MARTINEZ, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF AMERICAN ISLAMIC CONGRESS, COALITION OF AFRICAN-AMERICAN PASTORS, NATIONAL COUNCIL OF YOUNG ISRAEL, NATIONAL HISPANIC CHRISTIAN LEADERSHIP CONFERENCE, PROJECT NUR, SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND, AND SIKH COALITION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Constitution permits a public university law school to exclude a religious student organization from a forum for speech solely because the group requires its officers and voting members to share its core religious commitments.

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INTEREST OF THE *AMICI*

Amici represent the broad diversity of American religious traditions.[1] Although they disagree on many theological questions, *amici* are united in their support for the right of religious people to associate with one another to further their beliefs. *Amici* believe that the rights of religious and expressive association are especially important for religious minorities, who stand to lose the most if majoritarian notions of conformity find no constitutional limit. They therefore urge the Court to reaffirm the Constitution's longstanding protections for the rights of religious and expressive association.

Individual statements of interest are set forth in the Appendix.

SUMMARY OF ARGUMENT

Hastings College of the Law refuses to recognize the Christian Legal Society as a student organization so long as CLS requires its voting members to adhere to the organization's core beliefs. Hastings thereby violates CLS's right to expressive association and its right to religious association.

I. In *Healy* v. *James*, 408 U.S. 169 (1972), this Court held that universities cannot refuse recognition to a student organization on the basis of the organization's exercise of First Amendment rights. One

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[1] The parties have consented to the filing of this brief. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

such right, protected in many other cases of this Court, is the right of an expressive association to exclude from membership those who disagree with the association's core values. Because CLS is a small and selective organization, with a strong and focused message, it is maximally protected by this Court's expressive association cases.

Healy of course recognizes that universities can regulate the conduct of student organizations. But they cannot define the exercise of First Amendment rights as prohibited conduct. By banning CLS based on its choice of members, Hastings has done just that. It has banned CLS for its *identity*, not for its conduct, because an association's identity is constituted by its members. Hastings has thus violated CLS's right of expressive association.

II. Hastings has also violated CLS's right of religious association. Expressly reaffirmed in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), the right of religious association protects the right of a religious group to control its internal affairs, regardless of whether the group engages in expression. This Court has applied the right of religious association in a wide variety of contexts—from disputes over a religious group's property and governance, to disputes over a religious group's choice of employees, to disputes over a religious group's selection and discipline of members. By interfering with CLS's internal affairs—including its selection of members, its choice of Bible study leaders, and its application of a religious code of conduct—Hastings has burdened CLS's right of religious association.

III. It is no response to say that the burden on CLS is minimal because CLS is allowed to exist as an

unrecognized group. Neither the right to expressive association nor the right to religious association is subject to forfeit as a condition of participating in a university forum for speech. That was settled in *Healy*, and the rule has been repeatedly applied in subsequent cases.

IV. To justify the burden on CLS's right of expressive or religious association, at a minimum Hastings must show that its policy is narrowly tailored to further a compelling governmental interest. Many cases imply that a religious association's right to govern its internal affairs is essentially absolute.

But the choice of scrutiny does not matter here, because Hastings does not have even a legitimate interest in requiring a religious association to admit nonbelievers as voting members. Hastings' asserted interest in prohibiting "discrimination," as applied here, is simply the negation of the underlying constitutional right. Of course there is a strong interest in prohibiting religious discrimination where religion is irrelevant. But it is fundamentally confused to apply a rule against religious discrimination to a religious association. Hastings has changed the prohibition on religious discrimination from a protection for religious minorities into an instrument for excluding and victimizing those minorities. What Hastings has done is plainly unconstitutional.

ARGUMENT

I. Hastings has burdened CLS's right of expressive association.

This case is largely controlled by *Healy* v. *James*, 408 U.S. 169 (1972). To the extent that *Healy* leaves

any questions open, other decisions of this Court supply the answers.

A. *Healy* permits universities to regulate disruptive conduct, but not an organization's identity, associations, or beliefs.

Healy held that organizing a student group at a public university is an exercise of "the right of individuals to associate to further their personal beliefs," and that "denial of official recognition * * * burdens or abridges that associational right." *Id.* at 181. "[T]he College's denial of recognition was a form of prior restraint," and therefore "a 'heavy burden' rests on the college to demonstrate the appropriateness of that action." *Id.* at 184.

That burden might be met if the college could prove the group's "unwillingness to be bound by reasonable school rules governing *conduct*." *Id.* at 191 (emphasis added). But the group's choice of whom to associate with—in particular, its possible association with a national organization engaged in "disruptive and violent campus activity"—was *not* a legitimate reason for denying recognition. *Id.* at 185-87. Reasons for non-recognition must be "directed at the organization's *activities* rather than its philosophy." *Id.* at 188 (emphasis added). *Healy* uses the words "conduct," "actions," and "activities" some 26 times to describe the legitimate basis of regulation (not counting the use of those words for other purposes).

Nor was it just any conduct that the College could legitimately regulate. When *Healy* said that an organization could be barred for violating school rules regulating conduct, it meant conduct that "interrupt[ed] classes, or substantially interfere[d] with

the opportunity of other students to obtain an education," or "actions which 'materially and substantially disrupt[ed] the work and discipline of the school.'" *Id.* at 189 (quoting *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969)). Various forms of the words "disrupt," "disruptive," and "disruption" appear some 22 times. *Healy*'s references to "reasonable campus rules," *ibid.*, must be read in this context.

The same is true of *Healy*'s approving reference to the College's Student Bill of Rights, which said that "students have no right (1) 'to deprive others of the opportunity to speak or be heard,' (2) 'to invade the privacy of others,' (3) 'to damage the property of others,' (4) 'to disrupt the regular and essential operation of the college,' or (5) 'to interfere with the rights of others.'" 408 U.S. at 189. Point 5 of this quotation must be read in context. Hastings cannot evade the First Amendment by defining "the rights of others" to include the negation of First Amendment rights. Just as Students for a Democratic Society had no right to deprive others of the right to speak (point 1 of the quotation), so those "others" could not have a right to deprive SDS of the right to speak.

Thus, Hastings could prohibit *defamatory* speech, because defamation of other students violates those students' rights, but it could not prohibit *religious* speech on the ground that other students have a "right" to a religion-free environment. Similarly here, Hastings cannot prohibit CLS from exercising its constitutional right to select members and leaders by simply declaring that other students have a "right" to join CLS. *Healy*'s reference to "the rights of others" does not change the fundamental principle that

rights created by administrative regulation are subject to the Constitution—not the other way around.

SDS could be denied recognition if it engaged in harmful or disruptive conduct, but the harm must be something more tangible than a feeling of offense at the way the regulated group exercises its First Amendment rights. SDS could not be barred because of who it was, what name it chose, whom it associated with, or what it believed. Here, either version of Hastings' rule is on the wrong side of that line. Hastings has not banned CLS for its *conduct*, but for its *identity*: for who CLS is and whom it chooses to associate with.

An association is constituted by, and consists of, its members. Its members determine who and what it is. CLS is an association of Christian lawyers, law students, and judges who believe a particular statement of faith and attempt to live up to the moral teachings of traditional Christianity. Pet. App. 100a-103a; JA 146. Mix in with these Christians others who interpret the faith more metaphorically, and some who pick and choose which traditional Christian teachings to follow, and the association would quickly become very different. It might retain the name "CLS," but it would be a different association with a different identity—even before Hastings forced it to add adherents of other faiths, or religious seekers uncertain what they believe, or atheists and agnostics, or people indifferent to religion, or political or philosophical opponents deliberately seeking to disrupt the association and change its policies. But under Hastings' rule, every one of these people would have to be allowed to join, vote, and lead Bible study.

In effect, Hastings' rule is that no association of traditionally minded, morally strict Christians is permitted to exist at Hastings. An organization that insists on preserving such an identity will not be recognized. This dispute is therefore not about what CLS *does*; it is about who CLS *is*. Hastings has banned CLS for who it is and whom it associates with as effectively as Central Connecticut tried to ban SDS for who it was and whom it associated with. *Id.* at 185-87.

B. Expressive associations have the right to choose members and leaders who share the association's beliefs.

Healy did not squarely address membership rules, but other decisions of this Court confirm that expressive associations have the right to control their identity—especially by selecting members and leaders who share the association's beliefs and excluding those who don't.

Government violates an organization's right to expressive association if it tries "to interfere with the internal organization or affairs of the group." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984). And "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members that it does not desire." *Ibid.* More recently, the Court suggested that rules that "*directly* interfere with an organization's composition," or with its "membership," are even more burdensome than the rules struck down in *Healy*. See *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006) (emphasis added).

The Court has had frequent occasion to protect the membership decisions of political parties. "A political party has a First Amendment right to limit its membership as it wishes * * *." *New York State Board of Elections* v. *Lopez Torres*, 552 U.S. 196, 202 (2008). A party can limit voting in the party primary to party members, because "a corollary of the right to associate is the right not to associate." *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000). "Freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders." *Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214, 229 (1989). "[T]he freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party* v. *Wisconsin*, 450 U.S. 107, 122 (1981) (citation omitted).

The Court has applied the same principle to many other types of voluntary associations, from the Jaycees to parade organizers to the Boy Scouts—and of course, to religious organizations. The Court unanimously upheld the right of parade organizers to exclude a group with a dissenting message, "just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Hurley* v. *Irish-American Gay, Lesbian And Bisexual Group*, 515 U.S. 557, 581 (1995). With respect to the Boy Scouts, the Court said that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's

ability to advocate public or private viewpoints." *Boy Scouts of America* v. *Dale*, 530 U.S. 640, 648 (2000).

We consider the cases on religious associations at length in Section II. For now, we note only Justice Brennan's statement in *Corporation of the Presiding Bishop* v. *Amos*: "Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself." 483 U.S. 327, 342 (1987) (Brennan, J., concurring).

All this is common sense. Members make up the group, and in CLS and many other organizations, members elect the leaders. Pet. App. 100a-102a; J.A. 118, 229-231. In CLS, voting members may lead Bible study, J.A. 118, 230-31, so even one dissenting member could radically change CLS's core religious activity. An influx of such members could dilute the organization's faith commitments, or even take over the organization and elect a new slate of officers.

Remarkably, Hastings forbids the members of CLS to consider the religion of candidates for leadership positions. Its interrogatory answers state:

> Under the express terms of the Policy on Nondiscrimination, if a registered student organization adopts a *policy or practice that bars access to its leadership positions on the basis of* race, color, *religion*, national origin, ancestry, disability, age, sex or sexual orientation, then it is in violation of the Policy on Nondiscrimination.

J.A. 161 (emphasis added).

Rogue officers denouncing everything that CLS once stood for would be only the most obvious mani-

festation of the problem, and perhaps less harmful, because they would be easily recognized as usurpers. The greater danger might be more subtle departures from CLS's rigorous understanding of the faith. Either kind of officer could make public statements, spend CLS funds, or legally bind the group to positions that contradict CLS's original beliefs. See *Eu*, 489 U.S. at 231 n.21 ("By regulating the identity of the parties' leaders, the challenged statutes may also color the parties' message and interfere with the parties' decisions as to the best means to promote that message."). Control over membership is essential to control over message.

C. The right to choose members and leaders is at its strongest in organizations like CLS.

The right to control membership is at its strongest when an expressive association is small, selective, and has a strong and focused message—like CLS. In *Roberts*, by contrast, the Court concluded that Jaycees chapters were "large and basically unselective groups," 468 U.S. at 621, with no ideological commitments inconsistent with the admission of women, *id.* at 627, and that Minnesota's law "impose[d] no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Ibid.* So a law banning sex discrimination was upheld as applied to the Jaycees.

This question about the nature of the group's commitments was the principal point of disagreement in *Dale*. The dissents are devoted almost entirely to whether the Boy Scouts actually had a teaching against homosexuality. See, *e.g.*, 530 U.S. at

684 (Stevens, J., dissenting) ("In short, Boy Scouts of America is simply silent on homosexuality."); *id.* at 701 (Souter, J., dissenting) ("BSA has not made out an expressive association claim, * * * because of its failure to make sexual orientation the subject of any unequivocal advocacy."). No Justice suggested that the Boy Scouts could be required to accept a gay scoutmaster *even if* they had a clear teaching against same-sex relationships.

Here, there can be no doubt that CLS qualifies for the strongest version of the protection set out in this Court's cases. The record is clear that CLS has specific religious commitments and a specific message—not just Christianity, but the specific and traditional understanding of Christianity set out in its statement of faith. J.A. 144-47, 226; Pet. App. 100a-101a. CLS is selective in its membership, insisting on adherence to its statement of faith and on sincere efforts to live up to that statement. These restrictions define CLS's identity and are essential to maintaining that identity. With as few as nine active members at some times, J.A. 230, CLS is also quite small, with a viewpoint shared by only a small minority at Hastings. These facts leave it maximally vulnerable to having its commitments altered by interlopers.

CLS's prohibition on non-marital sexual activity flows directly from its statement of faith. J.A. 144-47, 226. Treating this rule as sexual-orientation discrimination has no basis in any legally accepted understanding of discrimination.[2] But even if it *were*

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[2] Petitioner's Br. 39. The rule applies equally to opposite-sex and same-sex relationships, prohibiting "fornication, adultery, and homosexual conduct." J.A. 146. In any student population, there are far more sexually active un-

sexual-orientation discrimination, it would be protected, because it is essential to the message of traditional Christian faith and morality that CLS seeks to promote and live by. *Dale* makes clear that CLS could exclude all gays and lesbians. *A fortiori*, it can exclude those who violate its generally applicable requirement of compliance with traditional norms of sexual morality.

D. Hastings claims unfettered discretion to deny recognition and access to groups it disapproves.

Hastings' claim that any nondiscrimination rule trumps the right of expressive association, together with its broad powers to make and enforce nondiscrimination rules, gives it largely unfettered discretion to restrict freedom of association.

First, Hastings claims power to ban discrimination on any grounds it chooses and to interpret such bans in wholly novel ways, as with its sexual-orientation argument. New rules banning discrimination on the basis of new categories could eliminate any student organization with a strong viewpoint that required exclusion of the newly protected category. *Cf.* Petitioner's Br. 51-52.

Second, Hastings can impose additional burdens on non-recognized groups. Although Hastings cur-

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married heterosexuals than gays and lesbians. Thus, there is neither disparate treatment nor disparate impact on the basis of sexual orientation. The marriage laws do not create disparate impact, because the legal possibility of marriage is factually irrelevant to the many students who are not yet prepared, emotionally or financially, to take on the commitments of marriage.

rently allows CLS to meet on campus as an act of grace, and allows unrecognized groups to announce events on classroom chalkboards, J.A. 218-219, 232-233, 300, it could change either of these rules immediately after this lawsuit ends.

Third, Hastings exercises unfettered discretion in enforcement of its rules. Hastings now claims to have an unwritten "all comers" policy that requires every recognized student organization to be open to every student. This claim may simply be false. But assuming that such a policy exists in the minds of Hastings officials, the record shows that it has never been enforced against anyone but CLS. Petitioner's Br. 4, 12-14. Hastings exercises discretion to enforce its alleged policy against any organization it chooses and to ignore open and explicit violations by any other organization it chooses.

Such unguided discretion, applied to exercises of the right of expressive association, violates the long-settled rule against discretionary control over First Amendment rights. Unguided discretion enables government officials to "favor or disfavor speech based on its content." *Thomas* v. *Chicago Park District*, 534 U.S. 316, 323 (2002).

Hastings has already used this discretion to attempt an end run around this Court's cases guaranteeing equal treatment for student religious organizations. See *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995); *Widmar* v. *Vincent*, 454 U.S. 263 (1981). High schools could use the same technique to evade the Equal Access Act, 20 U.S.C. § 4071 *et seq.* (2006). These cases hold, and the Act provides, that organizations cannot be excluded from campus forums because of the religious

content or viewpoint of their discussions. But Hastings' position here would enable schools to exclude a religious group for refusing to accept members who disagree with the group's viewpoint, and thus effectively exclude from the forum any group with a sufficiently strong commitment to its views. Only the wishy-washy need apply.

II. Hastings has burdened CLS's right of religious association.

CLS is also entitled to protection for its right of *religious* association. Petitioner's Br. 40-41. The right of religious association may not offer *greater* protection than the right of expressive association, but it offers *different* protection, focused not on CLS's expressive activities but on the autonomous management of its religious affairs.

The right to religious association is based not on the right of free speech but on the free exercise of religion, the separation of church and state, and the constitutional exclusion of government from questions of religious faith, doctrine, and polity. The government cannot run religious associations any more than religious associations can run the government. Consequently, the right of religious association is not limited to "expressive" activities. Even if CLS met only for private meditation and prayer and had no message or viewpoint discernible to outsiders, it would be entitled to define its religious mission and manage its internal affairs.

A. This Court has long protected the right of religious associations to be free from government interference in their internal affairs.

Religious associations have the right to determine their own systems of internal governance and to resolve their own disputes. They have the right to decide who may perform religious functions within the association. And they have the right to control their own membership.

Hastings is violating each of these rights. By dictating who can be a voting member or a leader, Hastings interferes with CLS's internal governance. Because voting members may lead Bible studies, Hastings dictates who can perform religious functions. Most obviously, Hastings dictates who can be a member.

1. The right to internal self-governance.

This Court's first prominent decision on autonomy for religious associations is *Watson* v. *Jones*, 80 U.S. 679 (1871). Slavery and anti-slavery factions in a Presbyterian congregation each claimed the church property. The highest authority of the Presbyterian Church, recognized by both sides before the dispute began, recognized the anti-slavery group as the true church officers. This Court deferred to that decision and awarded the property to the anti-slavery group, holding that civil courts must defer to religious authorities on internal matters of religious significance. *Id.* at 727.

The rule of deference to religious authorities, the Court said, was necessary to protect the "unquestioned" "*right to organize voluntary religious associa-*

tions * * *." *Id.* at 728 (emphasis added). That right includes the freedom "to create tribunals for the decision of controverted questions of faith within the association." *Id.* at 728-29. If civil courts could second-guess religious authorities on such internal matters, it "would lead to the total subversion of such religious bodies." *Id.* at 729.

Subsequent cases expanded and clarified this right. In *Kedroff* v. *Saint Nicholas Cathedral*, this Court struck down a New York law that interfered with a church's internal authority structure, explaining that religious organizations have a constitutional right "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." 344 U.S. 94, 116 (1952). In *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, the Court emphasized that when civil courts decide church property disputes, they must scrupulously refrain from deciding "underlying controversies over religious doctrine." 393 U.S. 440, 449 (1969). Similarly, in *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, the Court struck down state interference with a church's removal of a bishop, emphasizing that the First Amendment protects the right of religious groups "to establish their own rules and regulations for internal discipline and government." 426 U.S. 696, 724-25 (1976).

In *Jones* v. *Wolf*, 443 U.S. 595 (1979), the Court approved an alternate means of resolving religious property disputes, still in accordance with the intentions of the religious organization prior to the schism. This method allows civil courts to apply "well-established concepts of trust and property law" to re-

ligious property disputes, *id.* at 603—but only if (1) the courts defer to religious authorities on "issues of religious doctrine or polity," *id.* at 602, and (2) state law is "flexible enough to accommodate all forms of religious organization and polity" without burdening free exercise rights, *id.* at 603. The Court emphasized that this approach would protect "the free-exercise rights of the members of a religious association," because it would allow the association to provide in advance, in its governing documents, for any resolution of the dispute it desired. *Id.* at 606.

As further explained below, the Court expressly reaffirmed this line of cases in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). There, the Court said that government may not "lend its power to one or the other side in controversies over religious authority or dogma." *Id.* at 877 (citing *Kedroff*, *Milivojevich*, and *Presbyterian Church*). And it explicitly reaffirmed freedom of religious association. *Id.* at 882 (citing *Roberts*).

Voting for the election of officers, voting on any other disputed issues, and leading Bible study at the Hastings chapter of CLS are exercises of "religious authority," however modest, and government cannot lend its aid to those who think that the association's governance should be open to a larger pool of voters or that Bible study should have a wider range of leaders.

2. The right to select the individuals who perform religious functions.

Many of the church property disputes discussed above were also disputes about the selection of individuals to perform religious functions. *Kedroff* and

Milivojevich were presented as disputes over property, but it was undisputed that the property belonged to the bishop. The real dispute was: Who is the bishop? See *Milivojevich*, 426 U.S. at 709 ("[T]his case essentially involves not a church property dispute, but a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals.").

This protection extends not just to bishops but to other positions involving significant religious functions. The first such case in this Court was *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1 (1929), involving an endowed chaplaincy in the Catholic Church. An heir of the donor claimed an entitlement to the chaplaincy under the terms of the gift, but the archbishop determined that this heir was not qualified for the position under church law. Of course the Court refused to order the church to accept a chaplain it had rejected. *Id.* at 16-17.

A similar idea appears in *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987). There, the employee was not a bishop, but a building engineer. *Amos* held that Title VII's religious exemption, which allows religious organizations to make employment decisions on the (otherwise illegal) basis of religion, serves "the legitimate purpose of alleviating significant governmental interference with *the ability of religious organizations to define and carry out their religious missions.*" *Id.* at 339 (emphasis added). Similarly, in *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), the Court said that requiring religious schools to bargain with a union would cause "intrusion into the administration of the affairs of church-operated schools." *Id.* at 499. This intrusion presented "diffi-

cult and sensitive questions" under the Religion Clauses." *Id.* at 507. To avoid those questions, the Court interpreted the Act not to apply to "church-operated schools." *Ibid.*

Employment discrimination laws present similar constitutional issues when applied to religious groups. Title VII exempts religious organizations from the ban on religious discrimination—so, for example, Catholic schools may prefer Catholic teachers. 42 U.S.C. §2000e-1(a) (2006). But religious groups receive no exemption from the ban on race or sex discrimination (or age or disability discrimination under the Age Discrimination in Employment Act or Americans with Disabilities Act). So, for example, the Catholic Church violates the literal text of Title VII by confining the priesthood to males, as do Orthodox Jewish synagogues that appoint only male rabbis. And any pastor who is discharged, whatever the reason, may allege that the real reason was some kind of illegal discrimination. Such a claim would force the civil courts to evaluate the pastor's performance of his religious functions and the church's reasons for losing confidence in his religious leadership.

It would be unconstitutional for the courts to second-guess such important religious decisions, and the courts of appeals have uniformly refused to do so. See *Rweyemamu* v. *Cote*, 520 F.3d 198, 204-10 (2d Cir. 2008) (collecting cases); *Petruska* v. *Gannon University*, 462 F.3d 294, 303-04 (3d Cir. 2006) (same). The courts have derived this rule from cases such as *Watson*, *Kedroff*, *Milivojevich*, and *Catholic Bishop*. State courts have generally reached the same conclusion

with respect to a range of theories for claiming wrongful discharge.[3]

This rule is the right of religious association applied to employment. The rule is generally called the "ministerial exception," but it is not limited to "ministers" or to "churches." Rather, "it applies to any claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions." *Petruska*, 462 F.3d at 299. The ministerial exception applies to a chaplain at a Catholic college, *ibid.*, a chaplain at a Protestant hospital,[4] a rabbi at a Jewish temple,[5] a professor of canon law,[6] a kosher supervisor at a Jewish nursing home,[7] a church organist,[8] a church music director,[9] and a communications manager for a diocese.[10]

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[3] See, *e.g.*, *El-Farra* v. *Sayyed*, 226 S.W.3d 792 (Ark. 2006); *Pierce* v. *Iowa-Missouri Conference of Seventh-day Adventists*, 534 N.W.2d 425 (Iowa 1995); *Music* v. *United Methodist Church*, 864 S.W.2d 286 (Ky. 1993); *Miller* v. *Catholic Diocese*, 728 P.2d 794 (Mont. 1986).

[4] *Scharon* v. *St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991).

[5] *Friedlander* v. *Port Jewish Center*, No. 09-0021-CV, 2009 WL 3109870 (2d Cir. 2009).

[6] *EEOC* v. *Catholic University*, 83 F.3d 455 (D.C. Cir. 1996).

[7] *Shaliehsabou* v. *Hebrew Home*, 363 F.3d 299 (4th Cir. 2004).

[8] *Tomic* v. *Catholic Diocese*, 442 F.3d 1036 (7th Cir. 2006).

[9] *EEOC* v. *Roman Catholic Diocese*, 213 F.3d 795 (4th Cir. 2000).

[10] *Alicea-Hernandez* v. *Catholic Bishop*, 320 F.3d 698 (7th Cir. 2003).

The idea underlying the ministerial exception has led state courts to uniformly reject claims for so-called clergy malpractice. See 2 William W. Bassett, *Religious Organizations and the Law* § 8.38 (1997 & Supp. 2009) (collecting cases). As the Kentucky Supreme Court explained, "it is not for the court to construe or to enforce the clergy's religious duties." *Arlinghaus* v. *Gallenstein*, 115 S.W.3d 351, 353 (Ky. 2003). To do so would be for the state to regulate internal church affairs that are protected by the right of religious association.

The voting members of CLS fall squarely within the rationale of the ministerial exception. As already noted, voting members lead the group's most important religious activity—the weekly Bible studies. These studies are not merely an academic discussion of the text or a venue for open-mike theology, but an inherently religious undertaking, accompanied by prayer and other forms of worship. See J.A. 230-31. Members may be called upon to respond to the spiritual doubts or questions of other attendees, explain matters of religious doctrine, or pray for another member's spiritual needs. In short, voting members are "important to the spiritual and pastoral mission" of CLS. *EEOC* v. *Roman Catholic Diocese*, 213 F.3d 795, 801 (4th Cir. 2000) (quotation omitted).

Nor does it matter that CLS members are volunteers. Few cases address selection of volunteer leaders because discrimination statutes generally protect only employees. But forcing a religious group to accept an unwanted volunteer leader is no less intrusive than forcing it to accept a paid one. *Dale* protected the right to choose volunteer leaders. 530 U.S. at 651-52. See also *Christian Legal Society* v. *Walker*,

453 F.3d 853, 862-63 (7th Cir. 2006) (protecting another CLS chapter's right to require its volunteers to be Christian). Where a government rule reaches inside a religious group and attempts to dictate who can perform its religious functions, the right of religious association protects the religious group.

3. The right to select and discipline members.

So far as these *amici* are aware, no plaintiff has been bold enough to sue a church for discrimination in deciding its own membership—let alone for *religious* discrimination. There are no cases rejecting such a theory; "[t]he easiest cases don't even arise." *United States* v. *Lanier*, 520 U.S. 259, 271 (1997).

However, this Court has had occasion to comment on religious control of membership in the course of deciding disputes about church governance. Courts "have no power to revise or question ordinary acts of church discipline, or of excision from membership. * * * [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off." *Bouldin* v. *Alexander*, 82 U.S. 131, 139-140 (1872). Referring to "voluntary religious associations," the Court said that "[a]ll who unite themselves to such a body do so with an implied consent to [its] government, and are bound to submit to it." *Watson*, 80 U.S. at 728-29. Among the issues committed to religious decision is "the conformity of the members of the church to the standard of morals required of them." *Id.* at 733. What beliefs one must profess to be a member of CLS, and whether a member can be in good standing despite ongoing non-marital sex, is thus a matter that only CLS can decide.

There are also cases dismissing tort suits in which church members attempt to challenge religious discipline imposed by their church. *Westbrook* v. *Penley*, 231 S.W.3d 389 (Tex. 2007) (refusing to interfere with three-step disciplinary process outlined in scripture); *O'Connor* v. *Diocese of Honolulu*, 885 P.2d 361 (Haw. 1994) (refusing to interfere with an excommunication); *Paul* v. *Watchtower Bible & Tract Society*, 819 F.2d 875 (9th Cir. 1987) (refusing to interfere with practice of shunning disciplined members); *Dwenger* v. *Geary*, 14 N.E. 903 (Ind. 1888) (upholding bishop's right to refuse Catholic burial). If religious associations can discipline or expel their members, *a fortiori* they can apply religious criteria for membership.

4. *Employment Division* v. *Smith* reaffirmed religious associations' right to autonomy in their internal affairs.

These religious association cases are unaffected by *Employment Division* v. *Smith*, 494 U.S. 872 (1990). There, the Court held that a law burdening religiously motivated behavior requires no special justification under the Free Exercise Clause if the law is "neutral" and "generally applicable." *Id.* at 880. But as already mentioned, *Smith* reaffirmed the rule that government must stay out of "controversies over religious authority or dogma." *Id.* at 877. And it reaffirmed the right to religious association more generally:

> [I]t is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. *Cf. Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to

> worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the state [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed").

Id. at 882 (alteration of internal quotation by the Court).

Consequently, eleven circuits have adopted or reaffirmed the ministerial exception since *Smith*.[11] No circuit has taken a different view. As an early post-*Smith* opinion explained, although the Free Exercise Clause "does *not* guarantee the right of [church] members to practice what their church may preach if that practice is forbidden by a neutral law of general application," it still "guarantees a church's freedom to decide how it will govern itself, what it will teach, and to whom it will entrust its ministerial responsibilities." *Catholic University*, 83 F.3d at 463. First,

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[11] See, *e.g.*, *Rweyemamu* v. *Cote*, 520 F.3d 198, 204-10 (2d Cir. 2008); *Petruska* v. *Gannon University*, 462 F.3d 294, 303-09 (3d Cir. 2006); *EEOC* v. *Roman Catholic Diocese*, 213 F.3d 795, 800-05 (4th Cir. 2000); *Combs* v. *Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343, 348-50 (5th Cir. 1999); *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 225-27 (6th 2007); *Alicea-Hernandez* v. *Catholic Bishop*, 320 F.3d 698, 702-04 (7th Cir. 2003); *Scharon* v. *St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 362-63 (8th Cir. 1991); *Werft* v. *Desert Southwest Annual Conference of the United Methodist Church*, 377 F.3d 1099, 1100-04 (9th Cir. 2004); *Bryce* v. *Episcopal Church*, 289 F.3d 648, 656-58 (10th Cir. 2002); *Gellington* v. *Christian Methodist Episcopal Church*, 203 F.3d 1299, 1302-04 (11th Cir. 2000); *EEOC* v. *Catholic University*, 83 F.3d 455, 461-63 (D.C. Cir. 1996).

the court said, "the burden on free exercise that is addressed by the ministerial exception is of a fundamentally different character from that at issue in *Smith* * * *." *Id.* at 462. And second, protecting the church's right to control its internal affairs "does not present the dangers warned of in *Smith*"—it does not "empower a member of [a] church, 'by virtue of his beliefs, "to become a law unto himself."'" *Ibid.* (quoting *Smith*, 494 U.S. at 885). We also note that it does not potentially reach into every field of human activity or potentially apply to every government regulation.

The court looked instead to the "long line of Supreme Court cases that affirm the fundamental right of churches to 'decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Ibid.* (quoting *Kedroff*, 344 U.S. at 116). "[W]e cannot believe that the Supreme Court in *Smith* intended to qualify this century-old affirmation of a church's sovereignty over its own affairs." *Id.* at 463. Other circuits have adopted this reasoning, developed similar arguments on their own, or treated the matter as settled. See *supra* notes 4-11.

In sum, the right to religious association guarantees the right of religious organizations to govern their own internal affairs, select their own members, make rules for those members, select their own leaders, and select personnel to perform religious functions. It without question protects CLS's right to decide who will elect its officers and lead its Bible studies.

B. Cases protecting the internal affairs of religious organizations are all manifestations of the underlying right of religious association.

Some courts have described these cases as protecting a right to "church autonomy." *Bryce* v. *Episcopal Church*, 289 F.3d 648, 655-59 (10th Cir. 2002). See also *Marsh* v. *Chambers*, 463 U.S. 783, 803-04 (1983) ("The second purpose of separation and neutrality is to keep the state from interfering in the essential autonomy of religious life, either by taking upon itself the decision of religious issues, or by unduly involving itself in the supervision of religious institutions or officials.") (footnotes omitted). This usage correctly emphasizes that freedom of religious association includes not merely the right to form a religious association, but also—and what is more frequently at issue—the right to autonomously manage the internal affairs of that association.

Most courts describe the cases dismissing employment-law claims by individuals performing religious functions as the "ministerial exception." *Rweyemamu*, 520 F.3d at 204-07. This "judicial shorthand" is "evocative [but] imprecise." *Id.* at 206. As already discussed, the ministerial exception protects more than just ministers, and it protects the religious functions of all religious groups, not just Christian churches.

Underlying both these phrases is the freedom of religious association. Church autonomy and the ministerial exception are important applications of that underlying principle. The right of religious association unites all the cases on resolution of church disputes, selection of personnel to perform religious

functions, and selection and discipline of church members.

The right to religious association is analogous to, but distinct from, the right to expressive association. The right to expressive association is a "right to associate *for the purpose of speaking*." *Rumsfeld*, 547 U.S. at 68 (emphasis added). The key questions in an expressive association case are two. First, does the group "engage in some form of expression, whether it be public or private"? *Dale*, 530 U.S. at 648. And second, would the challenged regulation "significantly affect the [group's] ability to advocate public or private viewpoints"? *Id.* at 641, 650.

Similarly, the right of religious association is a right to associate *for the purpose of religious exercise*. While expressive association protects organizations' ability to advocate viewpoints, religious association protects organizations' ability "*to define and carry out their religious missions*." We borrow this phrase from *Amos*, 483 U.S. at 339, where it is used to explain the purpose and effect of religious exemptions.[12]

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[12] See also *Salvation Army* v. *Department of Community Affairs*, 919 F.2d 183 (3d Cir. 1990):

> [R]eligious organizations might engage in two different types of activity that are protected by the First Amendment: (1) expression of ideas, which is protected by the free speech clause whether the ideas in question are religious or not; and (2) exercise of religion, *which may include actions that are not covered by the free speech clause.* * * * *[T]he correct freedom of association analysis depends upon the nature of the activity for which protection is claimed.*

This inquiry makes sense of every case discussed in Section II.A of this brief. When a civil court decides disputes over religious doctrine or polity, or when government interferes with the relationship between a religious association and the individuals performing its religious functions, or when it overrules decisions to exclude or discipline members, it interferes with the religious association's ability to define and carry out its religious mission, and thus violates the freedom of religious association.

Just as courts give an expressive association deference on questions regarding "the nature of its expression" and "what would impair its expression," *Dale*, 530 U.S. at 651, courts must give a religious association deference on questions regarding "the nature of its [religious mission]" and "what would impair its [religious mission]." On the question whether a political party will be seriously burdened if forced to accept members it does not want, "a State, or a court, may not constitutionally substitute its own judgment for that of the Party." *Democratic Party* v. *Wisconsin*, 450 U.S. 107, 123-24 (1981). Neither may Hastings substitute its judgment on this question for that of CLS.

The right of religious association does not extend to functions with no religious significance. Religious groups "are not—and should not be—above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts." *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985). But here too, as with the "reasonable campus rules"

Id. at 199 (emphasis added).

in *Healy*, the state cannot define just anything to be a tort. See *supra* at 5-6. Limiting the membership of a religious association to those who share the association's faith is a constitutional right, not a tort.

III. The burden on CLS's rights of expressive and religious association is severe.

The identity of CLS's members and leaders is an integral part of both its external expression and its internal life as a religious community. CLS's stated purpose is to "enable[] its members . . . to love the [L]ord with their whole beings" and it accomplishes this purpose in part by "[c]ultivating spiritual growth through communal prayer, fellowship, and worship." Pet. App. 99a-100a. CLS's membership limits enable it to provide that fellowship and communal worship by guaranteeing that its members share the same beliefs. These activities help form CLS's conscience as a religious group. The membership of the CLS community at Hastings is critical to its religious identity, just as the membership of a church or synagogue is critical to those organizations' religious identities.

CLS pays a substantial price for preserving its organizational identity and internal autonomy. As in *Healy*, recognition as a student organization brings with it the right to communicate with other students by means of University-controlled media. Without official recognition, CLS has no access to the Student Organizations Faire, school newsletter, bulletin boards, university e-mail lists, or office space. J.A. 216-17.

Healy says that such "denial of access to the customary media" on campus is a burden that "cannot

be viewed as insubstantial." 408 U.S. at 181-82. As the Court explained, "[i]f an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students." *Id.* at 181. And "the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by" its nonrecognition. *Id.* at 183. See also *Widmar*, 454 U.S. at 267-70 (treating exclusion from campus forum as burden).

Healy and *Widmar* are not distinguishable on the ground that there the school also denied meeting space. Hastings has allowed meeting space for now, as an act of grace, while insisting that CLS has no right to this space. J.A. 233, 300, 442-44; Pet. App. 79a. As already explained, *Healy* treated exclusion from the "customary media" of campus communication as in itself a substantial burden on the right of association. 408 U.S. at 181-82. And in *Rosenberger*, the university recognized the students' group and allowed it to meet; only funding was denied. 515 U.S. at 827. Even this was an unconstitutional burden on expression.

Access to a forum was also at issue in *Hurley*. This was no routine use of the parks and sidewalks for public expression, but a massive parade that required the city to suspend the normal uses of its streets. See *Hurley*, 515 U.S. at 560-61 (parade drew up to 20,000 marchers and a million spectators). That the parade organizers were using government property did not require them to surrender their freedom of expressive association.

As in both *Healy* and *Hurley*, Hastings' policy puts CLS to a Hobson's choice between controlling its message and having access to the means of disseminating that message. That choice places a severe burden on CLS's right of expressive association.

These sanctions equally burden CLS's right of religious association. Either it must surrender its right to determine who is a member, who votes, who leads, and who teaches Bible study, or it must forfeit access to the means of communicating with students and attracting new members. That the penalty takes the form of a loss of the right to communicate does not make it any less a penalty on the right of religious association. Forfeiture of any right or privilege penalizes the exercise of any other right that must be surrendered in order to regain the forfeited right. Petitioner's Br. 54-57; Cato Institute Br. 19-32. Loss of access to Hastings' channels of communication severely burdens both associational rights at issue here.

IV. The burden on CLS's rights of expressive and religious association is not justified by any legitimate government interest.

The burden on CLS's associational rights is not justified by any legitimate government interest, let alone a compelling one.

Because refusal to recognize a student organization prevents that organization from functioning on campus, *Healy* treated nonrecognition as a prior restraint requiring a "heavy burden" of justification. 408 U.S. at 184. When the burden on expressive association is "severe," the state must show that its policy is "narrowly tailored to serve a compelling state

interest." *Clingman* v. *Beaver*, 544 U.S. 581, 586 (2005) (plurality opinion); *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Where the burden is more modest, "'important regulatory interests will usually be enough.'" *Clingman*, 544 U.S. at 587 (quoting *Timmons*, 520 U.S. at 358). An example of a modest burden is government interference with the membership rules of an organization that is large, diffuse, non-selective, and lacking in any clear message. See *supra* at 10-11 (citing *Roberts*, 468 U.S. at 621, 627).

Some courts have applied the compelling interest test to claims of interference with the choice of religious leaders. See *Rayburn*, 772 F.2d at 1169. But no court has ever found a government interest sufficient to justify such interference, and other cases appear to assume that the rule against interference with internal church affairs is a categorical rule not subject to balancing with governmental interests. There is no mention of possible government justifications in most of the ministerial exception cases, or in this Court's cases such as *Watson*, *Kedroff*, or *Milivojevich*. Balancing of interests in these cases generally occurs only implicitly, at the margins of the right to religious association, in deciding which functions are sufficiently religious to deserve protection. Once a religious group's decision is found to be inside the rule against government interference, "there is no further balancing." See Douglas Laycock, *Church Autonomy Revisited*, 7 Geo. J.L. & Pub. Pol'y 253, 267 (2009).[13]

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[13] There is a very different set of cases where physical torts, most notably sexual assaults and molestations, oc-

Little turns on this choice between categorical rule and strict scrutiny, or even some lesser standard of review, because there is simply no legitimate reason for forcing a religious organization to admit members or appoint leaders who do not adhere to the faith. Unlike a political party, *California Democratic Party*, 530 U.S. at 572, religious associations play no role in governing the state. They are essentially private bodies, engaged in a constitutionally protected activity, and the state has no legitimate interest in overriding their membership rules.

Of course Hastings has an important interest in prohibiting invidious discrimination in secular organizations that are part of the school's life. But it has no legitimate interest in prohibiting religious discrimination inside a religious organization. To do that is to claim an interest in abolishing distinctive religious organizations. It is to turn the religious discrimination laws on their head.

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cur inside churches, often against children. Of course the molester has no First Amendment defense. Claims against the church itself for negligent hiring or supervision implicate the church's right to select and supervise its own clergy. Some courts have held such suits barred by the church's right to manage its internal affairs; a larger number of courts have allowed such cases to proceed on some or all counts. See *Malicki* v. *Doe*, 814 So.2d 347, 351 & n.2, 358 & n.10 (Fla. 2002) (collecting both sets of cases). These cases have a variety of rationales, but they are best explained by the government's compelling interest in protecting children against physical harms having nothing to do with anyone's religion. See Laycock, 7 Geo. J.L. & Pub. Pol'y at 273-74.

Religion became part of the canonical list of civil rights categories when attention was focused on employment and the commercial sector. The goal was to ensure that religious minorities—Jews were the most prominent example, but Catholics and members of other faiths were also victimized in some parts of the country—could participate in business, work in the professions or any other occupation, and receive services from "establishments doing business with the general public." See S. Rep. No. 88-872 at 2355 (1964). No one ever intended to require synagogues to admit Gentile members or appoint Baptist rabbis. Title VII contains express exceptions to keep that from happening. Religious associations and religious schools can hire on the basis of religion, and anyone can hire on the basis of religion if religion is a *bona fide* occupational qualification. 42 U.S.C. §§ 2000e-1(a), 2000e-2(e) (2006).

Hastings has ripped the category from this context, dropped the exceptions, and applied it in a way that is simply absurd. A rule intended to protect religious minorities from discrimination is now used to target religious minorities for exclusion. Religious students at Hastings are forbidden from keeping their religious association faithful to its original creed and mission. Hastings' interest is *illegitimate*, because it directly negates the rights of expressive and religious association.

This Court's cases protecting the right to exclude members who do not support the cause are just one example of courts and other state actors distinguishing between invidious discrimination and legitimate association to advocate an idea or exercise a religious faith. Another example is the Code of Conduct for

United States Judges, which has long distinguished between permissible and impermissible discrimination in the organizations that judges join. The Code prohibits "membership in any organization that practices *invidious discrimination* on the basis of race, sex, religion, or national origin." *Id.*, Canon 2C (emphasis added).

The accompanying commentary explains that whether an organization is engaged in invidious discrimination "depends on how the organization selects members and other relevant factors, such as *that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members*, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited." *Id.* at cmt. 2C (citing *Roberts* and similar cases). It would be absurd—and unconstitutional—to forbid judges to belong to churches that require a profession of faith for membership. As applied to judges, such a rule would violate the Test Oath Clause, in addition to the First Amendment.

Hastings bans *all* "discrimination" on the basis of religion, whether invidious or not: even the constitutionally protected selection of voting members and religious leaders. J.A. 221. In short, Hastings has no legitimate interest in controlling CLS's identity, let alone a compelling one. By unjustifiably denying recognition to CLS, Hastings has violated its rights of religious and expressive association.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's ruling should be reversed.

Respectfully submitted,

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APPENDIX

The American Islamic Congress (AIC) is a civil rights organization promoting tolerance and the exchange of ideas among Muslims and between other peoples. AIC combats negative perceptions of Muslims by advocating responsible leadership and "two-way" interfaith understanding. As Muslim-Americans, thriving amidst America's open multicultural society and civil liberties, we promote these same values for the global Muslim community. We are not afraid to advocate unequivocally for women's equality, free expression, and nonviolence—making no apologies for terrorism, which primarily claims Muslim lives. We join this brief in support of the universal principles of freedom of religion and freedom of expression.

The Coalition of African-American Pastors (CAAP) is a grass-roots movement of African-American Christian leaders who believe in traditional family values, such as protecting the lives of the unborn, defending the sacred institution of marriage, and supporting the role of religion in American public life. Many African-American Pastors were involved in the civil rights movement of the 1960s and strongly reject the notion that, when a religious group chooses members and leaders that support its core values, it is somehow engaging in "invidious discrimination." Indeed, CAAP could not exist in its present form if it could not limit its membership and leadership to those who agree with its mission. Thus, CAAP strongly supports the right of the Christian Legal Society and other religious groups to limit their membership and leadership to those who agree

with their core religious tenets and abide by their religiously motivated standards of conduct.

The National Council of Young Israel (Young Israel) is a Jewish religious organization that seeks to promote the religious observance of the families that attend the Jewish congregations that comprise our membership. Young Israel was created in 1912, a time in which observance of Torah laws and customs required extraordinary sacrifice. We worked tirelessly then and continue to do so now to facilitate and enhance the Torah observance of our congregational constituents. Today, our membership includes approximately 150 congregations (representing approximately 200,000 individual constituents) and we additionally represent hundreds of synagogues, Jewish day schools, and Jewish community institutions throughout the United States. Young Israel's principal objective is to foster and maintain a program of spiritual, cultural, social and communal activity towards the advancement and perpetuation of traditional Torah-true Judaism. We join this brief in support of protecting the autonomy of religious associations that has permitted traditional Torah-true Judaism to flourish in our country.

The National Hispanic Christian Leadership Conference, The Hispanic National Association of Evangelicals, is America's largest Hispanic Christian organization serving over 16 million constituents via our 25,434 member churches and member organizations. The NHCLC exists to unify, serve and represent the Hispanic Born Again Faith community by reconciling the vertical and horizontal elements of the Christian message via the 7 directives of Life,

Family, Great Commission, Stewardship, Education, Justice and Youth.

Project Nur ("Project Light") is a Muslim-led forum for students from various backgrounds, cultures, and faith to come together to celebrate their differences, solidify their commonalities, and bring light or knowledge to their respective communities. Project Nur is dedicated to creating a space that allows all students to learn from and about each other in order to build an inter-ethnic and multi-faith student community promoting human rights and civil rights; ultimately resulting in emphasizing the positive values and expectations of all identities, while promoting co-existence, tolerance and understanding. Project Nur aims to emphasize positive relationships by building bridges between Muslims and people of other faiths in order to diminish generalizations and stereotypes. As a Muslim-led student organization, Project Nur is committed to the freedom of all people, and students in particular, to associate in furtherance of their beliefs.

The Sikh American Legal Defense and Education Fund ("SALDEF") is a national civil rights and educational organization. Its mission is to protect the civil rights of Sikh Americans and ensure a fostering environment in the United States for future generations of Sikh Americans. SALDEF seeks to empower Sikh Americans through legal assistance, educational outreach, legislative advocacy, and media relations. SALDEF believes that it can attain these goals by helping to protect the religious liberties of people of all religious backgrounds. SALDEF speaks here

for the religious and expressive association rights of all people.

The Sikh Coalition was founded on September 11, 2001, to 1) defend civil rights and liberties for all people; 2) promote community empowerment and civic engagement within the Sikh community; 3) create an environment where Sikhs can lead a dignified life unhindered by bias and discrimination; and 4) educate the broader community about Sikhism in order to promote cultural understanding and create bridges across communities. Ensuring religious liberty for all the people is a cornerstone of the Sikh Coalition's work. The Sikh Coalition files this amicus out of the belief that the rights of religious and expressive association are indispensable safeguards for religious minority communities.

AMICUS CURIAE BRIEF

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Petitioner,

v.

LEO P. MARTINEZ, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMERICAN JEWISH COMMITTEE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AND UNION FOR REFORM JUDAISM AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The American Jewish Committee (AJC), a national organization founded in 1906 for the purpose of protecting the civil and religious rights of Jews, seeks to advance the basic principles of pluralism and tolerance at home and around the world as the best defense against anti-Semitism and other forms of bigotry. It maintains 26 regional offices in major cities nationwide and has more than 175,000 members and supporters. AJC has participated as *amicus curiae* in numerous cases throughout the last century in defense of religious liberty for all and in support of antidiscrimination principles.

Americans United for Separation of Church and State (Americans United) is a national, nonsectarian public-interest organization based in Washington, D.C. Americans United's mission is twofold: to advance the free-exercise right of individuals and religious communities to worship as they see fit; and to preserve the separation of church and state as a vital component of democratic government. Americans United has more than 120,000 members and supporters across the country. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in many of the leading church-state cases decided by this Court and the U.S. Courts of Appeals.

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[1] All parties have consented in writing to the filing of this *amici curiae* brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members or counsel made a monetary contribution to the preparation or submission of this brief.

The Union for Reform Judaism (Union) is the congregational arm of the Reform Jewish Movement in North America including 900 congregations encompassing 1.5 million Reform Jews. The Union comes to this issue out of its longstanding commitment to the principles of religious freedom and non-discrimination.

AJC, Americans United, and the Union are all strongly committed to defending religious freedom. *Amici* believe that private religious groups should be free to craft their own membership requirements in accordance with the dictates of their faith, and that the state may not use its coercive powers to compel such groups to include as members or officers individuals who do not share the group's beliefs. But while the state is not free to prohibit a private religious group, or other expressive association, from exercising its right to discriminate, the state is under no constitutional obligation to subsidize the exercise of that right. That is, *amici* believe that a private religious group's right to exclude non-adherents from its membership and governance decisions is not incompatible with a public university's interest in preventing discrimination in its educational activities. Both interests are respected under the policy challenged in this case.

SUMMARY OF THE ARGUMENT

This case is about a state university's decision, in furtherance of the educational purpose in hosting on-campus student organizations, to withhold funding and official recognition from any student group that is not open to all of its students. The courts below correctly held that this decision, which

allowed more restrictive student organizations access to the campus, but denied them funding and university recognition, did not violate the First Amendment rights of these unrecognized groups.

1. Universities have a strong interest in barring exclusionary practices by recognized on-campus student organizations because a principal purpose of providing such organizations with meeting space and financial (and other) assistance is to enable students to experience an on-campus educational laboratory for democratic values in action. Opportunities to participate in the organizational life of these student groups teach students critical interpersonal and leaderships skills which are necessary to participation in a democratic society and helpful to a student's career and professional opportunities. Unfortunately, these opportunities have historically been denied to some groups of students on account of their race, religion, gender, or sexual orientation. Especially in light of this history, it is an important component of a university's educational mission to ensure that the student groups it recognizes and funds are open to all students.

2. In providing opportunities for students to participate in extracurricular activities, a state university may reasonably set ground rules for official recognition and funding of student groups to ensure that such participation furthers its educational mission. In this case, the University of California-Hastings College of the Law's (UC-Hastings or the University) nondiscrimination policy serves to ensure that the benefits of student-group

membership are available to all of its students. The University is also acting to safeguard that the student activity fees all students must pay support only those groups that are open to all students. Especially in light of the history of racial and religious exclusion on college campuses, UC-Hastings also has a strong interest in avoiding the appearance of facilitating discrimination by its officially recognized and funded student groups.

3. UC-Hastings's ground rules for student-group recognition and funding in furtherance of its educational mission are viewpoint neutral. Organizations of any political, religious, or ideological character can become recognized student organizations if they will allow any UC-Hastings student to become a member and possibly seek a leadership role. The University's nondiscrimination policy is not aimed at any group's expression; rather, it is designed to ensure that the educational benefits of participation in extracurricular student groups are in fact available to all students. Other organizations, like petitioner Christian Legal Society (CLS), can meet on campus and exclude from their membership and leadership those students who do not adhere to their beliefs. They have no claim, however, on the University's resources or educational imprimatur in light of their exclusionary policy.

ARGUMENT

I. STUDENT GROUPS THAT ARE OPEN TO ALL STUDENTS SERVE THE UNIVERSITY'S EDUCATIONAL MISSION, ESPECIALLY IN LIGHT OF THE HISTORY OF EXCLUSION OF

RACIAL AND RELIGIOUS MINORITIES IN HIGHER EDUCATION

Extracurricular students groups are far more than a forum for facilitating students' expression of a variety of viewpoints. Participation in extracurricular activities is an important component of a complete education, particularly in professional schools. But such opportunities have not always been open to all students on an equal basis. In the not-too-distant past, many institutions of higher education, including some of the most prestigious in the land, encouraged and assisted student groups that excluded religious and other minorities from the educational, professional, and social opportunities of campus life. UC-Hastings's policy of ensuring that these valuable on-campus opportunities are open to all of its students—not limited because of a student's race, religion, gender, or sexual orientation—is an important component of its educational mission.

America's institutions of higher learning have an unfortunate history of excluding certain racial and religious minorities. In the years following World War I, "[u]niversities had to make certain concessions to the social snobbery, if not to the ethnic, racial, and religious prejudices, of their clientele. From the 1920s to the late 1940s, they imposed admissions quotas on Jews and, perhaps, on Catholics, as well. []Concurrently, Princeton totally excluded blacks, while Harvard and Yale took only a handful each.[]" Marcia Graham Synnott, *The Half-Opened Door: Discrimination and Admissions at Harvard, Yale, and Princeton, 1900-1970*, at xviii (1979). As this Court has observed with reference to the educational arena, "discrimination . . . prevailed, with official

approval, for the first 165 years of this Nation's constitutional history." *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *see also Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Opinion of Powell, J.).

Jews, in particular, have long been a target of discrimination because of their religious beliefs. During the early decades of the previous century, universities employed quotas to limit the number of Jews they would admit. Indeed, "[t]wentieth century discrimination against Jews continued a long history in American higher education. Many of the great universities were founded as religious institutions, steeped in the tradition of various Christian denominations. Jews attended as outsiders in a campus milieu that was dominated by Christian theology, purpose, and culture. . . . Anti-Semitism was part and parcel of Christian teaching and behavior, and permeated the experience of Jews at many of the 'best' colleges and universities in the United States." Gary A. Tobin, Aryeh Kaufmann Weinberg & Jenna Ferer, *The Uncivil University: Intolerance on College Campuses* 66 (rev. ed. 2009).

Selective institutions like Harvard, Yale, Princeton, Columbia, and Dartmouth have well-documented histories of using quotas to restrict the admission of Jewish candidates. In the 1920s, Harvard, Yale, and Princeton used various means to implement their quota policies, including "photographs attached to admission forms, specific questions regarding the applicant's race and religion, personal interviews, and restriction of scholarship

aid." Synnott, *supra*, at 19-20.[2] And in the 1940s, "Columbia like most other colleges and universities did discriminate, especially against Jews . . . ." William E. Nelson, *The Changing Meaning of Equality in Twentieth-Century Constitutional Law*, 52 Wash. & Lee L. Rev. 3, 35 (1995).

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[2] Harvard president Abbott Lawrence Lowell justified Harvard's use of quotas limiting the number of Jews as a mechanism for *reducing* anti-Semitism within the student body: "'If their number should become 40 percent of the student body,' he explained in a letter to Alfred Benesch, a prominent Jewish alumnus from Cleveland, 'the race feeling would become intense. When on the other hand, the number of Jews was small, the race antagonism was also small.'" Henry L Feingold, *Lest Memory Cease: Finding Meaning in the American Jewish Past* 95 (1996) (quoting Nathan C Belth, *A Promise To Keep* 101-02 (1979)).

In 1934, Dartmouth alumnus Ford H. Whelden wrote to Robert C. Strong, the school's director of admissions, stating: "[T]he campus seems more Jewish each time I arrive in Hanover. And unfortunately many of them . . . seem to be the 'kike' type." W. Honan, *Dartmouth Reveals Anti-Semitic Past*, N.Y. Times, Nov. 11, 1997, at A16. In response, Strong stated: "I am glad to have your comments on the Jewish problem, and I shall appreciate your help along this line in the future. If we go beyond the 5 percent or 6 percent in the Class of 1938, I shall be grieved beyond words." *Id.*

In his 1944-45 annual report as the Chairman of the Board of Admissions at Yale during the 1940s, Edward Noyes wrote, "the Jewish problem . . . continues to call for the utmost care and tact. . . . [T]he proportion of Jews among the candidates who are both scholastically qualified for admission and young enough to matriculate has somewhat increased and remains too large for comfort." Dan A. Oren, *Joining the Club: A History of Jews and Yale* 177 (1985) (emphasis added) (quoting Edward S. Noyes, Report of the Board of Admissions, *Yale Reports To The President, 1944-45*, at 3).

These discriminatory policies were not limited to admissions; they extended to extracurricular organizations and social clubs: "WASP undergraduates limited or excluded altogether the Jews, Catholics, and the few blacks from their extracurricular organizations and clubs. Membership in these [clubs was] . . . part of the recruitment and conditioning process that selected the next generation of managers and leaders. . . . And in order to make it easier for themselves to climb the ladder to the higher echelons, they saw to it that 'outsiders' were barred from the lower rungs." Synnott, *supra*, at xviii. For instance, at Harvard, "old-stock Americans rarely extended invitations to blacks, Italians, or Jews. Not only were Jews almost entirely absent from social club rosters, but they were often excluded from athletic teams of the major sports, debating societies, editorial boards, and musical clubs." *Id.*, at 23. And "[t]he badge of bigotry that Yale earned for a time was displayed most prominently in the fraternities and secret senior societies, the undergraduate institutions most important to Elis." Dan A. Oren, *Joining the Club: A History of Jews and Yale* 36 (1985). At many other universities, racially discriminatory fraternities excluded African-American students. *See* Allen B. Ballard, *The Education of Black Folk: The Afro-American Struggle for Knowledge in White America* 4-5 (1973) ("Social life [at Kenyon College] revolved around the fraternities, from which we Blacks were automatically excluded. The cumulative toll, both psychically and academically, was heavy. . . . We looked forward eagerly to weekends away from that alien campus.").

Exclusion from student groups served to reinforce prejudicial attitudes both at the university and the larger society: "The total exclusion of Jews from the summit of Harvard's social system confirmed what many had long suspected: the sheer fact of being Jewish—regardless of background, education, and personal demeanor—remained a serious social handicap at Harvard" in the early twentieth century. Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton* 98 (2005) (noting the "relative paucity of Jews in extracurricular life"). Although conditions have improved significantly in recent decades—due in part to state and private enforcement of nondiscrimination policies—"many experts agree that anti-Semitism persists on college campuses." United States Commission on Civil Rights *Briefing Report: Campus Anti-Semitism* 1 (July 2006).

Especially in light of this history, a university's official recognition and funding of student groups that discriminate on account of religious faith would at the least create the appearance that the university itself facilitates discrimination. UC-Hastings thus has a strong interest in withholding funding from groups that will not admit to membership students with different beliefs.

Additionally, the University seeks to ensure students' equal access to on-campus student organizations because participation in these groups provides an important component of a high-quality education. Participation in extracurricular activities can significantly improve students' career prospects,

particularly students from traditionally underrepresented groups. *See* Stephen Lipscomb, *Secondary School Extracurricular Involvement and Academic Achievement: A Fixed Effects Approach*, 26 Econ. of Educ. Rev. 463, 464 (2006); Susan B. Gerber, *Extracurricular Activities and Academic Achievement*, 30 J. Res. & Dev. In Educ. 42, 48 (1996) (noting that "participation in [extracurricular activities] promotes greater academic achievement" and that "participation in school-related activities was more strongly associated with achievement than was participation in activities outside of school").

Involvement in campus organizational life is especially important in professional schools. One study found that while classroom work is important, "[t]o excel . . . requires that students also become adept at communications and management leadership—skills that students cannot simply 'possess' but must practice in order to achieve proficiency. . . . [And] participation in extracurricular activities may be the most *effective* route to skill improvement." Sabeen Sheikh, *Improving Communication and Leadership Skills: The Impact of Extracurricular Activities on MBA Students* 1-2 (Graduate Management Admission Council Working Paper 2009) (based on study of over 5000 students at 150 business schools reporting on participation in extracurricular groups) (emphasis in original). Such participation—and the opportunity to serve in a leadership capacity—is crucial to developing skills that lead to success in one's career. *See id.*

Another study—this one of undergraduate students—found a significant correlation between participation in extracurricular student groups and superior performance on an assessment of interpersonal skills, even after controlling for variables like grade point average, cognitive ability, and personality. *See* Robert S. Rubin, William H. Bommer & Timothy T. Baldwin, *Using Extracurricular Activity As An Indicator Of Interpersonal Skill: Prudent Evaluation Or Recruiting Malpractice*, 41 Hum. Resource Mgmt. 441, 447-49 (2002). The correlation was even greater for students holding leadership positions in these organizations. *See id.* Notably, employers recruiting on college campuses frequently use membership in, and leadership of, student groups as a proxy for interpersonal and leadership skills. *See id.* at 444.

Even participation in purely social organizations like university eating clubs—often in the past barred to students because of their race, gender, and religion[3] —can provide the opportunity to hone interpersonal and leadership skills and to forge lasting professional associations. *See* Sally Frank, *The Key to Unlocking the Clubhouse Door: The Application of Antidiscrimination Laws to Quasi-*

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[3] Certain eating clubs at Princeton began admitting women only after the New Jersey Supreme Court held the clubs' longstanding policies of gender discrimination to be illegal. *See Frank v. Ivy Club*, 576 A.2d 241, 260-61 (N.J. 1990) ("The eradication of the cancer of discrimination has long been one of our State's highest priorities.") (internal quotation marks omitted); *see also* Alessandra Stanley, *Court Tells Princeton Clubs They Must Admit Women*, N.Y. Times, July 4, 1990, § 1 at 33.

Private Clubs, 2 Mich. J. Gender & L. 27 (1994); Michael M. Burns, *The Exclusion of Women From Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 Harv. C.R.-C.L. L. Rev. 321 (1983); *see also* Rubin, et al., *supra* at 447 (finding significant correlation between interpersonal skills and membership in social organizations like fraternities and sororities).

Indeed, some writers maintain, exclusion of racial and religious minorities was often done precisely to ensure that they would not develop the leadership skills and connections that foretell professional success. *See* Karabel, *supra* at 74 ("Jews . . . were excluded from Princeton's eating clubs as surely as they were kept out of the country clubs that arose in the suburbs of America's cities in the late nineteenth and early twentieth centuries. In both cases, social exclusion—and the preservation of Anglo-Saxon dominance—was one of the main functions of the institution.")

Given the importance of participation in extracurricular activities and student groups to the educational mission of an institution of higher learning, it would be inimical to the purpose of the university to require it to recognize and fund organizations that exclude students because of their race, religion, gender, or other like characteristics. As this Court has explained:

> [U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. . . . In order to cultivate a set of

> leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. . . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

Grutter v. Bollinger, 539 U.S. 306, 332-33 (2006). The same can be said of school-supported extracurricular groups.

II. UC-HASTINGS MAY CONSTITUTIONALLY SET GROUND RULES FOR THE STUDENT GROUPS IT RECOGNIZES AND FUNDS TO FURTHER ITS EDUCATIONAL GOALS

In providing extracurricular opportunities to its students, a public university must be able to set ground rules to ensure that the on-campus groups and activities it supports further its educational mission.

"A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981). As the Court recognized in *Rosenberger v. Rector & Visitors of*

University of Virginia, 515 U.S. 819, 829 (1995), a state university may place reasonable limits on its program supporting extracurricular student groups to ensure that it furthers the "limited and legitimate purposes for which it was created." *See also Healy v. James*, 408 U.S. 169, 189 (1972) ("Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."). For example, a state university need not "make all of its facilities equally available to students and nonstudents alike, or . . . grant free access to all of its grounds or buildings." *Widmar*, 454 U.S. at 268 n.5. Likewise, a state university may, as here, determine that its educational goals are best served by providing recognition and funding only to student groups that are open to all of the university's students.

The University in this case provides support for extracurricular student groups because of the educational value these groups offer students. *See* J.A. 349 (testimony by UC-Hastings's Director of Student Services noting that extracurricular activities "further [students'] education, contribute to developing leadership skills, and generally contribute to the University community and experience"). And it reasonably seeks to provide all of its students with the opportunity to participate in these groups. It has thus adopted a nondiscrimination policy applicable to all recognized student groups.[4]

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[4] As Respondent UC-Hastings's brief makes clear, the parties stipulated in the district court that recognized student groups cannot discriminate against any student on any ground,

The University also has a legitimate interest in ensuring that the mandatory student activity fees paid by all students do not, in effect, subsidize groups that exclude from membership some of those students. As this Court has held, "[t]hat the Constitution may compel toleration of private discrimination in some circumstances does not mean it requires state support for such discrimination." *Norwood v. Harrison*, 413 U.S. 455, 463 (1973). Indeed, "[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars . . . do not serve to finance the evil of private prejudice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989); *see also Gilmore v. City of Montgomery*, 417 U.S. 556, 569 (1974) ("The constitutional obligation of the state requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination.") (internal quotation marks omitted).

UC-Hastings further has a strong interest in avoiding the appearance of facilitating discrimination. Preventing discrimination is a legitimate goal of a public educational institution, as this Court has stated on many occasions. *E.g., Brown v. Board of Education*, 347 U.S. 483, 493 (1954) ("[W]here the state has undertaken to provide it, [public education]

(continued ..)

not just those grounds forbidden by the University's written policy; registered student organizations must accept all comers. *See* J.A. 221. Thus, for example, the UC-Hastings Democratic Caucus cannot bar students who hold Republican political beliefs from becoming a member or seeking a leadership position in that student organization. *See id.*

is a right which must be made available to all on equal terms."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983) ("[E]very pronouncement of this Court and myriad acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education."); *cf. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (noting "[t]he State's compelling interest in assuring equal access to women"); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (noting "Minnesota's compelling interest in eradicating discrimination"). Although the University disclaims any endorsement of the activities or views of its recognized student groups, its official recognition and funding of student groups undoubtedly facilitates their activities. Even the authorized use of the UC-Hastings name further ties the group (in the public's eye) to the University.

In sum, the University properly may set the ground rules for the types of on-campus student organizations that it will recognize and fund in furtherance of its educational mission. Conditioning funding and recognition of student organizations on their compliance with a nondiscrimination policy designed to ensure that all UC-Hastings students are able to participate as members is "reasonable in light of the purpose served by" recognition of registered student organizations. *Rosenberger*, 515 U.S. at 829.

III. THE NONDISCRIMINATION POLICY DOES NOT TARGET OR INFRINGE ANY POLITICAL OR RELIGIOUS VIEWPOINT OR ANY GROUP'S RIGHT OF EXPRESSIVE ASSOCIATION

A state university's right to set the ground rules for its recognition and funding of student organizations is not without limit. Those rules cannot discriminate against speech based on the viewpoint of the speaker. *Rosenberger*, 515 U.S. at 829-30. A university cannot, for example, deny a religious student group access to campus facilities or suppress its speech simply because of the religious nature of that group's speech. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993); *Widmar*, 454 U.S. 269-70. But UC-Hastings's condition for student-group recognition and funding—compliance with its nondiscrimination policy—is viewpoint neutral. Organizations of any political, religious, or ideological stripe can become recognized groups provided they adhere to the nondiscrimination policy. As this Court has held, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). The University's ground rules for student-group recognition do not discriminate against any political or religious viewpoint. Nor do they target CLS in any way; CLS remains free to meet on campus and exclude from its membership roles students who do not subscribe to its religious tenets.

A. UC-Hastings's Nondiscrimination Policy Is Viewpoint Neutral

The University's nondiscrimination policy is viewpoint neutral on its face. It applies equally to every student group, whether religious or non-religious, racist or anti-racist, in favor of or against gay rights, or voicing any other political or ideological position. Regardless of a group's viewpoint, *all* are prohibited from discriminating against UC-Hastings students desiring to become members or leaders of the group.

The test for whether a restriction on speech is content—and, *a fortiori*, viewpoint—neutral is whether "it is *justified* without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis in original and quotation marks omitted). Thus, a "regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* Here, the University's nondiscrimination policy is not directed at the content of the exclusionary student group's speech or beliefs—just its exclusionary membership practice. The University's policy is based on the reasonable judgment that its students should not be excluded from the educational benefits of campus organizational life because of their religious beliefs or sexual orientation. It does not matter what the purpose, focus, or message of the student group is; all groups are barred from University recognition and financial assistance if they discriminate against a student on any of the proscribed grounds. *See id.*; *see also Madsen v. Women's Health Ctr., Inc.*, 512 U.S.

753, 762-63 (1994) (upholding restriction when "none of the restrictions imposed by the court were directed at the contents of petitioner's message"). As this Court has recognized in many contexts, a generally applicable nondiscrimination policy is viewpoint neutral. *See, e.g.*, *Rotary Int'l*, 481 U.S. at 549 (holding that nondiscrimination statute "makes no distinctions on the basis of the organization's viewpoint"); *Roberts*, 468 U.S. at 623-24 (finding nondiscrimination statute viewpoint neutral).

CLS itself acknowledges that the University's prohibition on discrimination on the basis of religion is commendable as applied to most organizations, including nonreligious clubs, Pet. Br. 36-37, but argues that as applied to groups organized around shared religious beliefs, the prohibition exceeds constitutional bounds. So even CLS recognizes that the prohibition on discrimination applies to *all* groups, religious and non-religious alike. The University is not acting to suppress or censor a religious (or any other) group's view, *see Perry*, 460 U.S. at 46, but rather seeks to protect students from discriminatory exclusion in *all* school-funded contexts. Here, the University's policy "places no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed by a speaker." *Hill v. Colorado*, 530 U.S. 703, 723 (2000).

The University's policy has nothing to do with the religious orientation or views of the student group. In *Rosenberger*, by contrast, the university had a policy against using student-activity fees to fund any student group's activity that "primarily

promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." 515 U.S. at 825 (alteration in original). Thus when a religious student group, at the time a registered student organization, sought reimbursement for the costs of printing its publication, Wide Awake: A Christian Perspective at the University of Virginia, the school denied funding precisely because the publication espoused a religious viewpoint. The "specific motivating ideology [and] the opinion or perspective of the speaker [was] the *rationale* for the restriction." *Id.* at 829 (emphasis added). Indeed, the university in *Rosenberger* "justifie[d] its denial of [funding] to [the student group] on the ground that the contents of Wide Awake reveal an avowed religious perspective." *Id.* at 832.[5]

The restrictions on religious groups' access to school property invalidated in *Lamb's Chapel* and *Widmar* likewise do not resemble the policy at issue

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[5] *Rosenberger* is also noteworthy for what it did not decide. The university in *Rosenberger* had a very similar policy to that of UC-Hastings, where any student group seeking recognition by the university and access to special benefits had to "pledge not to discriminate in its membership." 515 U.S. at 823. The Christian student group in *Rosenberger* agreed to abide by the school's nondiscrimination policy and was a registered student organization under the university's program. *See id.* at 823, 825-26 The student group did not claim that this nondiscrimination policy impaired its ability to express itself, and the Court did not find any First Amendment problem with the university's policy of conditioning official recognition on adherence to such a policy. The challenge in *Rosenberger* was to the facially viewpoint-discriminatory policy of denying registered student organizations funding for "religious activities." *Id.* at 831.

here. As the Court explained in *Rosenberger*, "the school district in *Lamb's Chapel* pointed to nothing but the religious views of the group as the rationale for excluding its message." *Id.* at 832 (citing *Lamb's Chapel*, 508 U.S. at 827). Similarly, in *Widmar*, the university barred a student group from using campus facilities specifically because of its desire "to engage in religious worship and discussion." 454 U.S. at 269.[6]

UC-Hastings's generally applicable nondiscrimination policy, by contrast, seeks to protect students from discriminatory exclusion, not restrict or suppress any group's particular viewpoint. It has simply placed restrictions on the type of student organizations it is willing to recognize and assist financially. Other groups can meet on campus; they cannot, however, receive funding or the University's imprimatur if they discriminate against students seeking membership in the group.

B. UC-Hastings Has Not Suppressed Or Censored CLS's Speech, Denied It Access To Campus, Nor Infringed On Its Right Of Expressive Association

By conditioning student-group recognition and funding on compliance with a generally applicable, viewpoint-neutral nondiscrimination policy, UC-Hastings has not suppressed or censored the speech of non-complying organizations. Nor has it infringed on their rights of expressive association. It has not

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[6] Also, unlike this case, the university in *Widmar* sought to bar the student group from using campus facilities altogether. *See* 454 U.S. at 265.

tried to force these groups to include individuals they would rather exclude; these groups remain free to meet on campus and to exclude any individuals they choose. UC-Hastings has simply declined to certify and subsidize groups that it has reasonably determined do not advance its educational mission. A state university has no duty to subsidize expressive activity that is unrelated to its educational mission. And groups, like CLS, that wish to exclude non-adherents from membership, are free to turn down the university's offer of support and continue their practices.

1. UC-Hastings Has No Obligation To Subsidize CLS

While the state is not free to prohibit a private religious group from exercising its freedom of expressive association by excluding those who do not subscribe to its tenets, *see, e.g.*, *Boy Scouts of America v. Dale*, 530 U.S. 640, 648, 656 (2000), the state is under no constitutional obligation to subsidize the exercise of that right. *See, e.g.*, *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. __, 129 S. Ct. 1093, 1098 (2009) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."). *See generally* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919, 1924-27 (2006).[7] So

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[7] For example, the government need not fund private schools, even if it funds public ones. *Norwood v. Harrison*, 413 U.S. 455, 462 (1973). It need not subsidize abortions or abortion advocacy, even if it funds childbirth or family planning. *Rust v. Sullivan*, 500 U.S. 173, 196-97 (1991); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 509-11 (1989); *Harris v. McRae*, 448 U.S. 297, 316-18 (1980); *Maher v. Roe*, 432 U.S. 464, 474-77

long as the government does not "discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas," the government is free to "subsidize some speech, but not all speech." *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 548 (1983) (quotation marks and brackets omitted).

Thus, although a religious student group like CLS has a right to insist that its members share its religious beliefs, and even that they refrain from homosexual conduct, a state university like UC-Hastings has no obligation to subsidize such a group.

2. UC-Hastings Has Not Infringed CLS's First Amendment Right Of Expressive Association

Through official recognition, UC-Hastings offers registered student groups a package of benefits

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(continued...)

(1977). It need not make government property or benefits available to all speakers, even if it provides access to some. *Perry*, 460 U.S. at 47-48; *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806-11 (1985). It need not facilitate through payroll deductions public employees' contributions to unions' political-action committees, even when it provides payroll deductions for union dues used to support other union speech. *Ysursa*, 555 U.S. at ___, 129 S. Ct. at 1098-99. And the government need not provide tax exemptions for lobbying or electioneering donations, even when it exempts donations that go towards other types of speech. *Regan v. Taxation With Representation*, 461 U.S. 540, 545-46 (1983); *Cammarano v. United States*, 358 U.S. 498, 512-13 (1959); *see also id* at 515 (Douglas, J., concurring) (rejecting "the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.").

(*e.g.*, funding, use of the UC-Hastings name, access to the school listserve, the ability to reserve classroom space). The University may condition access to this package of benefits—which it provides to further its educational mission—on compliance with a reasonable viewpoint-neutral nondiscriminatory membership policy.[8]

Non-recognition does not infringe on CLS's right of expressive association. Indeed, although it may permissibly restrict all access to its campus facilities on viewpoint-neutral grounds, UC-Hastings has opened its campus even to non-registered groups like CLS. As the stipulated facts reflect, UC-Hastings has not prohibited CLS members from meeting as a group on campus, and CLS members are free to reserve the school's classrooms, use the school's audiovisual equipment, and communicate with the school's students through physical and electronic means (*e.g.*, classroom blackboards, email, web pages). J.A. 232-33. Accordingly, in conditioning its official recognition, the University is neither

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[8] Although CLS only briefly addresses the point, the Free Exercise Clause does not entitle the group to a constitutional exemption from the school's neutral, generally applicable nondiscrimination policy. *See Employment Div. v. Smith*, 494 U.S 872, 879 (1990). The policy is not targeted at religion generally, let alone at any particular religion *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533-42 (1993). The Establishment and Equal Protection Clauses are unavailing for the same reason. UC-Hastings's policy reflects neither hostility to religion nor disparate treatment of religious groups. Whether the Establishment Clause would prohibit UC-Hastings from giving CLS the exemption it seeks is an issue not presented by this case and one the Court should not reach.

directly nor effectively forcing CLS to change its membership criteria in order to maintain a presence in the UC-Hastings community.

Healy v. James, 408 U.S. 169, 181 (1972), is distinguishable both because the university's purpose in that case was viewpoint-based exclusion of a group whose "philosophies were counter to the official policy of the college," *id.* at 187 (quotation marks omitted), and because the group was completely denied "use of campus facilities," *id.* at 181. The school authorities in *Healy* went so far as to actively break up the student group's meeting at a campus coffee shop. *Id.* at 176 n.6.

Here, by contrast, the University is not targeting CLS because of its viewpoint and, in addition, allows this group to meet on campus and reserve campus facilities. Moreover, CLS has several other ways of reaching the student body, particularly in today's world, where students frequently interact through websites and online social networks. *See, e.g., Christian Legal Soc'y v. Walker*, 453 F.3d 853, 874 (7th Cir. 2006) (Wood, J., dissenting). Indeed, although lacking official recognition for the 2004-2005 school year, the group still played an active role in the UC-Hastings community: It held weekly meetings, hosted a campus lecture, held several fellowship dinners, organized other activities, and recruited new members. Pet. App. 13a; J.A. 229-30.

The choice faced by CLS—accepting university funding and recognition conditioned on allowing non-adherent students to join as members or rejecting the state's funding and continuing to exclude them—is

not unlike the choice faced by certain law schools under the Solomon Amendment, the federal policy upheld in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 58 (2006). The Solomon Amendment requires law schools receiving federal funds to give military recruiters access to their students. Some schools argued that this requirement violated the First Amendment because the schools disagreed with the recruiters' policies yet had to allow them on campus in order to receive federal support. *Id.* at 53. But this Court found that the Solomon Amendment did not violate the law schools' associational rights, noting that they remained free to turn down the funding and exclude military recruiters. *Id.* at 59; *see also Grove City College v. Bell*, 465 U.S. 555, 575-76 (1984) (finding no First Amendment violation where Congress conditioned federal funds on compliance with the nondiscrimination policy of Title IX). Alternatively, the schools could accept the funding and the recruiters, but were still able "to voice their disapproval of the military's message," *FAIR*, 547 U.S. at 70, because the Solomon Amendment did not "limit[] what law schools may say." *Id.* at 60.

As with the law schools in *FAIR*, CLS—like any other group disagreeing with the nondiscrimination policy—may turn down the school's support, and exclude students from membership on the grounds of religion, sexual orientation, or any other basis covered by the policy. And if a group chooses to do so, it would still retain access to UC-Hastings students and its ability to propound its message.

3. UC-Hastings's Nondiscrimination Policy Is Not An Unconstitutional Condition On CLS's First Amendment Rights.

UC-Hastings's nondiscrimination policy does not, as CLS suggests, place an unconstitutional condition on the group's First Amendment rights of free association. CLS claims that exercising its freedom of association (and continuing to discriminate) would require it to forfeit its right to "equal treatment within a forum for speech." Pet. Br. at 55. CLS is, of course, correct that the state "may not deny a benefit [*i.e.*, the school's support] to a person on a basis that infringes his constitutionally protected . . . freedom of speech." *FAIR*, 547 U.S. at 59. But because the forum at issue is a limited public forum, CLS does not have an unfettered right of access to the forum; access to the forum can be conditioned on reasonable, viewpoint-neutral requirements. *See Rosenberger*, 515 U.S. at 829.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge the Court to affirm the Ninth Circuit's decision.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
DEC 15 2009
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No. 08-1371

In the

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE ANTI-DEFAMATION LEAGUE, PEOPLE FOR THE AMERICAN WAY FOUNDATION, JEWISH COUNCIL FOR PUBLIC AFFAIRS, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HUMAN RIGHTS CAMPAIGN, AND NATIONAL COUNCIL OF JEWISH WOMEN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici, several of which are rooted in religious communities, are organizations committed to protecting the civil rights, religious liberty, and equal treatment under law for all persons.[1] As part of their core beliefs, *amici* maintain a deep commitment to the principles of religious liberty that are enshrined in the "religion clauses" of the First Amendment. While *amici* believe strongly in robust free exercise rights, *amici* also believe that the separation of church and state advances the cause of religious freedom in America, and that, in order to ensure the free exercise of religion in our country, government funding must not be used to advance a particular religion.

Amici also value our nation's nondiscrimination laws and the role these laws have played in maintaining rights for minorities – including minority religions – in this country. At the same time, *amici* have supported the right for religious organizations to be granted certain exemptions from nondiscrimination laws, based on their sincerely held beliefs. Those exemptions, however, should not apply when the organization receives money from

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

the government. The use of government funds to discriminate is an improper use of any religious exemption and is not acceptable.

The relevant history and mission of the *amici* are summarized below.

The Anti-Defamation League ("ADL")

The ADL was founded in 1913 to stop the defamation of the Jewish people, to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all. Today, it is one of the world's leading civil and human rights organizations fighting hatred, bigotry, discrimination, and anti-Semitism. The ADL has filed amicus briefs in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws. These include many of the Supreme Court's landmark cases in the area of civil rights and equal protection.[2]

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[2] ADL filed amicus briefs in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Corp. of Presiding Bishop of Church of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979); *Regents of Univ. of California. v. Bakke*, 438 U.S. 265 (1978); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Sweatt v. Painter*, 339 U S. 629 (1950); and *Shelley v. Kraemer*, 334 U.S. 1 (1948).

People for the American Way Foundation ("PFAWF")

PFAWF is a nationwide, non-profit, non-partisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1981 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members and activists across the country. PFAWF is firmly committed to the principles of religious freedom and separation of church and state and has frequently represented parties and filed *amicus curiae* briefs in cases involving the Free Exercise and Establishment Clauses of the First Amendment. The resolution of this case is of extreme interest to our organization and its members, particularly the 4,500 ministers in our African American Ministers Leadership Conference.

American Association of University Women ("AAUW")

For more than 125 years, AAUW, an organization of over 100,000 members and 1,000 branches nationwide, has worked to break through educational and economic barriers so that all women have a fair chance. AAUW's 2009-11 member-adopted Public Policy Program states that AAUW is firmly committed to the separation of church and state and vigorous protection of and full access to civil and constitutional rights. AAUW believes that discrimination against any individual person or class of persons has no place in our country, and that all Americans are entitled to equal opportunity under the law.

Jewish Council for Public Affairs ("JCPA")

JCPA, the coordinating body of 14 national and 127 local Jewish community-relations organizations, was founded in 1944 by the Jewish federation system to safeguard the rights of Jews throughout the world, and to protect, preserve, and promote a just society. The JCPA recognizes that the Jewish community has a direct stake — along with an ethical imperative — in assuring that America remains a country wedded to the Bill of Rights and committed to the rule of law, a nation whose institutions continue to function as a public trust.

Human Rights Campaign ("HRC")

HRC, the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where lesbian, gay, bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. HRC has over 750,000 members and supporters nationwide committed to making this vision of equality a reality. HRC strongly supports the First Amendment rights of religious individuals and groups and respects the important role faith organizations play in many people's lives and the many important contributions those groups make to the community. HRC also strongly believes that all organizations that receive public funds should be required to abide by nondiscrimination laws and policies, including those prohibiting discrimination based on religion, sexual orientation or gender identity.

National Council of Jewish Women ("NCJW")

NCJW is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that the organization endorses and resolves to work to ensure that "discrimination on the basis of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation or gender identity must be eliminated." Consistent with our Resolutions, NCJW joins this brief.

SUMMARY OF ARGUMENT

The neutral nondiscrimination policy at issue in this case does not excessively burden Petitioner's religious freedom. A reversal of the Court of Appeals' decision, however, may well have a significant impact on the resolution of several issues of critical importance beyond just this case. One such issue, on which this *amicus* brief will focus, is the ability of government bodies – state or federal – to condition the grant of public funds for the provision of social services on compliance with neutral rules prohibiting faith-based employment discrimination.

For over one hundred years, federal, state and local governments have conditioned the grant of government funds on adherence to nondiscrimination policies, including faith-based discrimination. These government bodies have made

the affirmative decision to advance the interests of equality, civil rights, and religious freedom for the betterment of society as a whole.

Despite this history, Petitioner and a group of religious organizations that submitted an *amicus* brief (the "Faith-Based Amici")[3] urge the Court to announce a novel constitutional standard. They ask the Court to hold that religious groups enjoy a special constitutional right to discriminate in employment and membership while receiving public funding and resources. Under this novel standard, as it relates to religious groups, the federal government and the States will effectively be stripped of their long-recognized powers and discretion to condition the grant of taxpayer funds on compliance with neutral nondiscrimination policies, such as the policy at issue in this case.

At the beginning of this decade, the Executive Branch, relying on a legally incorrect interpretation of this Court's precedent, proclaimed that entities accepting funds under the federal government's Faith-Based and Neighborhood Partnerships program[4] are exempt from nondiscrimination provisions in statutes governing their grants. To support this proclamation, the Executive Branch. Petitioner and the Faith-Based Amici are seeking to impose this same flawed logic on the States, by advocating a novel constitutional standard that requires strict scrutiny of any laws and policies that

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[3] *See* Brief of *Amici Curiae* Association of Christian Schools International, *et al.*

[4] Formerly known as Faith-Based and Community Initiatives.

prohibit faith-based membership nondiscrimination, as applied to religious entities. Petitioner and the Faith-Based Amici effectively seek to invalidate countless federal, state and local nondiscrimination laws and policies in order to force governments to provide public funding to groups that choose to exclude large portions of society.

Although this case does not address the discretion and power of the States and the federal government to condition public funds on compliance with nondiscrimination employment laws, the Court's decision here may well have significant implications for that issue. Petitioner is seeking to eliminate a public university's ability to require that student religious groups comply with a neutral, universally applicable nondiscrimination policy that applies to any student group that seeks access to public resources and funds. Specifically, advancing freedom of association and expression arguments, Petitioner asserts that it is impermissible for the public university to condition access to public benefits on Petitioner's commitment not to engage in membership discrimination. Faith-based groups, such as the Faith-Based Amici, have been advancing essentially the same arguments in seeking to be exempt from universally applicable nondiscrimination employment laws in the context of publicly funded faith-based and community initiatives. Indeed, the Faith-Based Amici are urging the Court to reverse the Ninth Circuit here particularly because they believe that a reversal would support their position that they should always be exempted from employment nondiscrimination polices that are attached to public funding.

The Court has repeatedly upheld the discretion of the States and the federal government to condition public funding on compliance with viewpoint-neutral nondiscrimination laws and policies. Relatedly, the Court has also upheld the right of the States and the federal government to choose not to fund religiously motivated practices. *Amici*, thus, respectfully request that the Court decline the invitation to overrule its prior holdings and urge the Court to affirm the Court of Appeals' decision.

ARGUMENT

I. THE COURT SHOULD CONSIDER THE POTENTIALLY SIGNIFICANT NEGATIVE IMPACT THAT REVERSAL OF THE COURT OF APPEALS MAY HAVE ON THE POWER OF THE STATES AND THE FEDERAL GOVERNMENT TO ENFORCE NEUTRAL NONDISCRIMINATION LAWS AND POLICIES AS TO FAITH-BASED ORGANIZATIONS.

A. The Federal Government Has Long Prohibited Discrimination on the Basis of Religion in Government-Funded Programs.

The federal government possesses broad constitutional powers to protect its citizens from discrimination and promote equality. *See, e.g.*, *United States v. Fordice*, 505 U.S. 717, 729-43 (1992) (recognizing the power of the federal government to enact measures to ensure that the most subtle and sophisticated forms of discrimination are eliminated); *Brown v. Bd. of Educ.*, 347 U.S. 483, 489-96 (1954) (recognizing the broad powers of the government to combat racial discrimination). The

government also enjoys broad discretion to impose conditions on public funding to private parties. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (noting the constitutional power of the government to "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way").

Acting on these broad powers, Congress has traditionally conditioned public funding to private employers on the recipients' commitment not to engage in employment discrimination. That often included a prohibition on faith-based employment discrimination. *See, e.g.*, Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d(c)(1) ("No person in any State shall on the ground of . . . religion . . . be . . . denied employment in connection with any programs or activity funded in whole or in part with funds made available under this chapter").[5]

Like Congress, the Executive Branch has also frequently conditioned government funding on

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[5] *See also* Community Development Block Grant of 1974, 42 U.S.C. § 5309(a) ("No person in the United States shall on the ground of . . . religion . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this [Block Grant program]"); Workforce Investment Act, 29 U.S.C. § 2938(a)(2) ("No individual shall be . . . denied employment in the administration of or in connection with, any such program or activity because of . . . religion").

compliance with nondiscrimination policies, which often included a prohibition on faith-based employment discrimination. *See, e.g.*, Exec. Order No. 8802, 6 Fed. Reg. 3109 (Jun. 25, 1941) ("[T]here shall be no discrimination in the employment of workers in defense industries or government because of . . . creed").[6]

Amici are aware of no court decisions that have questioned the discretion or authority of the government to protect equal protection and First Amendment interests and rights by conditioning public funding to organizations – including religious organizations – on a commitment by the recipients not to engage in faith-based discrimination, including faith-based membership and employment discrimination.

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[6] *See also* Exec. Order No. 10479, 18 Fed. Reg. 4899 (Aug. 13, 1953) (establishing a committee entrusted with ensuring that entities contracting with the government complied with employment nondiscrimination policies, which included a ban on faith-based discrimination); Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965) (requiring the inclusion of a provision in all government contracts prohibiting faith-based employment discrimination); 41 C.F.R. § 60–50.1 (implementing within the Department of Labor the anti-discrimination mandate of Executive Order No. 11246, noting that "[m]embers of various religious and ethnic groups . . . such as Jews, Catholics, Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin . . . [and that t]hese guidelines are intended to remedy such unfair treatment").

Notably, as applied to religious organizations, such nondiscrimination policies may also serve as viable Establishment Clause safeguards. The Establishment Clause prohibits the establishment of a national religion by the government, as well as the preference of one religion over another. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947). The Court has interpreted these constitutional principles as requiring the government to employ sufficient safeguards and monitoring to ensure that public funds are not used to promote faith-based discrimination or religious indoctrination. *Mitchell v. Helms*, 530 U.S. 793, 840, 860-67 (2000) (O'Connor, J., concurring) ("[a]lthough 'our cases have permitted some government funding of secular functions performed by sectarian organizations,' our decisions 'provide no precedent for the use of public funds to finance religious activities.'") (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, J. concurring))

B. State Governments, Including California, Have Long Prohibited Discrimination on the Basis of Religion in Programs Funded by Public Funds.

Like the federal government, the States possess broad powers to protect their citizens from discrimination and to promote equality. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 623-26 (1984) (reviewing the history of state nondiscrimination laws and observing that a "State enjoys broad authority to create rights of public access on behalf of its citizens"); *Evans v. City of Berkeley*, 129 P.3d 394, 398-99 (Cal. 2006) (upholding a city's discretion to deny a scouting

group access to a public marina when the group refused to adequately assure the city that it would not follow the avowed anti-homosexual and anti-Atheist policy of the Boy Scouts, in violation of the nondiscrimination ordinance). In addition, States and local governments enjoy broad discretion when granting public funds and resources to private entities, including religious entities. *See, e.g., Locke v. Davey*, 540 U.S. 712, 722-25 (2004) (upholding the state of Washington's decision to exclude religious studies from a state scholarship program).

State legislatures, like Congress, have enacted provisions that prohibit employment discrimination, including faith-based employment discrimination, in publicly funded programs. Such provisions are in line with this Court's admonition that "[a] State's constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination." *Norwood v. Harrison*, 413 U.S. 455, 467 (1973). For example, the law of California, the state at issue here, mandates that "[e]very state contract and subcontract for public works or for goods or services shall contain a nondiscrimination clause prohibiting discrimination" on the basis of, among other things, religion. Cal. Gov. Code § 12990(c); *see also id* § 12940(a). With limited exceptions, the prohibition on faith-based discrimination in connection with government contracts extends fully to contracts with religious entities.[7]

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[7] Certain religious health care providers are exempt from the faith-based employment nondiscrimination laws to the extent that the person holding the position is responsible for performing religious activities, the

Other states have no exceptions from their employment nondiscrimination policies for religious entities.[8] In addition, thirty-seven states, including California, have Constitutional provisions that specifically address and impose limitations on public funding of religious entities.[9]

Moreover, in *Employment Division v. Smith*, this Court recognized the power and discretion of the States to enforce viewpoint-neutral and universally applicable laws, even when such enforcement has the incidental effect of burdening religious belief or practice. 494 U.S. 872, 877-82 (1990). The California Supreme Court applied *Smith* to reject a free exercise challenge and to uphold the constitutionality of a viewpoint-neutral, generally

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position is that of an executive manager, or the position directly involves providing health services. *See* Cal. Gov. Code § 12926.2(c)-(e). The exemption also extends to religious corporations that operate an educational institution as its sole or primary activity. *See id.* § 12926.2(f)(1). Faith-based organizations that do not fall within the above categories are fully subject to prohibitions against discrimination. *Id.* § 12926.2(f)(2).

[8] *See* Mark Ragan and David J. Wright, *The Policy Environment for Faith-Based Social Services in the United States: What has Changed Since 2002? Results of A 50-State Study* 38 (Dec. 2005) ("[I]n about one-third of the states religious organizations do not have or retain any right to prefer co-religionists in their hiring practices insofar as they relate to contracts with the government"), *available at* http://www.religionandsocialpolicy.org/docs/policy/State_Scan_2005_report.pdf.

[9] *Id.* at 35.

applicable statute aimed at eradicating discrimination. *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 81-94 (Cal. 2004).

C. Recent Executive Branch Analysis is Policy Driven and Does Not Withstand Legal Scrutiny.

In January 2001, the White House Office of Faith-Based and Community Initiatives was created, in addition to corresponding offices within five federal agencies, with the goal of increasing the involvement of faith-based organizations in delivering federally funded social services. *See* Exec. Order No. 13198, 66 Fed Reg. 8497 (Jan. 29, 2001); Exec. Order No. 13199, 66 Fed. Reg. 8499 (Jan. 29, 2001). As part of that effort, faith-based grantees of federal funds were exempted from rules and regulations that prohibited faith-based employment discrimination,[10] a dramatic deviation from the long-standing federal policy described above. Indeed, Executive Order No. 13279, 67 Fed. Reg. 77141 (Dec. 12, 2002), provided that the prohibition on faith-based employment discrimination in federal contract programs "shall not apply to a Government contractor or subcontractor that is a religious

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[10] *See* The White House, *The Quiet Revolution: The President's Faith-Based and Community Initiative: A Seven-Year Progress Report* 29-30 (Feb. 2008), *available at* http://www.socialpolicyandreligion.org/docs/policy/TheQuietRevolutionFinal.pdf.

corporation, association, educational institution, or society." *Id.*[11]

Further, in connection with this program, a novel and unprecedented analysis was adopted by the Executive Branch relating to the applicability of the Religious Freedom Restoration Act of 1993 ("RFRA") to faith-based grantees of federal funding. Generally, RFRA forbids the federal government from "substantially burden[ing] a person's exercise of religion," unless the government action furthers a "compelling governmental interest" and is the "least restrictive means of furthering that . . . interest." 42 U.S.C. § 2000bb-1.

Certain *amici* were supportive of RFRA's enactment. Currently, however, RFRA is being misapplied. The first such instance of RFRA's misapplication was the 2003 enactment of rules, by an arm of the Department of Health and Human Services, which allowed faith-based grantees to apply for and obtain an exemption from the governing act's prohibition on faith-based employment discrimination.[12] The second instance

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[11] President Johnson instituted the prohibition on faith-based employment discrimination for federal contracts in 1965. *See* Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965).

[12] *See* Public Health Service Act, 42 U.S.C § 300x-57(a)(2); *see also* 42 C.F.R. § 54.6. *See generally* Ira C. Lupu & Robert W. Tuttle, *The State of the Law – 2008: A Cumulative Report on Legal Developments Affecting Government Partnerships with Faith-Based Organizations* 31-33 (Dec. 2008), *available at* http://www.religionandsocialpolicy.org/docs/legal/state_of the_law_2008.pdf.

was announced in a highly controversial 2007 memorandum, issued by the Office of Legal Counsel of the Department of Justice (the "OLC Memorandum").[13] The OLC Memorandum exempted World Vision, Inc., one of the Faith-Based Amici in this case, from the prohibition on faith-based employment discrimination associated with a grant under the Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §§ 5601-5792a. In both instances, the relevant agency wrongly determined: (i) that RFRA overrode the act governing the federal grant, and (ii) that requiring the faith-based grantees to comply with the universal nondiscrimination employment policy violated RFRA as it constituted a "substantial burden" that did not further a compelling government interest. *See* OLC Memorandum at 6-20.

In concluding that the prohibition on faith-based discrimination constituted a "substantial burden" on World Vision, the OLC Memorandum drew an analogy between the circumstances of World Vision and the circumstances of the appellant in *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Sherbert*, a South Carolina statute conditioned eligibility for unemployment compensation on the applicants' availability to work on Saturday. *Id.* at 400-01. The Court held that, as so applied, the statute abridged Ms. Sherbert's right to the free exercise of her

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[13] *See* Memorandum Opinion from the Office of Legal Counsel for the General Counsel Office of Justice Programs, Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act, 1, 25 (Jun. 29, 2007), *available at* 2007 WL 5633562.

religion as a member of the Seventh-Day Adventist Church. *Id.* at 409-10.

The OLC Memorandum's analogy is flawed for at least two reasons. First, while faith-based hiring practices may constitute a form of religious expression, they are not compelled by religious convictions – certainly not when the hiring pertains to provision of government-funded secular social services. Second, the South Carolina statute left Ms. Sherbert with no meaningful choice as she relied on the unemployment benefit for subsistence. World Vision, on the other hand, was free to rely on its extensive private funding and to forbear from taking the federal grant, which pertained only to the provision of secular social services and did nothing to threaten its continued existence as a faith-based organization.[14]

Prior to 2003, no administration had taken the position that requiring religious grantees of public funds to comply with neutral nondiscrimination employment policies constitutes an impermissible substantial burden on religion.[15] Similarly, *amici*

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[14] *See* OLC Memorandum at 3 ("For the relevant fiscal year, the grant represents approximately 10% of the entire budget for World Vision's domestic community-based programs").

[15] Certain *amici* co-wrote an open letter to President Obama urging him to disavow the OLC Memorandum and its faulty legal basis. *See* Letter from the Coalition Against Religious Discrimination to President Obama (Feb. 4, 2010), *available at* http://www.adl.org/Civil_Rights/letter_presidentobama_2010.asp.

are aware of no court that has recognized such an argument, let alone invalidated a government law or policy that required religious recipients of public funds to comply with neutral nondiscrimination policies.

Instead, courts have generally held that a government rule may constitute a substantial burden on religion only when it forces a religious person or entity to perform an act that clearly conflicts with their creed or prohibits them from performing actions that are required by their creed. *See, e.g.*, *Sherbert*, 374 U.S. 398; *Wisconsin v. Yoder*, 406 U.S. 205, 219-21 (1972) (Wisconsin's attempt to compel school attendance of Amish children beyond the eighth grade was "in sharp conflict with the fundamental mode of life mandated by the Amish religion").

Requiring religious entities to comply with a rule that obliges all recipients of a federal grant to comply with a neutral nondiscrimination employment policy is not coercive in either of these ways, as such entities are free to decline the government funds and maintain their practices without such funds. For example, in *Locke*, 540 U.S. 712, this Court upheld the state of Washington's decision to exclude a student majoring in devotional theology from Washington's Promise Scholarship Program. The Court distinguished between a rule barring religious practices, which may constitute a substantial burden, and a "mere refusal to fund" religiously motivated practices, which constitutes only a "relatively minor burden." *Id.* at 721-22, 725. It noted that Washington did not bar devotional theology studies, but merely refused to pay for them.

Id. at 721. In addition, the student was not excluded from the program because of his faith – he was free to use the scholarship for secular studies and fund his devotional theology with private money. *Id.* at 724-25. Faith-based organizations are similarly free to avoid public funding and the restrictions that may come with such funding.

D. Petitioner and the Faith-Based Amici Ask the Court to Announce a Novel Constitutional Standard That is Contrary to Court Precedent.

Petitioner and the Faith-Based Amici argue that the Constitution mandates that, as applied to religious entities, any federal or state rule conditioning government funds on compliance with a prohibition on faith-based discrimination in the context of membership or employment must be "subject to strict and generally fatal scrutiny." Petitioner Br. at 41; *see also* Faith-Based Amici Br. at 27-41. This argument is flawed and groundless.

As demonstrated above, this argument contradicts the long and valuable history of federal and state nondiscrimination laws and cannot be reconciled with Court precedent. Moreover, the key Court precedent on which Petitioner and the Faith-Based Amici rely – *Corp. of Presiding Bishop of Church of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), *Bradfield v. Roberts*, 175 U.S. 291 (1899), *Bowen v. Kendrick*, 487 U.S. 589 (1988), and *Sherbert*, 374 U.S. 398 – lends no support to their position.

In *Amos*, this Court upheld the constitutionality of Section 702 of the Civil Rights Act of 1964, which exempts religious organizations from the act's general prohibition on employment discrimination. 483 U.S. at 339. As an initial matter, *Amos* has nothing to do with public funding. At issue there was a church function that was fully funded by private money. *Id.* at 330-31. *Amos* recognized Congress' power to accommodate religious organizations under such circumstances. While upholding the constitutionality of Congress' decision to grant the exemption, *Amos* does not in any way hold that Congress was required to provide the exemption. Indeed, the Court has never suggested that the Civil Rights Act's pre-Section 702 prohibition on faith-based employment discrimination, as applied to religious organizations, was unconstitutional.

Lukumi, like *Amos*, does not involve public funding. In *Lukumi*, the Court invalidated local ordinances that sought to outlaw animal sacrifice in the Santerian religion. 508 U.S. at 526-27, 546-47. The Court determined that the municipality had deliberately drafted the ordinances so as to ban only ritual sacrifice, and virtually no other form of animal killing. *Id.* at 542. Because of their apparent discriminatory treatment, the Court held that the ordinances were not entitled to the deference generally available to neutral government policies. *Id.* at 546. The policy that Petitioner and the Faith-Based Amici seek to subject to strict scrutiny (*i.e.*, Hastings' nondiscrimination policy), however, is wholly neutral and universally applicable – exactly the type of policy that, pursuant to the Court's

reasoning in *Lukumi*, merits a rational basis analysis. *Id.*; *see also Smith*, 494 U.S. at 877-882.

Bradfield and *Bowen* too are of no consequence here, as neither addresses the power or discretion of the government to place conditions on public funding to religious entities. In *Bradfield*, the Court upheld Congress' decision to fund a hospital that was incorporated as a "purely secular" corporation and did "not limit the exercise of its corporate powers to the members of any particular religious denomination." 175 U.S. at 298-299. In *Bowen*, the Court held that the Adolescent Family Life Act was not unconstitutional "on its face," but remanded to the district court to determine whether the act violated the Establishment Clause "as applied." 487 U.S. at 620-21. Significantly, in holding that it is permissible, in certain circumstances, for the government to grant religious organizations funding for secular functions, the Court provided as an example the circumstances of *Bradfield*, emphasizing "the absence of any allegation that the hospital discriminated on the basis of religion or operated in any way inconsistent with its secular charter." *Id.* at 609.

Sherbert, as demonstrated above (see pp. 16-17), presents a fact pattern that has no bearing on the issue here.

Finally, in addition to reliance on these inapplicable cases, throughout their brief, the Faith-Based Amici argue that there is no reason for the nondiscrimination laws to apply to religious entities because religious employment discrimination can never – under any circumstances – be "invidious." *See, e.g.* Faith-Based Amici Br. at 20-26. However,

there is no authority from this Court that the government must exclude religious entities from rules prohibiting faith-based discrimination in government-funded programs. Moreover, purposeful discrimination is a key component of what constitutes "invidious" discrimination. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) ("Where the claim is invidious discrimination in contravention of the First . . . Amendment[], our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose") (citing *Lukumi*, 508 U.S. at 540-41). And this Court has recognized that religious entities can engage in invidious faith-based discrimination. *See Norwood*, 413 U.S. at 467. In testimony before Congress, Rabbi David N. Saperstein warned that, if faith-based employment discrimination were to be allowed, "a job notice could be placed in the newspaper seeking employees for a government funded social service program run by a Protestant church that reads 'Jews, Catholics, Muslims need not apply' or 'No unmarried mothers will be hired.'"[16] There is no reason to turn back the clock decades on the progress of Civil Rights, as Faith-Based Amici suggest.

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[16] *See* Constitutional Role of Faith-Based Orgs. in Competition for Fed. Soc. Serv. Funds, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 107th Cong. (2001) (prepared statement of Rabbi David N. Saperstein), *available at* http://commdocs.house.gov/committees/judiciary/hju72981.000/hju72981_0f.htm.

E. A Reversal of the Court of Appeals' Decision May Well Have Significant Injurious Effects on the Powers of the States and the Federal Government to Enforce Nondiscrimination Policies.

A reversal of the Court of Appeals' decision may well have significant injurious effects on the power of the States and the federal government to enforce viewpoint-neutral nondiscrimination laws and policies on religious entities, including in the context of Faith-Based and Neighborhood Partnerships. Specifically, a decision by this Court to adopt the standard that Petitioner and the Faith-Based Amici are advocating may render invalid numerous nondiscrimination laws and policies, as applied to religious entities, and deny governments of all levels a critical tool – which they have used for decades – to prevent discrimination and address equal protection, free exercise and separation of church and state concerns.

1. Reversal of the Court of Appeals' Decision May Invalidate State Powers That the Court Has Explicitly Upheld.

Even if the Executive Branch's misapplication of RFRA was sustainable, which it is not, RFRA is inapplicable to states and local governments. *City of Boerne v. Flores*, 521 U.S. 507 (1997). Petitioner and the Faith-Based Amici, nevertheless, are seeking a ruling that will effectively turn the prior administration's interpretation of RFRA, as applied in the context of the Faith-Based and Neighborhood Partnerships, into a constitutional standard, which will apply to every government in this country.

If accepted, the proposed standard will render meaningless the Court's holding in *Boerne* that RFRA does not apply to state governments. It may well also overrule the Court's holding in *Locke*, 540 U.S. 712, which upheld the state of Washington's discretion to refuse to fund religiously motivated activities, among other reasons, because the State's powers to place restrictions on pubic funding of religious activities are rooted in the State's Constitution and are even greater than those required by the Establishment Clause. *Id.* at 725. The Court should decline the invitation to overrule its previous holdings and, instead, uphold the States' discretion to enforce laws and rules designed to combat discrimination.

2. Congress Already Has Rejected the Standard That Petitioner and the Faith-Based Amici Advocate.

Congress already has rejected a standard virtually identical to the standard Petitioner and the Faith-Based Amici are seeking here. In 2001, Congress rejected a proposed bill that stated: "[A] religious organization that provides assistance under a [federally-funded] program may, notwithstanding any other provision of law[, including the program's governing statute], require that its employees adhere to the religious practices of the organization." Community Solutions Act of 2001, H.R. 7, 107th Cong. § 201. Petitioner and the Faith-Based Amici are, thus, improperly seeking to establish by a judicial decision a standard that has been rejected by the elected representatives.

Congress is the proper forum to address this issue of public policy. The Court's decision in *Amos*

recognizes exactly that. There, the Court upheld Congress' power to accommodate private selective hiring practices by religious entities. *Amos* does not require Congress to accommodate such practices, but recognizes only that it has the discretion to do so. Further, this Court has explicitly stated: "That the Constitution may compel toleration of *private* discrimination in some circumstances does not mean that it requires *state support* for such discrimination." *Norwood*, 413 U.S. at 463 (emphasis added). Thus, Congress clearly has the discretion to decline to exempt religious entities from laws and policies prohibiting employment discrimination with respect to secular programs funded with public money. A reversal of the Court of Appeals here may threaten this critical congressional power, which the Court has explicitly upheld.[17]

CONCLUSION

Amici have a deep respect for the free exercise of religion and, to this end, support the right of religious organizations to enjoy exemptions from

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[17] *Amici* strongly believe that the Ninth Circuit's decision should be affirmed. However, if the Court is inclined to reverse, based on university-setting equal protection considerations such as those discussed in *Rosenberger*, 515 U.S. 819, *Amici* respectfully request that the Court's decision be limited to such a setting and to such considerations, avoiding broad statements that may implicate employment discrimination issues and thereby threaten the discretion of both the States and the federal government to combat discrimination.

nondiscrimination laws in appropriate circumstances. However, when pubic funds are involved, it is critical to preserve the discretion of the government to enforce neutral, generally applicable nondiscrimination laws on any and all grantees of such funds, including religious organizations. Although this case involves a faith-based student organization in a public university setting, the issue of discrimination by organizations receiving public funds is not only prominent here, but is ubiquitous in all contexts of publicly-funded activities and programs.

For all the reasons set forth above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* ASSOCIATED STUDENTS OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF LAW IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The Associated Students of the University of California, Hastings College of Law ("ASUCH") is the official student body association of the College.[1] ASUCH governs issues relating to the welfare of Hastings students and the activities in which they participate. The ASUCH General Council is composed of school-wide elected officers and representatives from each of the three classes at the College. The General Council has the power to enact legislation necessary and proper to exercise its powers, and to delegate the authority required to execute these powers.[2] All current Hastings students are members of ASUCH, and every Hastings student is required to pay an annual student activity fee, portions of which comprise ASUCH's general operating fund. This fund is used to provide financial support to the almost seventy Registered Student Organizations ("RSOs") operating on the Hastings campus.[3] ASUCH often

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[1] Counsel of Record for all parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] *See* ASUCH Const. Art I, § 2; Art. VI, § 9, *available at* http://www uchastings edu/asuch/records/ASUCH_Constitution. pdf (last visited March 12, 2010).

[3] *See* App. A, Current List of Registered Student Organizations at Hastings.

advocates on behalf of its members to the Hastings Administration and Board, the California Legislature, and other entities whose decisions touch and concern the Hastings student community.

This case raises legal questions of vital importance for the Hastings student body, for ASUCH as an institution, and for the Hastings community at large. ASUCH and the students it represents are profoundly concerned with maintaining equal student access to all RSOs at Hastings. To this end, ASUCH, duly elected by and acting on behalf of Hastings' student body, has passed a unanimous resolution supporting the Hastings Policy on Nondiscrimination.[4] ASUCH strongly believes that the interests of present and future Hastings students will be best served by ensuring that all students have equal access to all school-funded groups—particularly when the students themselves help subsidize those groups.

SUMMARY OF ARGUMENT

This Court has long recognized that the University represents a "marketplace of ideas" where students' academic and personal development is furthered through exposure to diverse viewpoints. Because such groups ensure that students "have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life

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[4] *See* App. B, ASUCH Res. *In Support of the UC Hastings Policy on Nondiscrimination* (Feb. 24, 2010).

outside the lecture hall," a thriving community of extracurricular groups and activities are central to the University's goals. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233 (2000).

The Hastings Nondiscrimination Policy protects and nurtures the thriving, dynamic student community on campus by promoting dialogue between and among students. There is tremendous benefit in having a community in which all students are guaranteed access to all groups, and no student feels excluded. The Hastings Nondiscrimination Policy also exposes groups to a broader range of ideas and viewpoints by fostering a vigorous discussion both within and among groups. Additionally, the Nondiscrimination Policy ensures that students are not forced to fund groups that would not have them as members.

Religious student organizations are and have been an important part of student life at Hastings. Numerous religious organizations are active at Hastings and abide by the Nondiscrimination Policy. These organizations maintain strong religious communities without excluding any of their fellow students from their membership and leadership positions. Indeed, ASUCH is not aware of any other organization, religious or otherwise, that has objected to the Hastings' Nondiscrimination Policy.

CLS's decision to forego registered status has not adversely affected its ability to engage with Hastings students and thrive as an organization. After forgoing registration, CLS continued to hold meetings and social events, and actually increased

its membership. And Hastings continued to offer some resources to CLS to ensure that it would remain a viable campus organization.

Additionally, CLS's inability to use a Hastings bulletin board must be evaluated in light of how students communicate in this modern age. Hastings student groups use various modes of communication to alert students of opportunities, events, and important information. Student groups today communicate with actual and prospective members through e-mail, third-party social networking sites, and Internet chat groups. The importance of access to a school bulletin board is much less important than in previous generations.

ARGUMENT

I. THE HASTINGS CAMPUS REPRESENTS A "MARKETPLACE OF IDEAS" WHERE STUDENTS LEARN THROUGH EXPOSURE TO DIVERSE VIEWPOINTS.

Because they represent a "tradition of thought and experiment that is at the center of our intellectual and philosophic tradition," the university classroom and its environs have long commanded distinctive respect from this Court. *Rosenberger v. Rector and Visitors of the Univ. Of Va.*, 515 U.S. 819, 835 (1995). At Hastings, as on thousands of other higher education campuses across the Nation, students gather to learn new ideas and pursue unexpected lines of inquiry. Through exposure to diverse viewpoints in a dynamic "marketplace of ideas," students learn to critically evaluate unfamiliar or challenging ideas and defend (or

amend) their own set of beliefs and values. *Id.* at 831. Students emerge not only intellectually enriched, but better able to succeed in an increasingly multicultural world characterized by a heterogeneity of worldviews.

This is a style of learning that this Court knows and has strongly endorsed. In even its earliest cases addressing the issue, this Court recognized that diversity on campus has an inherent pedagogical value. Approvingly quoting the President of Princeton University, for example, the Court has observed that a "great deal of learning" comes through informal "interactions among students...who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world." *Regents of the Univ. of Ca. v. Bakke*, 438 U.S. 265, 312 n.48 (1978) (opinion of Powell, J.). Or, to put it more plainly, "'[p]eople do not learn very much when they are surrounded only by the likes of themselves.'" *Id.*

Building and exposing students to a diversity of viewpoints on campus, then, is not simply an academic fad. Indeed, it stands as a compelling interest of constitutional dimension for the public university. *See Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) ("Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission..."). And it is in the similarly compelling interests of the Nation as a whole. *See Keyishian v. Bd. of Regents of the Univ. of*

the State of N.Y., 385 U.S. 589, 603 (1967) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'") (citation omitted).

Students' exposure to this "multitude of tongues" happens both inside and outside the classroom. *Id.* Hastings, like most colleges and universities, offers all its students the opportunity to participate in a wide variety of extracurricular groups that range from the personal to the political. Such student groups complement and enrich the academic experience by ensuring students have a place to "engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall." *Southworth*, 529 U.S. at 233. Hastings currently recognizes almost seventy such organizations. *See* App. A.

Precisely because they meet outside the more formalized atmosphere of the lecture hall, these student groups often incubate the types of new ideas that challenge conventional academic, political, and cultural opinions. This type of critical thought is characteristic of a healthy university and fundamental to its mission of encouraging new ways of thinking and challenging ingrained beliefs. Indeed, the constitutional protections afforded those views is emblematic of a vital democracy. *See Sweezy v. New Hampshire*, 354 U.S. 234, 251 (1957) ("Mere unorthodoxy or dissent from the prevailing mores is not to be condemned."). As this Court has

declared, "the absence of such voices would be a symptom of grave illness in our society." *Id.*

Student groups, then, are not incidental to the university experience. They are part and parcel of the "marketplace of ideas," and crucial to the university's mission.[5] *See Southworth*, 529 U.S. at 222-23 ("In the University's view, the activity fees [that support student groups] 'enhance the educational experience' of its students by 'promot[ing] extracurricular activities,' 'stimulating advocacy and debate on diverse points of view,' enabling 'participa[tion] in political activity,' 'promot[ing] student participa[tion] in campus administrative activity,' and providing 'opportunities to develop social skills,' all consistent with the University's mission."); *see also Board of Ed. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 832 n.4 (2002) (observing that participation in student organizations "is a significant contributor to the breadth and quality of the educational experience"). By serving as a forum in which *all* Hastings students can vigorously debate and advocate for new ideas, student groups contribute to the "quality and creative power of student intellectual life," which remains a "vital

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[5] Many empirical studies have similarly concluded that student groups enhance the learning experience on campus. *See generally* Br. for *Amici Curiae* American Council on Education, Association of Public and Land-Grant Universities, Association of Jesuit Colleges and Universities, and American Dental Education Association In Support of Respondents.

measure of [the] school's influence and attainment." *Rosenberger*, 515 U.S. at 836.

A. Hastings' Policy Creates An Inclusive Campus Atmosphere That Is Conducive To Collaborative Learning.

The vitality of the university marketplace of ideas hinges upon the freedom students feel to have their say in that forum. The university atmosphere must be "conducive to speculation, experiment and creation," or dissenting voices will be lost and new ideas stifled. *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (citation omitted). And as Justice Stevens has concluded, that same open "atmosphere" must extend to student groups. *Widmar v. Vincent*, 454 U.S. 263, 279 n.2 (1981) ("...it is clear that the 'atmosphere' of a university includes such a critical aspect of campus life" as extracurricular activities) (Stevens, J., concurring).

ASUCH has unanimously resolved that the school's nondiscrimination policy "benefits the student community" and fosters an atmosphere of "dialogue" on campus by ensuring that any student has the opportunity to join any officially recognized group. *See* App. B. This is not to say that many students will decide to join groups whose views they find objectionable. But some may, and, regardless, it is important that students know they could if they wished to do so. And Hastings' policy at least ensures that students are not forced to fund groups that would not have them as members.

A contrary rule that would allow officially-recognized student groups to categorically exclude

students on the basis of their faith, race, ethnicity, sexual orientation, disability, military status, martial status or parenthood, or political affiliation is antithetical to the inclusive atmosphere ASUCH supports. "Speculation, experiment, and creation" cannot flourish in an environment where students are targeted for exclusion on the basis of characteristics over which they may have no control. *See Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring). And a rule that sanctions unvarnished exclusion can only inspire resentment by forcing some students to subsidize organizations that advocate messages with which they disagree, and that they cannot even join in order to effect change from within.

A decision from this Court requiring Hastings and ASUCH to support groups that practice naked discrimination against certain students, if they are to support any groups at all, would create a campus atmosphere of "suspicion and distrust." *Sweezy*, 354 U.S. at 250. This Court has been vigilant in ensuring that universities have the constitutional authority to avoid that ruinous result. *See id.* ("Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.").

B. Hastings' Policy Helps Promote Vigorous Debate Between Student Groups By Facilitating Debate Within Student Groups.

The university marketplace of ideas is only as vibrant as the diversity of viewpoints represented within the university. *See Bakke*, 438 U.S. at 312 ("The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse study body."). Student groups play a vital role in this marketplace by clarifying different points of view and amplifying the voices of members who may otherwise stay silent. The respectful dialogue between different-minded organizations—between the American Constitution Society ("ACS") and Federalist Society, for example—is thus a vital part of that "robust exchange of ideas" out of which students determine their own truth. *See Keyishian*, 385 U.S. at 603. ASUCH both supports and encourages this type of inter-organizational dialogue.

Just as a healthy community of extracurricular groups serves the University's mission of "foster[ing] vibrant campus debate among students," Hastings' policy has the unremarkable effect of ensuring that student groups also benefit from a "debate among students" *internally*. *See Southworth*, 529 U.S. at 234. As a way of example, a member of the Federalist Society may wish to join the ACS and vigorously debate the merits of different approaches to judicial interpretation. To the extent those types of internal debates encourage members to evaluate critically their organization's positions, those

members are better prepared to defend and advocate their perspective to the broader campus community. The "robust exchange of ideas" *within* the organization results in a more nuanced, articulate debate *among* organizations. *See Keyishian*, 385 U.S. at 603.

In ASUCH's experience, the Hastings Policy has successfully fostered this type of dialogue both within and between student groups. Indeed, ASUCH itself is emblematic of intra-organizational debate, as each year brings a fresh crop of elected leaders who inevitably critique and refresh ASUCH's agenda and priorities. Other groups have had the same revitalizing experience.[6] And even a cursory stroll through the Hastings campus and its environs reveals a vast array of fliers and leaflets from student groups, some advertising meetings and some advocating causes, but all competing for students' attention in a healthy and heterogeneous marketplace of ideas.[7]

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[6] In the 2007-2008 school year, for example, a student of Asian descent ran for and was elected president of the Black Law Students Association (BLSA), bringing a unique (and popularly-endorsed) perspective to the organization. This would not have been possible, of course, if BLSA had both the constitutional latitude and desire to adopt a CLS-style rule excluding students who were not of African descent.

[7] Inter-organizational meetings and debates are common at Hastings. For example, each election season brings a series of debate-watching parties co-hosted by the Hastings Democrats and the Federalist Society. Those same groups participate in an annual "Supreme Court Review," where visiting academics (continued...)

Indeed, many of the ASUCH officers, and the students they represent, chose to attend Hastings because of the opportunity to participate in and help shape the agendas of a diverse community of registered student groups.[8] But not all students came knowing whether they were attracted to the ACS or Federalist perspective on matters of the law, for example. Students' freedom to participate in these and similar groups has shaped the development of their personal and legal values. And students' ability to seek leadership positions, insulated from ideological or substantive litmus tests, has ensured student groups remain vital, responsive to new ideas, and relevant to both students and the legal community at large.

The Constitution should not compel Hastings to choose between the extremes of only promoting debate within groups or only promoting debate among groups. The school may do both. And by guaranteeing that every student may join every registered group, Hastings' Policy ensures that students are not forced to choose between the extremes of participating in groups with which they

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discuss this Court's upcoming docket and field questions from members of these groups.

[8] Hastings enthusiastically promotes its diverse community of student organizations to potential students. *See, e.g.*, Hastings Admission Viewbook, *available at* http://www.uchastings.edu/site_files/Admissions/Viewbook.pdf (listing sample of student groups that contribute to "an intellectually stimulating environment like no other") (last visited March 12, 2010).

already agree, or no groups at all. Allowing groups to shelter themselves from dissenting viewpoints internally in the name of protecting their ability to advocate externally represents a profound departure from principles this Court has long embraced. If the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom," nor should it tolerate rules that cast a similar pall over the student organizations that play such a critical role in university learning. *See Keyishian*, 385 U.S. at 603.

C. Hastings' Policy Is Reasonable In Light of the College's Interest In Preserving a Diverse Marketplace of Ideas.

In ASUCH's experience, Hastings' Policy has proven itself a "reasonable" rule in "light of the purpose of the forum and all the surrounding circumstances." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 809 (1985). As discussed above, it was reasonable for Hastings to conclude that the Policy promotes a "robust exchange of ideas" by fostering an inclusive atmosphere that exposes students to diverse voices both inside and outside the lecture hall. *See Keyishian*, 385 U.S. at 603. Furthermore, it was reasonable for Hastings to conclude that applying the Policy to all groups avoids the type of intrusive entanglement with student groups—by either the administration or ASUCH—that could ultimately chill dialogue on campus.

By adopting a policy that applies to every group that seeks official recognition, neither ASUCH nor the Hastings Administration is required to make inherently subjective, ad hoc judgments about

whether a student group is excluding individual members on impermissible grounds or not. Certainly ASUCH neither seeks nor desires that responsibility, which would put elected student leaders in the unwanted and unpopular position of scrutinizing the genuineness of their fellow students' beliefs and motivations. A policy that called for—indeed, mandated—those sorts of intrusive inquiries would inevitably foster a campus environment of "suspicion and distrust." *Sweezy*, 354 U.S. at 250.

Indeed, it is not inconceivable that Hastings and other public universities, forced with the choice between funding student groups under an intrusive regime that institutionalizes group monitoring and engenders ill will, on the one hand, and not funding student groups at all, on the other, may well choose the latter. As the ASUCH resolution notes, Hastings' decision to cease funding student organizations altogether would have a "chilling effect on student speech and association." *See* App. B. Avoiding that result is surely one goal on which both Hastings, ASUCH, and the CLS can agree.

II. CLS'S DECISION TO FOREGO REGISTERED STATUS HAS WORKED AT MOST AN INCIDENTAL BURDEN ON THE GROUP'S ABILITY TO ADVOCATE ITS VIEWPOINT AND COMMUNICATE WITH THE HASTINGS STUDENT BODY.

A. Even As An Unregistered Organization, CLS Has The Ability To Actively Engage With The Hastings Student Body.

As discussed in the Respondent's and

Respondent-Intervenor's briefs, even as an unregistered organization, CLS maintained a strong presence on campus. CLS has the ability to be engaged on campus and communicate with active and prospective members through a host of mediums. Because CLS was not excluded from campus and enjoys access to facilities and campus, *Healy* is inapposite. *See Healy v. James*, 408 U.S. 169, 176, 181 (1972) (university affirmatively sought to exclude the disfavored groups from campus entirely); *Widmar*, 454 U.S. at 265 n.3 (same).

CLS contends that it is being deprived of benefits that are given to registered organizations—benefits that allegedly impact CLS's ability to engage adequately with the Hastings student body. Pet. Br. 12. These benefits purportedly include access to certain bulletin boards, a weekly Hastings newsletter, Student Information Center space, eligibility to send out certain mass emails using a Hastings email address, participation in the student organization fair, and access to the general operating funds from ASUCH. *Id.* at 4. But CLS's argument that it is being denied access to "the customary means by which student organizations communicate with the student body" fails to take account of the ways in which the "customary means" of communication have dramatically changed in recent years, at Hastings and other campuses of higher learning. *See id.; see also Christian Legal Soc'y v. Walker*, 453 F.3d 853, 874 (7th Cir. 2006) (Wood, J., dissenting) ("Moreover, the importance that physical campus bulletin boards have today is nothing like the situation [when *Healy* was decided] in 1972. Most universities and colleges, and most college-aged

students, communicate through email, websites, and hosts like MySpace.").

First, groups communicate with actual and prospective student members through a variety of different electronic media that bear no relationship to whether or not an organization is registered. Every Hastings student can send e-mail communications to other Hastings students through the Hastings exchange server. Because almost all communication occurs through e-mail, every Hastings student has the ability to communicate with their fellow students, including providing information about meetings and other group activities. Alternatively, many campus organizations, RSOs and unregistered organizations alike, use e-mail distribution lists created on third-party software, such as Google Groups and Yahoo! Groups, to communicate with members. Indeed, CLS itself used a Yahoo! group to communicate with members. *See* JA 114. Additionally, numerous Hastings organizations presently use third-party social networking sites to organize meetings, engage in online debates, and otherwise communicate with current and prospective members. Whether they are registered or not has no bearing on these groups' presence on sites ranging from Facebook, to Twitter, to Internet chat groups.[9]

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[9] Several organizations maintain active Facebook and Twitter pages. *See, e.g.*, ASUCH Facebook group, *available at* http://www.facebook.com/group.php?v=wall&ref=search&gid=2404446850 (last visited March 14, 2010); ASUCH Twitter page, *available at* http://twitter.com/asuch (last visited March 14, (continued...)

Second, CLS was not in fact excluded from campus simply because it could not participate in the student organization fair. The student organization fair presents a short (2-3 hours) opportunity for RSOs to meet new students that attend the fair. However, over the years, student attendance has declined and the number of students a group can reach during the student activity fair is dwarfed by the students reached by attendance at organization meetings and by electronic means.

Third, CLS argues that it seeks its "legal right to meet on the premises of the law school." Pet. Br. at 11. There is no evidence that Hastings did anything to prevent CLS from using the campus facilities for its meetings. In fact, the record shows that Hastings did almost everything to ensure CLS would remain active on campus other than confer registered status on it. Hastings provided CLS (and any other unregistered organization) the opportunity to use the campus facilities for its meetings. Pet. App. 78a-79a.[10] Indeed, CLS remained an active member of the Hastings community the year after it decided to

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2010); South Asian Law Students Association Facebook group, *available at* http://www.facebook.com/group.php?v=wall&gid=5789339342 (last visited March 14, 2010); American Constitution Society Facebook group, *available at* http://www.facebook.com/group.php?v=wall&ref=search&gid=123262933291 (last visited March 14, 2010).

[10] Additionally, Hastings informed CLS that "[i]f CLS wishes to form independent of Hastings we would be pleased to provide the organization the use of Hastings facilities for its meetings and activities." Joint Appendix (JA) 294.

forego RSO status. CLS hosted several events throughout the year including a beach barbecue, a Thanksgiving dinner, a campus lecture, fellow dinners, an end-of-year banquet, informal social activities, and weekly Bible-study meetings. Pet. App. 13a.

Lastly, by foregoing RSO status, CLS did not receive the modest monetary awards that are given to RSOs. But because these awards represent a small amount of the total monies typically needed for an event, student groups are encouraged to raise funds and seek money from additional sources. Consequently, not receiving the modest award, does not affect the ability of an organization to have a successful event. Any effect that resulted from CLS's failure to receive a small monetary award from ASUCH was *de minimis*.

In short, CLS exaggerates the importance of the limited benefits offered to RSOs. Hastings did not prohibit CLS from taking advantage of routine electronic modes of communication and CLS was able to hold group meetings in the law school (and had access to other locales for meetings). CLS's ability to engage with the student body is similar to those used by all student organizations on campus.

B. Groups That Choose Not To Register Can Still Successfully Advocate Their Viewpoint On Campus.

As discussed above, Hastings seeks to create an environment where all groups are welcome on campus regardless of its registration status. Over the years, several unregistered, informal groups

have assembled and thrived on campus. For example, during the last presidential election, several Hastings students created the "UC Hastings Law Students for Obama" group.[11] This informal group used campus facilities and did not complain to ASUCH about difficulty in conveying its message to the students. There are also private study groups and informal interest groups that are actively involved on the college campus without being a RSO. Tellingly, the record shows that CLS continued to hold activities and doubled its membership after refusing to comply with the Nondiscrimination Policy and foregoing its RSO status. The denial of the limited benefits that come with being a RSO were not detrimental to the organization.

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[11] *See* UC Hastings Law Students for Obama group, *available at* http://my.barackobama.com/page/group/UCHastingsLawStudentsforObama (last visited March 14, 2010) ("We are a group of current law students, faculty, and alumni from UC Hastings College of the Law in San Francisco, CA who have banded together to support Barack Obama on his road to the White House!"); *see also* Hastings for Obama Facebook group, *available at* http://www.facebook.com/group.php?v=wall&ref=search&gid=8456222162 (last visited March 14, 2010).

III. RELIGIOUS AND OTHER GROUPS THAT ENGAGE IN EXPRESSIVE ASSOCIATION HAVE SOUGHT RECOGNITION, COMPLIED WITH THE NONDISCRIMINATION POLICY, AND STILL THRIVED AT HASTINGS.

For many years, other RSOs have complied with Hastings' Nondiscrimination Policy without suffering from or complaining of any adverse effects. ASUCH has not received complaints that the Nondiscrimination Policy significantly infringes on any of these organizations' ability to advocate their viewpoints. Additionally, CLS has not put forth evidence showing how their situation is dissimilar from other religious organizations at Hastings such that complying with the policy would work a unique burden on them.

There are presently four RSOs at Hastings that represent specific religious faiths. Each of these organizations has traditionally and continues to comply with the Nondiscrimination Policy. For example, the Hastings Jewish Law Students Association ("HJLSA") has been a RSO for over fifteen years. The HJLSA seeks to "promote activities related to Judaism on campus; provide a forum for Jewish students to meet and network; and represent the interests of Jewish students to Hastings' administration." *See* HJLSA Bylaws, Art II.[12] And as set out in its bylaws, HJLSA "is open to

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[12] HJLSA Bylaws, Art II, *available at* http://www.uchastings.edu/student-
(continued...)

all full-time students of Hastings College of the Law." *Id.*, Art. III. The J. Reuben Clark Society seeks to "affirm the strength brought to the study of law by a law student's personal religious conviction." *See* JRCS Bylaws, Art. II.[13] But the group's bylaws stipulate that their membership is "multi-faith and open to all currently enrolled law students at the University of California, Hastings College of the Law, without regard to race, color, religion, national origin, ancestry, disability, age, sex, or sexual orientation." *Id.* The Law Students' Christian Fellowship and the Hastings Catholic Law Students Association ("HCLSA") are new RSOs. The HCLSA's purpose is "to promote an understanding of Catholicism and its relation to the legal community; to provide a forum for students to meet, network and celebrate the Catholic faith; to promote and provide opportunities for service to the community." *See* HCLSA student organization page.[14] Membership in HCLSA is open to all students.

There is nothing that inherently distinguishes these religious organizations from CLS. The purpose of CLS is, *inter alia*, "[t]o provide a means of society,

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services/docs/bylaws/bylaws-jewish-law-students-assoc.pdf (last visited March 12, 2010).

[13] JRCS Bylaws, Art II, *available at* http://www uchastings.edu/student-services/docs/bylaws/bylaws-j-reuben-clark-law-society.pdf (last visited March 14, 2010).

[14] HCLSA student organization page, *available at* http://www.uchastings.edu/student-services/student-orgs/HCLSA.html (last visited March 12, 2010).

fellowship and nurture among Christian lawyers" and "[t]o clarify and promote the concept of the Christian lawyer and to help Christian lawyers integrate their faith with their professional lives." CLS Bylaws, JA 358. Indeed, the CLS mission statement is very similar to the goals of the HJLSA and the HCLSA, both active RSOs seeking to create a group of Hastings students who share the same religious conviction, but neither organization insists on categorically excluding fellow classmates. ASUCH is not aware of any problems that HJLSA and HCLSA have had in creating a religious community while abiding by the Hastings Nondiscrimination Policy. The record also shows that CLS's predecessor group, the Hastings Christian Fellowship, agreed to abide by the Hastings Nondiscrimination Policy and was recognized for a decade without any deleterious effect. *See* JA 222-23.

Other officially-recognized groups at Hastings are organized around similar backgrounds and interests and, like CLS, engage in expressive association. For example, the La Raza Law Students Association seeks to "create a safe space where Latina/o students can forge a vibrant community by fostering political involvement, social awareness, cultural celebration, professional growth and academic excellence." *See* La Raza organization page.[15] The obvious membership for this

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[15] La Raza student organization page, *available at* http://www.uchastings.edu/student-services/student-orgs/la-raza.html (last visited March 12, 2010)

organization is Hastings students of Hispanic heritage. However, La Raza has a nondiscrimination clause in its bylaws which requires the Association "not to discriminate on the basis of race, color, religion, national origin, ancestry, age, sex, sexual orientation or disability." *See* La Raza Bylaws, Art. II.[16] ASUCH has never received complaints from La Raza that complying with the Hastings Policy has been to their detriment.

Consistent with the success these various groups have enjoyed without a discriminatory policy, the record here contains no evidence that the open membership policy that CLS maintained while previously identified as the Hastings Christian Fellowship caused any problems with its or its members' ability to express their stated goals. ASUCH has also never received complaints that the Hastings' Policy has led to or even encouraged students to join who do not support the organization's mission. CLS's concern that members will join for the sole reason to "sabotage the enterprise and wreak havoc on the group's chosen message" is inconsistent with the way membership in the organizations actually happens. Pet. Br. at 28. While it is certainly true that most students join groups that align with their interests and background, the rule that all groups must accept all comers nevertheless creates an inclusive atmosphere

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[16] La Raza Bylaws, Art. II, *available at* http://www.uchastings.edu/student-services/docs/bylaws/bylaws-la-raza.pdf (last visited March 14, 2010).

that fosters the academic experience. The rule advocated by CLS would allow groups to discriminate against students on the basis of any number of factors—including faith, race, gender, ethnicity, sexual orientation, disability, military status, marital status, or political affiliation—which not only undermine debate but create a hostile environment for students. In addition, it could single particular groups of students for disfavorable treatment on campus, including gay and lesbian students or students with a particular political affiliation. Such a result would be very destructive for the academic environment and experience.

CLS's suggestion that the policy will require groups to accept leaders not of its own choosing is also totally unfounded. All the policy requires is that every member is eligible for a leadership position (so that every member is a full-fledged and not second-class member). RSOs select their leaders in different ways, ranging from a vote of all members[17] to academic competitions.[18] In practice, ASUCH is not aware of any group that has been prevented from selecting the leaders it wants.

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[17] *See, e.g.*, La Raza Bylaws, Art. V; Hastings Federalist Society Bylaws, Article IV, *available at* http://www.uchastings.edu/student-services/docs/bylaws/bylaws-federalist-society.pdf (last visited March 14, 2010).

[18] *See, e.g.* Hastings Law Journal Bylaws, Arts. III and VI, *available at* http://www.uchastings.edu/student-services/docs/bylaws/bylaws-hlj.pdf (last visited March 14, 2010).

CONCLUSION

ASUCH has formally endorsed Hastings' Nondiscrimination Policy, not because it is "fashionable," as Petitioners suggest, Pet. Br. 39, but because it is ASUCH's conclusion that the vast majority of Hastings students share the values the school seeks to promote by enforcing the Policy against RSOs. For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A: Current List of Registered Student Organizations at Hastings (2009-2010 academic year) 1a

APPENDIX B: Associated Students of the University of California, Hastings Resolution, *In Support of the UC Hastings Policy on Nondiscrimination* 4a

APPENDIX A

Current List of Registered Student Organizations at Hastings (2009-2010 academic year)

American Constitution Society (ACS)
Armenian Law Students Association (ALSA)
Asian Pacific American Law Student Association (APALSA)
Associated Students UC Hastings (ASUCH)
Association of Communications, Sports & Entertainment Law (ACSEL)
Black Law Students Association (BLSA)
Business Law Association of Hastings
Clara Foltz Feminist Association (CFFA)
Employment and Labor Law Students Association (ELLSA)
Environmental Law Society (ELS)
Federalist Society UC Hastings Chapter
General Assistance Advocacy Project (GAAP)
Hastings Advocates for the Arts (HAART)
Hastings Animal Law Society (HALS)
Hastings Ballroom Dance Club
Hastings Business Law Journal (HBLJ)
Hastings Catholic Law Students Association (HCLSA)
Hastings Chinese Law & Culture Society (HCLCS)
Hastings Client Counseling Organization
Hastings Communications & Entertainment Law Journal (COMM/ENT)
Hastings Constitutional Law Quarterly (CLQ)
Hastings Cycling League
Hastings Democrats
Hastings Entrepreneurs

Hastings Golf Club
Hastings Health Law Organization (HHLO)
Hastings Hurricane Relief (HHR)
Hastings In-House Organization
Hastings Intellectual Property and Cyber Law Society
Hastings International and Comparative Law Review (HICLR)
Hastings International and Comparative Law Society (HICLS)
Hastings International Human Rights Organization
Hastings Intramural Basketball League
Hastings Jewish Law Students Association (HJLSA)
Hastings Law Journal (HLJ)
Hastings Legal Vines
Hastings OUTLAW
Hastings Public Interest Law Foundation (HPILF)
Hastings Race Poverty Law Journal (HRPLJ)
Hastings Race Poverty Law Organization
Hastings Science & Technology Law Journal
Hastings Soccer Club
Hastings Tax Law Students Association (HTLSA)
Hastings to Haiti Partnership (HHP)
Hastings Trial Law Association
Hastings Vietnamese American Law Society (VALS)
Hastings Women's Law Journal (HWLJ)
Homeless Legal Services
Iranian Law Students Association (ILSA)
J. Reuben Clark Law Society, UC Hastings Chapter
Japanese Law Society
Korean-American Law Students Association (KALSA)
La Raza Law Students Association
Law Students' Christian Fellowship (LSCF)
Law Students for Reproductive Justice

Legal Eagles - Hastings Running Club
Legal Notes
Middle Eastern Law Students Association (MELSA)
Military Law Students Association
National Lawyers Guild - Hastings Chapter
Native American Law Students Association (NALSA)
Othello Club
Phi Alpha Delta, Law Fraternity
Pilipino American Law Society (PALS)
South Asian Law Students Association (SALSA)
Third Year Class Council
UC Hastings Association of Students for Kids (ASK)
Usual Suspects Criminal Justice Film Club
West-Northwest Journal of Environmental Law and Policy

APPENDIX B

ASUCH Resolution

IN SUPPORT OF THE UC HASTINGS POLICY ON NONDISCRIMINATION

February 24, 2010

WHEREAS, it is the Purpose of the Associated Students of the University of California –Hastings ("ASUCH") to govern the affairs pertaining to the welfare and activities of the associated students (ASUCH Const. art I, § 2), and the General Council has the power to enact the legislation necessary and proper to exercise its powers, and to delegate the authority required to execute these powers (ASUCH Const. art. XI, § 9); and

WHEREAS, on June 22, 1990, the Board of Directors of the University of California, Hastings College of the Law ("the College") adopted and, on June 3, 2002, amended the Policy on Nondiscrimination, which governs all student governments, covers access and treatment in Hastings - sponsored programs and activities, and, in relevant part, prohibits discrimination on the basis of religion and sexual orientation (Policies and Regulations Applying to College Activities, Organizations and Students, § 20); and

WHEREAS, the Student Activity Fee is paid for by each student at the College, and the Policy on Nondiscrimination ensures that all students have equal access to the activities and organizations their monies fund, and the General Council already

demonstrates its support of the Policy on Nondiscrimination by specifically refusing to fund student organizations that do not comply (Budget Regulations for Student Organizations at UC Hastings 2009 - 2010); and

WHEREAS, the College is party to the case *Christian Legal Society v. Martinez* (08 - 1371) set to be argued April 19, 2010 before the Supreme Court of the United States, arising from an incident in 2004 where the College followed the Policy on Nondiscrimination by withholding registration from a student organization that refused to change their bylaws to include a policy prohibiting discrimination on the basis of religion and sexual orientation, and the deadline to file amicus briefs is March 15, 2010; therefore, be it

RESOLVED, in his capacity as the chief executive officer of ASUCH, that the ASUCH President retain Counsel to write and file an amicus brief not inconsistent with the following nonexclusive list of arguments, statements, and values:

(1) Student organizations are and provide a forum for student speech, and ASUCH actively promotes student speech and association;

(2) Public institutions forced to choose between subsidizing discriminatory organizations and not funding or recognizing any organizations will likely choose the latter to avoid litigation and goodwill costs, resulting in a chilling effect on student speech and association;

(3) The nondiscrimination policy is workable and furthers the interests of all students, and the policy allows ASUCH and the College to ensure that school monies are not put toward discriminatory or illegal purposes by student organizations without impracticable monitoring and tracking;

(4) The resulting all comers policy for membership is reasonable and benefits the student community, promoting inclusiveness and dialogue;

(5) Religious student groups are and have been an important part of student life, and all student organizations but the Christian Legal Society have readily amended their bylaws when made aware they were in violation of the Policy on Nondiscrimination;

(6) Any of the foregoing facts and findings in this resolution; and be it

FURTHER RESOLVED, in balancing the interests of expediency and integrity, that the finished amicus brief gain the General Council's final approval for filing upon a majority vote of the ASUCH President, Internal Vice President and External Vice President finding that it comports with the foregoing provisions.

AMICUS CURIAE BRIEF

No. 08-1371

IN THE

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,
Petitioner,
v.
LEO P. MARTINEZ, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN LAW SCHOOLS IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

Founded in 1900 to improve the legal profession through legal education, the Association of American Law Schools ("AALS") is a non-profit association of 171 public and private law schools, including Respondent, the University of California, Hastings College of the Law ("Hastings").[2] The core values of the AALS shape the efforts of the Association as well as define the obligations of its member schools. AALS Bylaw § 6-1. The core values emphasize both excellent teaching (across a rigorous and dynamic curriculum) and scholarship, noting its relationship to the creation and dissemination of knowledge. The core values also embody inter-related commitments to a self-governing academic community, to academic freedom, and to diversity of viewpoints. Member schools commit to support all of these objectives in an environment free of discrimination and rich in

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Respondent, Leo Martinez, Interim Dean of Hastings College of Law, is a member of the AALS Executive Committee; however, he has not participated in any way in the decision to seek to participate as *Amicus* or in the creation of this brief. Letters of consent to the filing of this brief from Petitioner and Respondent-Intervener Hastings Outlaw are being filed with this brief. Respondent Martinez's blanket letter of consent has been lodged with this court.

[2] The AALS is a voluntary association with requirements for membership widely regarded as indicators of a law school's quality. The Association does not serve an accreditation function.

diversity among faculty, staff, and students. The core values are framed by the idea that institutional autonomy should be honored whenever possible because wide latitude will encourage the development of strong and effective educational programs and learning communities. The core values combine to provide an environment where students have the opportunity to study law in an intellectually vibrant institution capable of preparing them for professional lives as lawyers instilled with a sense of justice and an obligation of public service.

Of specific relevance to the case before this Court, each AALS Member school undertakes to "provide equality of opportunity in legal education for all . . . enrolled students . . . without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, disability, or sexual orientation." AALS Bylaw § 6-3(a). Based on their expertise in legal education and familiarity with their own learning environments, AALS Member schools take varied approaches to student organizations. Some schools do not mandate nondiscrimination rules or open-membership policies for all student organizations, while others have exercised their institutional autonomy to make a judgment of the sort embodied in the Hastings policy. A decision to constitutionalize this area of sensitive educational judgment would rigidify the policy choices of state-supported AALS member schools, and thereby undermine the principles to which the AALS and its members are committed.

SUMMARY OF ARGUMENT

In addition to ensuring compliance with federal, state, and local law, the application of a law school's

nondiscrimination policy to registered student organizations can play a vital pedagogical function. Legal education is not simply a matter of classroom learning but also of learning by doing. To train lawyers for their dual role as zealous advocates and officers of the law, legal educators must have the space to make the policy judgment that students *practice*, rather than merely hear about, nondiscrimination. In making just that judgment, Hastings transgressed no constitutional boundaries.

This is not a case in which government has sought to dictate the membership of an expressive association. Rather, this is a case about a state university's ability to decide whether to spend scarce funds on, and dispense other benefits to, organizations that engage in illicit discrimination. As the parties have stipulated, Hastings conditions official recognition and funding for student organizations on their compliance with an open-membership (or "all-comers") rule. *See* Pet. App. 2a. That rule is a constitutional means of avoiding participation by Hastings in discriminatory conduct.

This Court has looked to its forum doctrine to evaluate conditions on expression in programs of official recognition and financial support for student organizations at public institutions of higher learning. *See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). Under that doctrine, a government policy that limits the access of individuals or groups to the benefits of a limited forum is permissible if it is "reasonable in light of the purpose served by the forum and . . . viewpoint neutral." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384,

392-93 (1993) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

Accordingly, this case poses two questions about the Hastings policy of granting official recognition and the tangible benefits that go with it only to student groups that abide by its all-comers rule. First, is the rule viewpoint-neutral? Second, is it reasonable? The answer to both questions is yes.

The Hastings rule is viewpoint-neutral. It singles out no expression whatsoever. Instead, it imposes a blanket rule of conduct upon all student groups seeking official recognition. The American Constitution Society and the Federalist Society, the Black Law Students Association and the Chinese Law & Culture Society, the Ballroom Dance Club and the Cycling League, all must abide by the all-comers rule in admitting members and leaders.

The Hastings policy is also reasonable. Having endorsed a policy of nondiscrimination and having admitted a diverse student body, Hastings has decided that official recognition and school resources should not then be bestowed on student groups that illicitly discriminate or otherwise exclude prospective student members. Other schools may choose different means to implement their nondiscrimination policies or to avoid subsidizing exclusion of students, but that casts no doubt on the reasonableness of the means Hastings has chosen.

Nothing in this Court's expressive association cases leads to a contrary conclusion. In *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000), this Court held that government in its *regulatory capacity* may not compel an expressive association to accept members or leaders whose membership or leadership would undermine the association's message. *See also*

id. ("New Jersey's public accommodations law *directly* and immediately affects associational rights . . . .") (emphasis added); *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995) ("[A] speaker who takes to the street corner to express his views in this way should be *free from interference by the State* based on the content of what he says.") (emphasis added).

A decision to deny funding and recognition to a student organization that excludes putative members in violation of a viewpoint-neutral policy is not in any sense a *direct* infringement on, or *interference* with, associational rights. To extend the principles of *Hurley* and *Dale* into the domain of government benefits in limited public fora would be to convert the First Amendment from a right against government interference into a right to government support.

To recognize the right Petitioner seeks would thus jeopardize government power to withhold subsidies from organizations that refuse to comply with reasonable conduct rules. It would call into question a wide range of educational policy judgments, from the requirement that student groups have faculty advisors to the requirement that they consist of students. *See* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1941-44 (2006). Indeed, Petitioner's new right would even jeopardize nondiscrimination rules that the state and federal governments routinely apply to private, non-profit, and religious recipients of aid for social services. At the very least, a ruling for Petitioner would invite decades of litigation over the question of when an expressive association that receives government

largess is privileged to disregard conditions forbidding discrimination that the government has attached to the benefit at issue.

There is no reason to go down that road. Straightforward application of this Court's existing limited forum doctrine leads to the inescapable conclusion that the viewpoint-neutral Hastings policy at issue here is reasonable, and thus constitutional. Respect for the "educational autonomy" of institutions such as Hastings is itself a principle rooted in the First Amendment. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). This Court should resist Petitioner's plea to formulate a one-size-fits-all constitutional rule that would displace the diverse judgments of state educational institutions and other government actors around the country.

ARGUMENT

I. THE HASTINGS "ALL-COMERS" RULE IMPLEMENTS THE SCHOOL'S NONDISCRIMINATION POLICY

The parties have stipulated "that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members . . . ." Pet. App. 2a. However, Petitioner argues in this Court that Hastings does not enforce its policy uniformly, and is thus engaged in viewpoint discrimination. *See* Brief for Petitioner at 12-14, 39-40. If this Court believes that the record reveals a genuine issue of material fact about whether Hastings has engaged in viewpoint discrimination, then the writ should be dismissed as improvidently granted. The law already establishes that a state university cannot discriminate based on

viewpoint in deciding which student organizations to officially recognize and fund.

Should this Court instead treat the stipulation as binding, it would do best to understand the all-comers rule as the district court did—as the mechanism through which Hastings enforces its nondiscrimination policy. *See* Pet. App. 12a-13a.[3] The all-comers rule allows Hastings to avoid making difficult judgments about subjective motive when a student complains about exclusion based on an illicit criterion. As explained below in Part V, an all-comers policy has other benefits as well. Most obviously, it ensures that organizations funded through student activities fees collected from all students are open to all students.

In any event, the balance of this brief shows why both the actual all-comers rule to which the parties stipulated and the non-discrimination policy that it serves are constitutional.

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[3] Religious organizations may have unique grounds for a legislative exception from a statutory prohibition on discrimination on the basis of religion. *See* 42 U.S.C. § 2000e-1(a) (exempting religious employers from Title VII's prohibition on religious discrimination). In this case, however, Hastings would have denied recognition and funding to Petitioner based on its failure to comply with the all-comers policy and its discrimination based on sexual orientation, regardless of Petitioner's discrimination based on religion. Thus, Petitioner is entitled to no special sympathy on the basis of its religious character, much less a constitutionally mandated exemption from the Hastings policy. *See Employment Div. v. Smith*, 494 U.S. 872 (1990).

II. THE HASTINGS POLICY INCULCATES VITAL NORMS OF THE LEGAL PROFESSION

This Court has long recognized that universities play a special role in our constitutional order. As the Court noted over half a century ago:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion), later quoted in *Keyishian v. Bd. of Regents of Univ. of State of N.Y.* 385 U.S. 589, 603 (1967).

Accordingly, courts will not lightly interfere with the pedagogical choices of educators. Yet those choices must be understood broadly, for law schools—like other university units—do not operate in an "academic vacuum." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). Nor does a university discharge its educative function solely in the classroom. Student organizations play a vital role in the life of any institution of higher education, even if not strictly part of the curriculum. Participation in organized student life enables students to join and build networks that may blossom into future career opportunities, *cf. United States v. Virginia*, 518 U.S. 515, 551-53 (1996), or simply to forge the sorts of bonds that are essential to healthy and happiness.

See Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* 326-35 (2000).

Officially recognized extracurricular organizations take on special significance in a law school, as confirmed by a highly influential recent study of legal education. *See* William M. Sullivan, et al., *Educating Lawyers: Preparation for the Profession of Law* (2007) (hereinafter "Carnegie Report"). The Carnegie Report emphasized that law schools must teach students not only how to think like lawyers but also how to perform like them. *See id.* at 22. Inculcating norms of professional conduct is especially important because "professions have been given significant grants of public trust." *Id.* at 21. In exchange, members pledge themselves "to ideals of service to their clients and the public as a whole." *Id.*

Lawyers must balance zealous advocacy on behalf of clients against the obligation to serve as officers of the law committed to the general welfare. Law schools play a profoundly important role in training students to navigate these potentially conflicting obligations to a client's interest and the public good. Imparting norms of professional conduct, not surprisingly, often goes beyond abstract instructional exercises to include learning by doing. Law schools have increasingly relied on methods of education that anchor the lessons of professionalism in concrete experience, such as live-client clinics and externships. Even so, teaching professionalism remains a challenging task, very often imparted as much by example as by exhortation.

Extracurricular activities thus play a key role in the law school learning process. As this Court recognized six decades ago, the benefits of such

activities are "incapable of objective measurement but . . . make for greatness in a law school." *Sweatt*, 339 U.S. at 633-34. Likewise, the latest report of the Law School Survey of Student Engagement finds that participation in student groups and activities ensures that first-year law students feel like full members of the learning community. Second- and third-year students use these opportunities to develop their professional identities as well as to burnish their resumes. Across the board, students who are involved in extracurricular activities report higher levels of engagement in the legal educational experience. *See* Law School Survey of Student Engagement, *Student Engagement in Law School: Enhancing Student Learning—2009 Annual Survey Results* at 12-13.

Because extracurricular activities play such a significant role in the learning process, Hastings is permitted to make pedagogical judgments about how recognized student organizations can best be structured to promote an inclusive learning environment and to teach standards of professional conduct. By adopting a principle of nondiscrimination in membership decisions, Hastings advances both of these goals.

To read the First Amendment as exempting Petitioner from the Hastings policy would seriously undermine the ability of Hastings and countless other institutions to advance their pedagogical goals. Petitioner's claimed exemption from the Hastings policy is not, and cannot logically be, limited to religious organizations or prohibitions on sexual orientation discrimination. Under Petitioner's expressive association theory, a white supremacist student organization that excludes African-American

students and a male chauvinist club that excludes female students would each be entitled to official recognition and funding.

In applying its policy notwithstanding such claims, Hastings asserts interests that this Court has previously recognized as vital. Illicit segregation can deprive students of important opportunities to learn from peers by engaging their differences as well as their commonalities. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 722-25 (2007); *Grutter v. Bollinger*, 539 U.S. 306, 328-32 (2003); *Regents of the Univ. of Ca. v. Bakke*, 438 U.S. 265, 311-15 (1978). "Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin." *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in the judgment). Group membership rules, no less than "the choices the state makes in grouping individuals[,] will affect the choices individuals make in expressing their identity." Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 Harv. L. Rev. 104, 120 (2007).

Recognizing that student organizations play a critical role in the education of law students, Hastings has chosen to ensure equal educational access to this experience for all students. As this brief next demonstrates, that choice clearly falls within constitutional bounds.

III. A STATE UNIVERSITY SATISFIES THE FIRST AMENDMENT WHERE IT BASES THE DECISION TO DENY OFFICIAL RECOGNITION AND FUNDING TO A STUDENT ORGANIZATION ON REASONABLE, VIEWPOINT-NEUTRAL GROUNDS

The Hastings policy is solely a limit on the *conduct* of student groups that receive official recognition and funding. Accordingly, the district court concluded that the policy should be judged under the relatively forgiving test for conduct regulations that have the incidental effect of burdening speech. *See United States v. O'Brien*, 391 U.S. 367 (1968); Pet. App. 24a. In failing even to cite *O'Brien*, Petitioner tacitly admits, as it must, that the Hastings policy satisfies the *O'Brien* test.

This Court need not choose between the *O'Brien* test and the forum analysis that it has used in other cases involving official recognition and funding of student organizations, however, because even under the latter, more demanding approach, the Hastings policy withstands constitutional scrutiny. This Part describes the contours of forum analysis; the next two Parts demonstrate why the Hastings policy readily satisfies it.

Board of Regents of the University of Wisconsin System v. Southworth, 529 U.S. 217 (2000), and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), show that state universities, as government actors, have a duty not to censor. But a neutral policy that has the incidental effect of burdening speech or expressive association does not run afoul of that duty.

Southworth involved a challenge to an activities fee by University of Wisconsin students who objected to the allocation of portions of the fee to expressive activities conveying messages with which they disagreed. This Court treated its "public forum cases" as "instructive . . . by close analogy." 529 U.S. at 229-30. In the typical public forum case, a speaker objects to exclusion from some tangible or intangible government property or benefit. But whether the issue is exclusion of speakers or government use of funds, and whether the forum is "geographic" or "metaphysical," *Rosenberger*, 515 U.S. at 830 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46-47 (1983); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985)), the First Amendment test is the same. In a limited forum, "[t]he State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint." *Rosenberger*, 515 U.S. at 829 (citations and internal quotation marks omitted). *Accord Southworth*, 529 U.S. at 233-34.

This Court's first foray into student organization objections to university rules confirms and illustrates the central role of viewpoint neutrality in this context. In *Healy v. James*, 408 U.S. 169 (1972), a Connecticut state college president denied recognition to a local affiliate of Students for a Democratic Society ("SDS"), and as a result, the students were excluded from a range of privileges. This Court found that the students had sufficiently stated a First Amendment claim, but only because the president's grounds for denying recognition to the student group were unclear in the record. "The

mere disagreement of the President with the group's philosophy," the Court explained, would have afforded "no reason to deny it recognition." *Id.* at 187. However, this Court drew a crucial line between viewpoint-based and viewpoint-neutral grounds for withholding recognition from the SDS chapter: If the president's nonrecognition decision were "directed at the organization's activities rather than its philosophy," the Court reasoned, that would be permissible. *Id.* at 188. The Court concluded this line of reasoning as follows: "Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." *Id.* at 189. Accordingly, the Court remanded the case for a determination of whether the basis for nonrecognition was the SDS philosophy or the possibility that the student members were unwilling to comply with reasonable, viewpoint-neutral campus rules. *See id.* at 193-94.

Healy thus teaches that a state college or university may not deny official recognition and concomitant privileges to a student association on the basis of its viewpoint; conversely, a putative student association's unwillingness to abide by reasonable, viewpoint-neutral rules supplies a sufficient basis for nonrecognition. Subsequent cases simply apply these basic principles. *See Southworth*, 529 U.S. at 233-34; *Rosenberger*, 515 U.S. at 829.

IV. THE HASTINGS POLICY IS VIEWPOINT-NEUTRAL

This Court's prior association cases confirm that nondiscrimination rules and, *a fortiori*, all-comers rules, are viewpoint-neutral. For example, in

Roberts v. United States Jaycees, 468 U.S. 609 (1984), this Court found that a law forbidding discrimination on the basis of "race, color, creed, religion, disability, national origin or sex" did "not distinguish between prohibited and permitted activity on the basis of viewpoint." *Id.* at 615, 623. Likewise, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), this Court allowed that a California nondiscrimination law that forbade a civic organization from rejecting prospective members on the basis of sex made "no distinctions on the basis of the organization's viewpoint." *Id.* at 549; *see also Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (unanimously holding that a law providing an enhanced sentence because the defendant selected his victim based on race did not target expression or thought).

Thus, the Hastings policy is viewpoint-neutral. Unlike the government policies invalidated in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Widmar v. Vincent*, 454 U.S. 263 (1981), neither the all-comers rule nor the underlying nondiscrimination policy singles out messages of any sort. The challenged rule is not only viewpoint-neutral; it is content-neutral; indeed, it is *expression-neutral*, a condition on the *conduct* of officially recognized and funded student organizations, not on their *expression*.

The interest Hastings asserts in avoiding underwriting discrimination does not in any way undermine that conclusion. This is not a matter of Hastings distancing itself from the *message* of

Petitioner or any other student organization. Rather, Hastings aims to avoid *participating in the conduct of discrimination* in much the same way that the federal government aimed to avoid participating in the racially discriminatory policies of universities receiving favorable tax treatment in *Bob Jones University v. United States*, 461 U.S. 574 (1983).

Crucially, the all-comers rule does not target expression. Hastings law students individually and collectively have a First Amendment right to believe and say that homosexual conduct is sinful or that all sexual activity outside heterosexual marriage is sinful, but when Hastings students attempt to exclude "unrepentant" gay and lesbian students from membership in a student organization on the basis of those views, they are not merely speaking but acting.[4] Accordingly, the Hastings policy satisfies the viewpoint-neutrality requirement of this Court's limited forum cases.

V. THE HASTINGS POLICY IS REASONABLE

This Court has repeatedly upheld as reasonable, laws and policies that were substantially more restrictive of speech than the Hastings policy at issue here. These include: a requirement that nonmembers of a collective bargaining unit opt in to

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[4] Citing Justice O'Connor's concurrence in *Lawrence v. Texas*, 539 U.S. 558, 583 (2003), the district court found that Petitioner's willingness to accept "repentant" gay and lesbian members but not those who engage in or advocate homosexual conduct to be "a distinction without a difference." Pet. App. 22a n.2. Even if one thought that distinction meaningful, the Hastings policy of forbidding exclusions based on homosexual conduct would still be expression-neutral and, *a fortiori*, viewpoint-neutral.

permit the union to spend agency-shop fees on election activities, *see Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 189-90 (2007); the exclusion of an independent candidate with little popular support from a debate on a state-owned public television station, *see Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682-83 (1998); a ban on solicitation on postal premises, including abutting sidewalks, *see United States v. Kokinda*, 497 U.S. 720, 732-36 (1990); the exclusion of legal defense and advocacy organizations from a government-sponsored charity drive, *see Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808-09 (1985); and the grant of access to workplace mailboxes for the workers' bargaining representative but not a rival union, *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50-52 (1983).

"The Government's decision to restrict access . . . need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808. Moreover, viewpoint-neutrality itself goes a long way towards establishing reasonableness. In most of the foregoing cases, the absence of credible evidence of censorial motives played a substantial role in the Court's finding of reasonableness. *See, e.g., Davenport*, 551 U.S. at 190 ("Quite obviously, no suppression of ideas is afoot . . ."); *Ark. Educ. Television Comm'n*, 523 U.S. at 683 ("There is no substance to Forbes' suggestion that he was excluded because his views were unpopular or out of the mainstream."); *Kokinda*, 497 U.S. at 736 ("Clearly, the regulation does not discriminate on the basis of content or viewpoint.").

Only rarely has this Court found that a viewpoint-neutral restriction on speech in a

nonpublic or limited forum was unreasonable, and in those instances the challenged law was both targeted at speech and profoundly overbroad. Thus, in *Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), this Court found it unnecessary to determine whether an airport was a public forum, *see id.* at 573-74, where the challenged policy expressly forbade all "First Amendment activities" in the airport. *Id.* at 570.

Likewise, in a pair of cases also involving speech at an airport, different majorities of this Court held that: (a) the public portions of the airports in the New York metropolitan area were not public fora; but that (b) a ban on leafleting in these public areas was nonetheless invalid as unreasonable. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) ("*ISKC I*") (not a public forum); *Lee v. Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) (*per curiam*) (invalidating leafleting ban). The controlling opinion was authored by Justice O'Connor, who thought that the leafleting ban was unreasonable, but that a solicitation ban was reasonable. *See ISKC I*, 505 U.S. at 685 (concurring in part and concurring in the judgment in part).

By contrast with the speech bans invalidated in *Jews for Jesus* and *ISKC I*, the Hastings policy at issue here does not even target expressive activities. In that regard, its reasonableness follows *a fortiori* from the reasonableness of the challenged laws and policies this Court has previously upheld that did directly limit expression.

Indeed, the Hastings policy is not merely reasonable. It furthers the state's vital interests in preventing, and avoiding participation in, discrimination. *Cf. City of Richmond v. J.A. Croson*

Co., 488 U.S. 469, 492 (1989) (crediting government's interest in avoiding becoming a "passive participant" in racial exclusion). Notably, whether or not Petitioner admits it, the arguments advanced by Petitioner would apply with equal force to an organization that, on religious or ideological grounds, wished to exclude student members who were engaged in "unrepentant" interracial dating, *cf. Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), but sought official recognition and funding despite thereby violating the Hastings nondiscrimination policy and all-comers rule.

In *Healy v. James*, 408 U.S. 169 (1972), this Court recognized that a state educational institution could constitutionally insist that student organizations abide by "reasonable campus rules" as the price of official recognition and eligibility for funding. *Id.* at 189. Such rules include prohibitions of the sort of violence forbidden by the criminal code, but "[i]n the context of the 'special characteristics of the school environment,' the power of the government to prohibit 'lawless action' is not limited to acts of a criminal nature." *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

Surely, a nondiscrimination policy counts as a reasonable rule. Prohibitions on discrimination afford "protections taken for granted by most people either because they already have them or do not need them." *Romer v. Evans*, 517 U.S. 620, 631 (1996).

Likewise, enforcing a nondiscrimination policy through an all-comers rule is reasonable. This indirect approach has an important practical advantage over direct enforcement of a nondiscrimination rule: enforcement of an all-comers

policy does not depend on proving subjective intent to discriminate. And that is to say nothing of the other legitimate pedagogical ends an all-comers policy serves—including ensuring that funds raised from all students be available only for organizations open to all students. Thus, other law schools have also adopted all-comers rules.[5]

Even accepting Petitioner's claim that under the Hastings policy the Democratic Club would have to accept Republicans and the pro-life club would have to accept pro-choice members to receive subsidies and official recognition, *see* Brief for Petitioner at 15, the policy is reasonable. The reasonableness inquiry asks whether "the restriction [is] 'reasonable in light of the purpose served by the forum.'" *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001)

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[5] The AALS does not collect information on law school policies regarding membership in registered student organizations, and law schools do not routinely make such policies publicly available. Three schools that do publish their polices on the internet, and list all-comers rules, are: Georgetown University Law Center, Hofstra Law School, and Capital University Law School. *See* Georgetown Law, Office of Student Life: Student Organizations, http://www.law.georgetown.edu/studentlife/StudentOrgs/NewGroup.htm; *Hofstra Law School Student Handbook 2009-2010*, at 49, *available at* http://law.hofstra.edu/pdf/StudentLife/StudentAffairs/Handbook/stuhb_handbook.pdf; *Capital University Law School Student Organization Handbook* 2008-2009, Rule 2.3-1, *available at* https://culsnet.law.capital.edu/StudentOrganizations/Handbook/HANDBOOKFINAL.pdf. Columbia Law School's Student Senate By-Laws allow for "reasonable" exceptions to its all-comers rule, but specifically disallow exceptions from the nondiscrimination policy. *See* Columbia Law School Student Senate By-Laws § 6.B.3, *available at* http://www.columbia.edu/cu/law/senate/docs/constitution.pdf.

(quoting *Cornelius*, 473 U.S. at 806). Participation in recognized student organizations affords Hastings students opportunities to freely exchange ideas and develop a professional identity. Requiring that all organizations be open to all interested students directly furthers these goals. If an all-comers rule had the collateral consequence of encouraging students to join organizations in order to sabotage them, that fact would be relevant to a school's institutional decision whether to modify the rule or otherwise discourage such sabotage, but it would not bear on the reasonableness of the rule's adoption in the first place.

In any event, the record contains no evidence that any Hastings student organization has ever been sabotaged by students who disagree with its fundamental aims. Petitioner and its amici cite a handful of examples of this phenomenon at *other* institutions, but none at Hastings itself. *See* Brief for Petitioner at 29 n.4; Brief of Amici Curiae, Foundation for Individual Rights in Education and Students for Liberty at 8-12. Given this experience with the rule, the Court should not second-guess Hastings' judgment about its pedagogical utility. Petitioner's invocation of the specter of hypothetical saboteurs falls far short of demonstrating that the Hastings policy is substantially overbroad. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The policy, on its face and as applied to Petitioner, is reasonable.

VI. EXTENDING THIS COURT'S EXPRESSIVE ASSOCIATION PRECEDENTS INTO THE DOMAIN OF GOVERNMENT BENEFITS WOULD CONVERT THE FIRST AMENDMENT FROM A RIGHT AGAINST GOVERNMENT INTERFERENCE INTO A RIGHT TO GOVERNMENT SUPPORT

Constitutional rights, including the right to free speech and freedom of association, are rights against government interference rather than rights to government assistance. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 198-200 (1991); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 873 (7th Cir. 2006) (Wood, J., dissenting) ("The Supreme Court has often drawn a line between rules that compel conduct and rules that merely withhold benefits."); Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919, 1944 (2006). Of course, the government's ability to condition a private actor's receipt of benefits on conformity with various conduct rules is not unlimited, but where the conditions at issue arise out of a limited forum, this Court's doctrines concerning such fora express the appropriate limits. *See Rust*, 500 U.S. at 199-200. Those limits consist in the requirements of viewpoint-neutrality and reasonableness, which, as this brief has shown, the Hastings policy satisfies.

Petitioner seeks to avoid that ineluctable conclusion by asking this Court to dramatically alter its limited forum doctrine. Petitioner would have this Court apply the distinct constitutional principle exempting expressive organizations from *direct regulation of their membership*, where such regulation substantially impairs an organization's ability to control its message. But that principle has

never been applied by this Court in cases involving access to government facilities or funds, and for good reason: the very notion of a limited forum for membership organizations implies limits on membership criteria that are incompatible with the right Petitioner asks this Court to invent.

Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, 515 U.S. 557 (1995), is instructive. There the Court acknowledged the state's valid interest in its public accommodations law as a successor to the common law right to commercial service. *See id.* at 571. However, the application of a public accommodations law raised a distinct issue of government interference with expressive association. As this Court explained: "Our tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be *free from interference by the State* based on the content of what he says." *Id.* at 579 (emphasis added). *Accord Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000) ("The state interests embodied in New Jersey's public accommodations law do not justify such a *severe intrusion* on the Boy Scouts' rights to freedom of expressive association.") (Emphasis added).

Here, in marked contrast, Petitioner cannot complain about the state's *interference* with or *intrusion* on its right to affirm its views about religion or sexual morality without that message being undermined by the participation of unwanted members because this is not a case about state interference or intrusion. Instead, this is a case about the withholding, on viewpoint-neutral grounds, of state benefits from a putative

organization that would violate the Hastings non-discrimination policy and all-comers rule.

To be sure, *Hurley* involved a special kind of government benefit: the right to hold a parade. But holding a parade on a public street is a matter of access to a *traditional* public forum to which individuals and groups have a freestanding right. Limits on access to traditional public fora are tantamount to direct regulations of speech and association. *See Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009).

Consequently, *Hurley* has no bearing on a case such as this one, in which only the narrower right against unreasonable and viewpoint-based restrictions applies. "A university differs in significant respects from public forums such as streets . . . . A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

Petitioner's proposed application of principles developed in the context of direct regulation and public parades would lead to a parade of horribles all too real. It would wreak havoc with the First Amendment law governing educational institutions and beyond. Consider just a small sample of the wide range of educational policies that would be jeopardized by the constitutional rule Petitioner asks this Court to fashion.

Many public universities require, as a condition of official recognition, that a student organization find a faculty or staff member willing to serve as its

advisor.[6] Such requirements ensure that a responsible university official supervises the group's activities for the protection of the students themselves, the university, and the broader community. In particular settings, a faculty advisor requirement may also ensure that student organizations pursue activities consistent with the institution's educational mission. Yet in any particular institution, a small group of students with unpopular or simply idiosyncratic views may have difficulty attracting any faculty or staff member willing to give his or her time to the cause. Or, if the student group's activities and ideas are sufficiently idiosyncratic, no faculty or staff member may support them. Does it violate the right to expressive association to condition official recognition and funding for a small group of students on their acceptance of an otherwise willing faculty advisor who does not fully believe in, or behave in accordance with, every item in their statement of faith or principles?

Next consider that, as a neutral means of allocating scarce space and resources, many state educational institutions require that a student group seeking official recognition have some minimum

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[6] Among the institutions requiring a faculty or staff advisor are the University of Oklahoma, Texas A&M University, the University of Cincinnati, the University of West Virginia, the University of Texas at Dallas, and Mississippi State University. *See* http://studentlife.ou.edu/content/view/225/173; http://studentactivities.tamu.edu/orgmanual/recognition#nso; http://www.uc.edu/sald/Student_Organizations/default.html; http://student.wvstateu.edu/union/advisor.pdf; http://www.utdallas.edu/orgs/manual/02/; http://www.msstate.edu/dept/audit/91200.html.

number of members.[7] Such policies are both viewpoint-neutral and reasonable. Yet they have the incidental effect of disadvantaging small, potentially unpopular groups of students seeking official recognition and funding. Or perhaps worse from Petitioner's perspective, a small group of students seeking official recognition may have to accept as members some other students who do not entirely share their views in order to reach the numerical threshold. Do minimum-membership requirements also succumb to Petitioner's newly minted constitutional rule?

Furthermore, if Petitioner is correct that the right to expressive association requires exemptions from reasonable, viewpoint-neutral requirements for official recognition and funding, then that right could also be invoked to invalidate policies that deny official recognition and benefits to organizations that *include* certain prospective members. After all, the line of expressive association cases from which Petitioner would export the *Dale* rule begins with, and certainly still includes, a right *to associate*, not merely a right *not to associate*. *See NAACP v. Alabama*, 357 U.S. 449, 460-66 (1958). Here too, what Petitioner requests would dramatically expand the role of the courts in supervising the management of educational institutions.

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[7] The University of New Mexico, the University of Oklahoma, and the University of Cincinnati each requires that an official student organization have at least ten members. *See* http://pathfinder.unm.edu/policies.htm#charteredstudentorg; http://studentlife.ou.edu/content/view/225/173; http://www.uc.edu/sald/Student_Organizations/default.html. The University of Iowa requires at least five members. http://imu.uiowa.edu/start-a-student-organization/.

For example, to ensure that students with marginal academic records devote needed time to their studies before immersing themselves in extracurricular activities, some public colleges and universities—not to mention public high schools—require students to maintain a minimum grade point average in order to participate in or lead student organizations.[8] Despite their viewpoint-neutrality and obvious educational value, such requirements would be vulnerable under Petitioner's proposed constitutional rule whenever they prevent like-minded students from receiving state subsidies and assembling under official auspices.

Indeed, even rules requiring that student organizations consist of, or be led by, enrolled students, would be vulnerable to Petitioner's attack. Such rules are viewpoint-neutral and reasonable, pursuing the sensible goal of reserving institutional resources for members of the institutional community; yet they undoubtedly could incidentally affect student groups that wish to associate with outsiders as part of their message. *See* Volokh, 58 Stan. L. Rev. at 1940 (describing plausible

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[8] At the University of Cincinnati, eligibility for leadership positions requires a minimum GPA of 2.0. *See* http://www.uc.edu/Trustees/Rules/RuleDetail.asp?ID=178. For University of Florida undergraduates, the leadership GPA threshold is 2.5, while for graduate students it is 3.0. *See* http://www.union.ufl.edu/involvement/studentOrgs/handbook/contents/3.asp. At West Virginia State University, new members of student organizations must have at least a 2.3 GPA. *See* http://student.wvstateu.edu/union/advisor.pdf.

ideological grounds for desired association with outsiders).

Finally, the chaos that would be unleashed by adoption of Petitioner's proposed radical expansion of the *Dale* principle could not be limited to the educational setting but would threaten to unravel government benefits more broadly. For example, the federal government administers various programs of social services through grants to community organizations, including religiously affiliated ones. Utilizing such existing charitable entities and their public-spirited volunteers has obvious advantages over distribution through government bureaucracies. In order to ensure equal access for beneficiaries, current federal law bars participating organizations from discriminating on various enumerated grounds.[9] Likewise, the Ohio school voucher program upheld by this Court against an Establishment Clause challenge in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), forbade participating schools from discriminating on racial or other grounds. *See id.* at 645. Suppose that an otherwise qualified organization would, on grounds of freedom of expressive association, deny services to potential recipients based on legally proscribed grounds. Existing precedents make clear that the government can require compliance with a rule of non-discriminatory service. However, under Petitioner's proposed constitutional rule, such vital

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[9] *See* Participation in Department of Health and Human Services Programs by Religious Organizations; Providing for Equal Treatment of All Department of Health and Human Services Program Participants, 69 Fed. Reg. 42,586, 42,591 (July 16, 2004) (to be codified at 45 C.F.R. pts. 74, 87, 92, 96).

limits on faith-based services and school vouchers would be vulnerable to challenge as unconstitutional infringements on expressive association.

In short, Petitioner's proposal to force the right of expressive association recognized in direct regulation cases onto the Procrustean bed of limited forum doctrine is both inconsistent with the latter and threatens to undermine the institutional autonomy of state decision makers in a wide range of settings. It would usher in decades of legal confusion and litigation. The Hastings policy satisfies the existing constitutional requirements of viewpoint-neutrality and reasonableness. That is enough.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,[10]

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[10] The AALS and its Counsel wish to recognize the significant intellectual contributions made by Professor Daniel B. Rodriguez, University of Texas Law School, to the creation of this brief. (Professor Rodriguez and Professor Rachel Moran are Members of the AALS Executive Committee.) All brief writers are acting in their individual capacities. Law schools are listed for affiliation purposes only.

AMICUS CURIAE BRIEF

(14)

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Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER
OF UNIVERSITY OF CALIFORNIA,
HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, AZUSA PACIFIC UNIVERSITY, BETHESDA MINISTRIES, CHERRY HILLS COMMUNITY CHURCH, CHRISTIAN CAMP AND CONFERENCE ASSOCIATION, COLORADO CHRISTIAN UNIVERSITY, COMPASSION INTERNATIONAL, COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES, CRISTA MINISTRIES, CROSSWAY BOOKS & BIBLES, CROSSWORLD, DENVER RESCUE MISSION, MOODY BIBLE INSTITUTE, MOPS INTERNATIONAL, PRISON FELLOWSHIP, REGENT UNIVERSITY, SAMARITAN'S PURSE, SIM USA, INC., THE ALLIANCE DEVELOPMENT FUND, THE BIBLE LEAGUE, THE CHRISTIAN AND MISSIONARY ALLIANCE, THE EVANGELICAL ALLIANCE MISSION, THE ORCHARD FOUNDATION AND WORLD VISION, INC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici constitute a diverse group of religious organizations and collectively they conduct many different types of activities including humanitarian relief, care for seniors, education at all levels and training in religious texts and religious living. Their programs include both distinctly religious activities such as the study of sacred texts, prayer and sacramental services, and a wide range of other activities that serve social needs as an exercise of religious conviction. These institutions conduct all of their activities out of a Christian motivation and in furtherance of their respective Christian missions.

Like Christian Legal Society ("CLS") and many other religious organizations, *amici* are guided by their beliefs to carry out their activities as associations of like-minded believers, and doing so is an expression of those beliefs. Further, the experience of community within such religious associations often inspires and energizes their service to others. Shared religious belief among those carrying out *amici's* activities also ensures that these activities are

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

conducted in a manner that distinctly expresses and exercises their religious convictions. In short, a*mici* cultivate, preserve and express their distinctive religious character and mission through their religious associational policies.

Although this case does not address the rights of *amici* and other religious organizations to employ like-minded believers, the decision of this Court could have significant implications for religious hiring rights. As an initial matter, if this Court determines that CLS does not have any constitutional right to religious association in the context of this case, then there will be little constitutional protection for religious employers, particularly if they receive any kind of government benefit, use government buildings such as schools and convention centers and/or participate in government-funded programs. Perhaps even more importantly, how this Court characterizes the religious associational policies and rights of religious organizations in this case will likely establish the framework for future deliberations within all branches of government on questions of religious hiring.

The religious character and mission of the *amici* are as follows.

Association of Christian Schools International ("ACSI") is the largest association of Protestant schools in the world, having more than 5,000 member Christian schools in more than 100 nations. ACSI is based in Colorado Springs. Its mission is to

enable Christian educators and schools worldwide to effectively prepare students for life.

Azusa Pacific University ("APU") is a comprehensive, evangelical, Christian university located near Los Angeles. A leader in the Council for Christian Colleges & Universities, APU is committed to God First and excellence in higher education. APU serves more than 8,500 students on campus, online and at 7 regional centers, offering more than 60 areas of undergraduate study, 26 master's degree programs, and 7 doctorates.

Bethesda Ministries is a nonprofit Christian ministry organization headquartered in Colorado Springs whose mission is to provide child care, education and health care to over 40,000 impoverished children in 19 countries through *Mission of Mercy*. Bethesda Ministries also has a nonprofit subsidiary, whose mission is to care for seniors with dignity, including those whose financial status qualifies them for Medicaid. The subsidiary operates 15 residential senior living communities in 6 states with over 600 employees.

Cherry Hills Community Church, located in Highlands Ranch, CO, was established in 1982. The church is a large, vibrant congregation of everyday people who come together in many ways – in learning and faith, in raising children and strengthening marriages, and in discovering the kind of life God desires. The church supports a variety of outreach ministries including, among many others, programs serving the

urban poor, addressing AIDS issues and providing medical services in India.

Christian Camp and Conference Association ("CCCA") provides resources for leaders and participants in camping and conference organizations. There are more than 900 Christian camps and conference centers who are CCCA members and every year nearly eight million people participate in their programs.

Colorado Christian University ("CCU") is an evangelical Christian university with a main campus located near Denver and several satellite campuses throughout Colorado. CCU has over 2,000 students in more than 35 undergraduate and graduate programs. CCU cultivates knowledge and love of God in a Christ-centered community of learners and scholars, with an enduring commitment to the integration of exemplary academics, spiritual formation and engagement with the world.

Compassion International ("Compassion") is a Christian child advocacy ministry that, in response to Christ's instructions to his followers (the "Great Commission"), releases children from their spiritual, economic, social and physical poverty and enables them to become responsible and fulfilled Christian adults. Based in Colorado Springs, Compassion provides regular support to more than one million children in 24 countries.

Council for Christian Colleges & Universities ("CCCU") is an international association of

intentionally Christian colleges and universities. Founded in 1976 with 38 members, CCCU has grown to 111 members in North America and 70 affiliate institutions in 24 countries. CCCU's mission is to advance the cause of Christ-centered higher education and to help its institutions transform lives by faithfully relating scholarship and service to biblical truth.

CRISTA Ministries ("CRISTA") was founded in 1948 and its corporate offices are in Seattle. CRISTA's mission is to love God by serving people – meeting practical and spiritual needs – so that those it serves will be built up in love, united in faith and maturing in Christ. CRISTA has 2 senior living facilities (over 600 residents), 3 broadcasting stations, 2 K-12 Christian schools, a school for at-risk-teens, 2 camps, a veterinary mission and an international relief organization operating as World Concern. World Concern works with communities in some of the most neglected areas of the world, including Myanmar and Chad.

Crossway Books & Bibles ("Crossway") is owned by Good News Publishers. Good News Publishers is a nonprofit Christian ministry founded in 1938 which exists solely for the purpose of proclaiming the Gospel through publishing and all other means, by God's grace. Crossway publishes and distributes the English Standard Version of the Bible. Good News Publishers' principal office is in Wheaton, IL.

CrossWorld was founded as Unevangelized Fields Mission in 1931 with 36 missionaries serving in the Congo and Brazil. Today nearly 400 missionaries serve on 80 teams in 25 ministry areas of the world. CrossWorld serves the church around the world by mobilizing teams to make disciples and train leaders.

Denver Rescue Mission is a Christian organization in Denver that provides shelter, food, clothing, education, Christian teaching and work discipline to meet individuals at their physical and spiritual points of need. Founded in 1892, the organization serves thousands of needy individuals through a range of programs.

Moody Bible Institute of Chicago ("Institute") was established in 1886 by D.L. Moody. The Institute is a nonprofit organization with broadcasting, publishing, and education branches. Approximately 4,000 students representing over 38 countries study each year in the undergraduate and graduate programs. The Institute has 83 full-time faculty members and approximately 600 employees.

MOPS International, Inc. ("MOPS") exists to encourage, equip and develop every mother of preschoolers to realize her potential as a woman, mother and leader in the name of Jesus Christ. There are currently over 3,700 MOPS programs at churches around the world, with over 95,000 members. MOPS is a nonprofit organization, and its principal office is in Denver.

Prison Fellowship is a national nonprofit ministry that for over 30 years has focused on transforming prisoners through Jesus Christ. Prison Fellowship helps reduce recidivism by partnering with churches to provide in-prison programs and values-based reentry services and to serve prisoners' children. Prison Fellowship also advocates for needed reforms in the criminal justice system and promotes biblical thinking as it applies to all of life. From its principal office in Lansdowne, VA, Prison Fellowship serves inmates in 1,423 prisons in all 50 states in the U.S. and through Prison Fellowship International, serves prisoners in 110 nations.

Regent University ("Regent") is a higher educational, nonprofit institution based in Virginia Beach, VA. Regent offers rigorous academics within a faith-based context including a multitude of on-campus and online programs available worldwide with over 70 graduate and undergraduate degrees. Regent currently has over 2,100 full-time students and over 2,700 part-time students.

Samaritan's Purse is a nondenominational evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people around the world. The organization seeks to follow the command of Jesus to "go and do likewise" in response to the story of the Samaritan who helped a hurting stranger. Samaritan's Purse operates in over 100 countries providing emergency relief, community development, vocational programs and resources for children, all in the name of Jesus Christ.

SIM USA, Inc. has ministered globally since 1893. The organization's purpose is to glorify God by planting, strengthening, and partnering with churches around the world as it evangelizes the unreached, ministers to human need, disciples believers into churches, and equips churches to fulfill Christ's Commission. The organization is based in Charlotte, NC.

The Alliance Development Fund is a corporate subsidiary of The Christian and Missionary Alliance formed to provide construction loans and other financial services for member churches of the denomination. In so doing, the organization advances the mission of transforming peoples' lives through local Alliance churches.

The Bible League was founded in 1936 by William Chapman, a Chicago area businessman, and its international ministry center is now located in Crete, IL. The Bible League provides scriptures and bible study materials world wide while at the same time training local Christians who use them to lead people to Christ. The Bible League views itself as being called by God to conduct these activities.

The Christian and Missionary Alliance is a church denomination and missionary organization with about 429,000 members in over 2,000 churches in all 50 states. In addition, there are over 800 missionaries in 58 nations supported by the organization. Based in Colorado Springs, the organization

also sponsors a number of educational institutions and retirement centers around the country.

The Evangelical Alliance Mission ("TEAM") was founded in 1890 as a missions organization. The organization, which is based in Carol Stream, IL, helps churches and missionaries around the globe fulfill their ministries. TEAM characterizes itself as a body of people that are being and building the Body of Christ around the world through missionaries, representatives, and leaders.

The Orchard Foundation is a corporate subsidiary of The Christian and Missionary Alliance formed to provide trust and planned giving services for those who wish to support the ministries of the Alliance.

World Vision, Inc. is the U.S. affiliate of an international Christian relief, development and advocacy organization based in the Seattle area that serves over 100 million people in nearly 100 countries. The organization is dedicated to working with children, families and their communities world wide to overcome poverty and injustice. Motivated by their faith in Jesus Christ, World Vision personnel serve alongside the poor and oppressed as a demonstration of God's unconditional love for all people.

SUMMARY OF ARGUMENT

This case asks whether a public law school can deny certain benefits to an otherwise qualifying religious student group merely because the group requires its voting members and leaders to subscribe to its religious beliefs. Accordingly, this brief sets forth three foundational points that apply both to the voting member and leadership requirements of religious student groups, and to the religious hiring practices of *amici* and other religious organizations.

1. Religious association by religious organizations is both an expression and an exercise of their religious beliefs.

Many churches and other religious organizations are defined by the common religious commitment of their members and employees. As Justice Brennan wrote in this Court's leading case upholding religious hiring rights: "determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is . . . a means by which a religious community defines itself." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). The mere existence of an association defined by the shared religious beliefs of its members can be an expression of those beliefs to others. In addition, many religious associations are grounded in the shared view of their individual members that they have a religious duty to associate with fellow believers. Hence, the association is not only an

expression of religious beliefs to others, but it is also separately and independently an exercise of those beliefs.

2. *The religiously selective policies of religious organizations fundamentally differ from invidious religious discrimination by secular organizations.*

Religious beliefs constitute a core *institutional value* of many religious organizations, and they operate to define such organizations in a manner similar to how nonreligious organizations are defined by their institutional values. Accordingly, hiring based on religion is to many religious organizations what hiring based on academic excellence is to Harvard, or what hiring based on software proficiency is to Microsoft, or what hiring based on commitment to the environment is to the Sierra Club. It is not inherently invidious for employers, whether religious or secular, to require their employees to adhere to their institutional values. Indeed, religious exemptions from religious nondiscrimination laws such as Title VII generally recognize the following key distinction: for many religious organizations, association with fellow believers is essential to the definition, expression and exercise of their religious beliefs; for other organizations, excluding individuals of certain religions reflects nothing but animus and is neither an exercise nor expression of religion by such organizations.

3. Religious liberty principles of neutrality and deference support a broad exemption from religious nondiscrimination rules for religious organizations.

Because only religious organizations rely upon religious associational policies to express and exercise their core institutional values, religious nondiscrimination laws impose a unique impact on such organizations. A religious nondiscrimination rule has no impact on the character or mission of Microsoft, for example, or any other nonreligious organization. But that same rule uses religious criteria to undermine the institutional character and mission of religious organizations. Exemptions from such rules for religious organizations, therefore, promote religious neutrality and deference.

These same principles apply to rules imposed as a condition on access to government benefits. Like other organizations, religious organizations may interact with government agencies in a variety of ways, such as from time to time using facilities owned by governmental entities or requesting government funds for a portion of their activities serving specific social needs. However, access to particular government benefits or facilities may be conditioned on the organization's agreement not to discriminate on the basis of religion in its employment (and perhaps leadership), with no exception for religious organizations. This condition effectively requires religious organizations (and only such organizations) to sacrifice their institutional character (*i.e.*, to forego the

religious expression and exercise reflected in their associational practices) in order to receive government benefits for which they otherwise qualify. This religious discrimination results in the "secularization" of the many areas of society in which government is involved. Further, applying the condition to religious organizations does nothing to protect the government's interest in not conferring benefits on groups engaging in invidious discrimination.

Religious liberty principles also preclude narrow exemptions that purport to exempt only those religious organizations or activities which are determined to be sufficiently religious. The criteria used to distinguish among exempt and nonexempt religious organizations or activities inevitably require government officials to make intrusive religious determinations and/or result in religious favoritism. In addition, exemptions that exclude religious organizations engaged in social services, for instance, may require such organizations to sacrifice their religious character in order to fulfill their religious duties.

Because religious nondiscrimination rules uniquely impair the ability of religious organizations to express and exercise their distinct religious beliefs, *amici* respectfully request this Court to affirm the right of the Christian Legal Society ("CLS") student group to an exemption from the religious nondiscrimination rules imposed on recognized student groups at Hastings Law School.

ARGUMENT

I. Religious associational policies constitute both an expression and an exercise of religion for many religious organizations and individuals serving diverse roles in society.

The short descriptions of *amici* in the Statement of Interests section of this brief reveal that *amici*, like many other religious organizations, engage in a wide variety of activities serving the physical, emotional and spiritual needs of people. A number of organizations, such as Compassion International, Samaritan's Purse, World Vision, CRISTA and Bethesda Ministries focus on delivering humanitarian relief and basic life sustenance resources and services to the desperately needy. These organizations and others have been on the front lines responding to catastrophic events such as the recent earthquake in Haiti.[2] In addition, on a daily basis Compassion International, to take just one example, provides food and support for over 1 million needy children in 25 developing countries around the world.

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[2] The Evangelical Council for Financial Accountability, an organization which accredits Christian ministries complying with rigorous financial and governance standards, has posted on its website a list of member organizations responding to the Haiti earthquake. Of the 100 organizations listed, seven are *co-amici* on this brief (including those named above plus CrossWorld and The Christian and Missionary Alliance). *See* ECFA Servant Match, *available at* http://www.ecfa.org/ServantMatch.aspx?Type=Haiti (last visited Jan. 27, 2010).

Other organizations such as Denver Rescue Mission reach out to the homeless and others on the margins of society, providing homeless shelters, meals, and job and life skills training to help these persons work back into society. As another example, Prison Fellowship provides extensive programs to help inmates and their families during incarceration and following release.

While some organizations serve a range of human needs, others focus on the specific needs of certain social segments. For instance, MOPS provides emotional and spiritual support for mothers of preschool children, and Bethesda Ministries and CRISTA each operate senior living centers to serve the elderly. The Association of Christian Schools International has over 5,000 member institutions providing accredited educational programs. The Council for Christian Colleges & Universities likewise has over 100 member institutions, each providing fully-accredited higher educational programs.

Amici and other religious organizations view their respective activities, whether serving the poor or elderly or marginalized, or providing education, or offering distinctly spiritual worship or counseling, both as service to God and as an expression of religious faith. As explained by Justice Brennan in *Amos*: "Churches often regard the provision of [community] services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster. . . ." 483 U.S. at 344 (Brennan, J., concurring). But the full expression and, separately,

exercise of religion comes not from conducting such activities, but from conducting them as an association of like-minded believers. This associational expression and exercise applies regardless of the nature of the activities a religious organization may conduct, because it is the associating itself which is the expression and exercise.

A. Association as Expression

Religious organizations adopt religious associational policies to define, nurture and express their religious character and mission. For example, in its mission statement, World Vision describes itself as a "*partnership of Christians* whose mission is to follow our Lord and Savior Jesus Christ in working with the poor and oppressed to promote human transformation, seek justice and *bear witness* to the good news of the Kingdom of God." Our Mission, *available at* http://www.worldvision.org/content.nsf/about/our-mission?Open&1pos=lft_txt_Our-Mission (last visited Jan. 25, 2010) (emphasis added). Similarly, Samaritan's Purse affirms that its activities are done "with the purpose of sharing God's love through His Son, Jesus Christ." About Us, *available at* http://www.samaritanspurse.org/index.php/Who_We_Are/About_Us (last visited Jan. 27, 2010).

The activities of such organizations are an expression of their religious beliefs, and that is what distinguishes such activities from similar activities of secular organizations. Religious associational policies

help these organizations ensure that their activities maintain their distinctive religious expression. The point is not just that services are being provided, but that services are being provided by religious followers as an expression of their religious beliefs.

Not only does religious association express the religious aspect of an organization's activities, but perhaps even more importantly it also directly expresses religious views. The mere act of associating based on shared religious beliefs is an expression of those beliefs (just as many other organizations consist of like-minded individuals associating to express their commonly held views).

That associations may have an expressive component has long been recognized by this Court. Indeed, this Court has held that such expressive associations are entitled to protection. In *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), this Court explained that protecting:

> . . . collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, . . . implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

This Court has applied the right of expressive association in a variety of contexts, each time

affirming the right of a group to include only persons who share its message. *See, e.g., Boy Scouts of America v. Dale*, 530 U.S. 640, 649, 655 (2000) (the Boy Scouts); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (parade organizer). As recognized in these cases, religious organizations engage in distinctive expression through their religious associational policies.

B. Association as Religious Exercise

Religious organizations rely upon religious associational policies not only to *express* but also separately to *exercise* their religious convictions. For example, Compassion International performs humanitarian work in response to the "Great Commission" (Jesus' command to his followers to make disciples). Mission Statement, *available at* http://www.compassion.com/about/missionstatement.htm (last visited Jan. 26, 2010). Further, just as with the expressive component of religious associations, an organization's religious exercise may consist of both its activities and its religious association. The carrying out of certain activities in service to society and the associating with fellow believers are intertwined, and often the latter energizes the former. For instance, TEAM identifies itself as "a body of people that are being and building the Body of Christ around the world." Who Is Team, *available at* http://www.teamworld.org/LEARN/Default.aspx (last visited Jan. 26, 2010).

This Court has repeatedly observed that religious association can be a form of religious exercise. In *Wisconsin v. Yoder*, this Court observed that "Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith." 406 U.S. 205, 210 (1972). This Court further noted that the Amish base this concept on "their literal interpretation of the Biblical injunction from the Epistle Of Paul to the Romans, 'be not conformed to this world. . . .'" *Id.* at 216.

Subsequently, Justice Brennan in *Amos* observed that:

> religious organizations have an interest in autonomy in ordering their internal affairs so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations. . . . For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.

Amos, 483 U.S. at 341-43 (1987) (Brennan, J., concurring) (internal quotation omitted).

Clearly different religious organizations, even those of the same general faith, will reach different conclusions regarding the extent of associational requirements of their faith. Perhaps not many religious organizations believe the requirements apply as broadly as do the Amish. But the important point is that in each case this determination is based on religious beliefs as interpreted and applied by the religious organization, and is therefore religious exercise.

II. The religiously selective policies of religious organizations fundamentally differ from invidious religious discrimination by secular organizations.

Many organizations of all kinds, both religious and nonreligious, adopt forms of mission and/or values statements to which they aspire. For instance, Microsoft affirms that "[a]s a company, and as individuals, we value integrity, honesty, openness, personal excellence, constructive self-criticism, continual self-improvement, and mutual respect." About Microsoft, *available at* http://www.microsoft.com/about/default.mspx (last visited Jan. 29, 2010). Similarly, Harvard College "encourages students to respect ideas and their free expression, and to rejoice in discovery and in critical thought; to pursue excellence in a spirit of productive cooperation; and to assume responsibility for the consequences of personal actions." The Mission of Harvard College, *available at* http://www.harvard.edu/siteguide/faqs/faq110.php

(last visited Jan. 29, 2010). As another example, the Fundamental Principles of the American Red Cross include "promoting mutual understanding, friendship, cooperation and lasting peace among all peoples" and "not tak[ing] sides in hostilities or engag[ing] at any time in controversies of a political, racial, religious or ideological nature." The Fundamental Principles of the Red Cross, *available at* http://www.ifrc.org/what/values/principles/index.asp (last visited Jan. 29, 2010).

Based on their respective institutional values, Harvard may choose not to employ someone who thinks students are not responsible for the consequences of their actions, and the Red Cross may choose not to employ someone who thinks it is important to take sides in political, racial or religious hostilities. In this same way, religious organizations may employ only those individuals who subscribe to their religious values. Put differently, for many religious organizations, religious beliefs are core institutional values. Assuming these institutional values are not inherently invidious, then employment practices based on such values are also not invidious. Accordingly, the religiously selective policies of religious organizations are inherently invidious only if religious associations are by their nature invidious.

This has never been the case. From a moral standpoint, religious selectivity by religious organizations fundamentally differs from invidious discrimination by nonreligious organizations seeking to exclude a particular disfavored religion. This is in part why Congress exempted religious employers

from the religious nondiscrimination requirements under Title VII. *See* 42 U.S.C. § 2000e-1(a) (exempting any "religious corporation, association, educational institution, or society") ("Section 702").

At the time Title VII was adopted, the House of Representatives debated an additional exemption specifically for religious schools (which is now codified at 42 U.S.C. § 2000e-2(e)(2)). Proponents of this particular amendment were concerned that the general exemption for religious corporations might be construed narrowly to exclude religious schools. They also argued that the exemption should apply to all positions at religious schools, and that a separate exemption for bona fide occupational qualifications was not sufficient in this regard. Opponents of the amendment did not dispute the principle that religious schools should be exempt, but they thought the exemption should be limited to administrative and faculty positions.

Congressman Purcell, the amendment sponsor, argued for an express exemption on religious liberty grounds:

> There may be some who feel that it would be an unwise policy for a church-affiliated school to restrict itself only to members of its own church for its employees, *but certainly it should be their right to do so* . . . The church-related school should never be called upon to defend itself for failure to hire an atheist or a member of a different faith. Also the school should not be called upon to prove in a legal

> action that it is protected by a provision of this bill. It should be so spelled out that there is no question of their right to hire employees on the basis of religion.

110 Cong. Rec. 2585 (1964) (emphasis added).

Building on this argument, Congressman Harris emphasized the difficulty for government officials to categorize types of positions within religious organizations:

> As an example, let us suppose that Ouachita Baptist College in my district received an application from a person who happened to be an atheist for a position of janitor. Suppose that the college determined it would not be a proper employee. Suppose he made a complaint. Would the Commission then have authority to investigate and take action?

110 Cong. Rec. 2586. In response to this inquiry, and in opposition to the amendment, Congressman Celler expressed his view that "[r]eligion is not, and should not, be a qualification for the job of janitor." *Id.* Congressman Harris replied with another question: "Suppose a man applied as coach of the football team. Would that be included?" *Id.* This led to the following dialogue:

> Mr. Celler: That might be in the nature of an administrative qualification for a football coach.
>
> Mr. Harris: It might be?

Mr. Celler: It might be.

Mr. Harris: But it might not be?

Mr. Celler: I believe it likely would be. I believe it would be administrative.

Mr. Harris: We are getting into very dangerous territory, Mr. Chairman.

Id.

In addition to these religious liberty arguments, a number of representatives noted the valuable contributions religious organizations make to society, and they expressed concern that the religious nondiscrimination rules would be imposed on religious schools which were in their districts, or from which they graduated, or on whose governing boards they served. They clearly did not consider these organizations, or their religious hiring policies, to be invidious.

For example, Congressman Roush stated:

> I attended a denominational college. I serve on the board of trustees of a denominational college. I lived on the campus of a denominational college. That college insists not only that its administrators, not only its teachers and professors adhere to its religious beliefs, but insists that the janitors and everyone else who is employed by that school adhere to those beliefs.

110 Cong. Rec. 2587. Congressman Chelf added similar sentiments:

> I have many splendid Catholic colleges, schools and orders. Why I have the famous and God-fearing order of the Trappist Monks, Baptist colleges, Presbyterian colleges, even some fine Mormons. All of these good people have the right under the first amendment to follow the religion of their own choice.

Id. And Congressman Bennett expressed the key point as a question:

> I am on the board of trustees of Lynchburg College, which is a Disciples of Christ Church school. I am happy to be there. I am happy to serve in connection with the old people's home in Jacksonville, Fla., where retired Disciples of Christ people go. They do hire janitors of my faith. They hire charwomen of my faith. *Is there something bad about that?*

Id. at 2592 (emphasis added). *See also*, comments of Congressmen Roberts, Quie, Poage, Gary and Kornegay. *Id.* at 2587-2593. The prevailing view at that time was "no, it's not bad," and the opponents eventually dropped their objections and agreed to the amendment. *Id.* at 2593.

Consistent with this history, the U.S. Department of Health and Human Services has asserted that the Section 702 exemption

> reflects Congress's judgment that employment decisions are an important component

> of a religious organization's autonomy, and that the government has a much stronger interest in applying a religious nondiscrimination requirement to secular organizations than to religious organizations[,] many of whose existence depends upon their ability to define themselves on a religious basis.

68 Fed. Reg. 56430, 56435 (Sept. 30, 2003). In addition, other courts have recognized the distinction between invidious religious discrimination by secular organizations and the religiously selective policies of religious organizations. *See, e.g., Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 870 (2d Cir. 1996); *see also* Paul Taylor, *The Costs of Denying Religious Organizations the Right to Staff on a Religious Basis When They Join Federal Social Service Efforts*, 12 Geo. Mason U. Civ. Rts. L.J. 158, 181 (2002) ("When a religious group seeks to staff its church outreach program on a religious basis, it is not engaging in the sort of invidious discrimination that is viewed as immoral and thus rightly forbidden by law.").

In short, when religious organizations choose as their employees and leaders only those who agree with their religious beliefs, they are in part doing just what Microsoft, Harvard, the Red Cross and most other organizations do: hiring people who agree with their mission. In addition, they are also engaging in religious exercise. By way of contrast, when a non-religious organization excludes an individual because of his or her religion, it is doing so out of animosity and not as an exercise or expression of religion. The difference is crucial.

III. Religious liberty principles of neutrality and deference support a broad exemption from religious nondiscrimination rules for religious organizations.

Religious liberty as conceived by this country's Founders started with the twin propositions that duty to God transcends duty to society and that true religious faith cannot be coerced. James Madison captured these propositions in his *Memorial and Remonstrance Against Religious Assessments:*

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe[.]

Id., reprinted in Everson v. Board of Education of Ewing, 330 U.S. 1, 64 (1947) (appendix to dissenting opinion of Rutledge, J.). Thomas Jefferson incorporated the same propositions into the Virginia Act for Religious Freedom, which in its preamble asserts that any attempt by the government to influence the mind through coercion is "a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do. . . ." Va. Code Ann. § 57-1 (West 2003). Put differently, because individuals possess an inalienable

right and duty to worship God as they deem best, government can have no authority over religious exercise as such.

This Court in 1871 expanded upon and applied these principles in a landmark church property dispute case, stating:

> The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine . . . is unquestioned. All who unite themselves to such a body do so with an implied consent to [its] government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.

Watson v. Jones, 80 U.S. 679, 728-29 (1871).

Accordingly, religious liberty in our constitutional system protects religious organizations from discriminatory or intrusive governmental action that impairs the religious character of such organizations. As this Court observed in *Yoder*, " . . . in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.'" *Yoder*, 406 U.S. at 223-24. This Court further noted that "[e]ven their idiosyncratic separateness exemplifies the diversity we

profess to admire and encourage." *Id.* at 226. Rules of religious neutrality and deference based on these fundamental principles support a broad exemption for religious organizations from religious nondiscrimination rules.

A. Exemptions recognize that religious nondiscrimination rules uniquely burden religious organizations.

Religious neutrality and deference rules fully support exemptions such as Section 702 because such exemptions avoid imposing unique burdens on religious organizations. As an initial matter, this Court in *Amos* recognized that a religious nondiscrimination requirement creates "significant governmental interference with the ability of religious organizations to define and carry out their mission." *Amos*, 483 U.S. at 335; *see also id.* at 338 (the exemption "lift[s] a regulation that burdens the exercise of religion").

In addition, the burden imposed on religious organizations is unique to such organizations. It is no burden on Microsoft or Harvard or the Red Cross to comply with a religious nondiscrimination requirement, as religion is simply not part of their defining characteristics. The burden falls solely and squarely on religious organizations.

This Court has held that "the minimum requirement of neutrality is that a law not discriminate on its face[,]" and that "[a] law lacks facial neutrality if

it refers to a religious practice without a secular meaning discernible from the language or context." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993). Because religious criteria is the basis upon which religious nondiscrimination turns, there is no secular meaning for the prohibited action. Accordingly, religious nondiscrimination rules are not facially neutral with respect to religion.

Also, prohibiting religious discrimination by religious organizations is unrelated to the civil rights law interest in prohibiting invidious discrimination. As this Court noted in *Lukumi*, "a law which visits gratuitous restrictions on religious conduct . . . seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Lukumi*, 508 U.S. at 538. For these reasons, exemptions for religious organizations help ensure that religious nondiscrimination laws comply with fundamental religious liberty principles of neutrality and deference.

B. This unique impact also applies when religious nondiscrimination is imposed as a condition on access to government benefits.

Some laws and regulations limit the religious exemption by imposing a religious nondiscrimination requirement as a condition on access to certain government benefits (such as the use of a government facility or the participation in a government-funded

program). *See, e.g.*, 42 U.S.C. § 3789d(c)(1) (federally funded program); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (state employee charitable campaign). The issue in these situations is not whether religious organizations should be granted a right that they do not already have, but whether they must forfeit that right when engaged in certain interactions with the government. In the context in which such benefits are made available, the religious nondiscrimination rule imposes the same unique burden on religious organizations as described above under general civil rights laws.

As an initial matter, this Court has repeatedly held that "the liberties of religion and expression may be infringed by the denial of or placing of conditions on a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). In *Sherbert*, this Court held that government burdens the free exercise of religion when it imposes a condition on the availability of a government benefit that forces someone to choose between the benefit and following a precept of that person's faith. *Id.*

In addition, a government benefit open to associations formed around virtually any ideology except religion discriminates against religion. Imposing a religious nondiscrimination requirement on religious organizations essentially says that such organizations (and only such organizations) cannot be who they are and participate in government programs. Because the rule results in government benefits being open to associations formed around virtually any

ideology except religion, it effectively "gerrymanders" the marketplace of ideas against a religious presence or voice in any area where the government gets involved. *See Lukumi*, 508 U.S. at 534. Such a rule not only marginalizes religious organizations, but it also harms potential recipients who would prefer but are unable to obtain services from faith-based providers.

The discriminatory impact on religious organizations is compounded by the fact that no policy justifies such discrimination. The nondiscrimination conditions attached to government benefits are intended to ensure that such benefits are not extended to groups engaging in invidious discriminatory practices. But, as noted above, religious associational practices of religious organizations are not invidious. And they do not become invidious merely by virtue of the organization participating in a government program.

Further, providing a benefit to a religious organization under such circumstances does not promote or endorse or fund its hiring practices anymore than it does the hiring practices or criteria of any other participating organization. The government is only funding (and perhaps endorsing) the delivery of the social services or other government benefit for which the organization qualifies on nonreligious criteria. This is why this Court has never prohibited the extension of government benefits to a religious organization solely because of its religiously selective employment policies. Indeed, over 100 years ago, this

Court sustained a contract between the District of Columbia and a private hospital corporation controlled and managed exclusively by members of a sisterhood of the Catholic Church. *Bradfield v. Roberts*, 175 U.S. 291 (1899). In holding that the contract complied with the Establishment Clause, this Court stated: "[w]hether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarian, or members of any other religious organization, or of no organization at all, is of not the slightest consequence . . . " *Id.* at 298. *See also Bowen v. Kendrick*, 487 U.S. 589, 609 (1988) (applying *Bradfield*).

Finally, because an exemption avoids imposing a unique burden on religious organizations, it does not constitute special treatment for such organizations. To the contrary, providing an exemption in a context where the law has no moral relevance is simply good lawmaking. It also advances religious liberty.

C. Attempts to exempt only sufficiently religious organizations or activities lead to unconstitutional religious determinations and favoritism.

Faced with the rationale for religious exemptions discussed above, some governmental entities have agreed to provide an exemption but have limited it to those *activities* or *organizations* which are deemed to be sufficiently religious. These efforts continue to

misconceive the distinction between benign religious selection policies and invidious discrimination. And they also draw government officials into making unconstitutional religious determinations and favoring certain types of religious organizations over others.

In 1972, Congress extended the Section 702 exemption to include all activities of a religious organization, not just its *religious activities* (as the exemption initially provided). In upholding this extension against an Establishment Clause challenge, this Court held that "Congress' purpose in extending the exemption was to minimize governmental 'interfer[ence] with the decision-making process in religions.'" *Amos*, 483 U.S. at 336. This Court observed that "[t]he line [between religious and secular activities] is hardly a bright one and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission." *Id.* at 336. Accordingly, this Court warned that requiring a religious organization "to predict which of its activities a secular court will consider religious" imposes a significant burden and that "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Id.*

More generally, this Court has repeatedly held that government officials have no competence or constitutional authority to interpret or apply religious beliefs, or to determine the religious significance of various activities. *See, e.g., Watson v. Jones*, 80 U.S. 679 (1871); *Serbian Eastern Orthodox Diocese v.*

Milijovech, 426 U.S. 696, 713 (1976) (holding that courts cannot review whether actions of religious organizations "involving matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law" comply with church laws and regulations).

In *New York v. Cathedral Academy*, 434 U.S. 125 (1977), this Court struck down a statute which required government officials to "review in detail all expenditures for which reimbursement is claimed, including all teacher-prepared tests, in order to assure that state funds are not given for sectarian activities." *Id.* at 132. This Court noted that the requirement would place religious schools "in the position of trying to disprove any religious content in various classroom materials" while at the same time requiring the state "to undertake a *search for religious meaning* in every classroom examination offered in support of a claim." *Id.* at 132-33 (emphasis added). This Court concluded that "[t]he prospect of church and state litigating in Court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *Id.* at 133.[3]

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[3] *See also Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981) ("[m]erely to draw the distinction [between religious worship and other religious expression] would require the [State] – and ultimately the Courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases"); *Hernandez v. Commissioner*, 490 U.S.

(Continued on following page)

These cases all recognize that in practice discerning the religious significance of an activity or policy requires doctrinal interpretation. Further, the extent of distinctly religious content in a particular activity is not a reliable indicator of the activity's religious character. Bible reading is a religious activity if performed out of a desire to know and obey God, but it is not if performed merely as a study of literature. Eating bread and drinking wine is a religious activity if performed as part of a communion service, but it is not if performed merely to satisfy physical needs or desires. Ingesting peyote and killing chickens are generally not religious activities, but they become so when conducted as a sacrament in certain religions. *Employment Division v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993).

These same constraints apply to governmental determinations regarding the religious character of an *organization*. In this regard, the Court of Appeals for the D.C. Circuit struck down a *substantial religious character* test used by the National Labor Relations Board to determine whether it could exercise jurisdiction over a religious organization. *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). The Court concluded that the test, which

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680, 694 (1989) (in income tax exemption context, pervasive governmental inquiry into "the subtle or overt presence of religious matter" is proscribed by the First Amendment Establishment Clause).

required the NLRB to consider "all aspects of a religious school's organization and function," *id.* at 1339 (quotation omitted), was flawed because it "boils down to 'is [an institution] sufficiently religious?'" *Id.* at 1343. The court further held that "very process of inquiry" into the "'religious mission' of the University," as well as "the Board's conclusions have implicated [] First Amendment concerns. . . ." *Id.* at 1341 (citing *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979)); *see also Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality) ("It is well established, in numerous other contexts, that Courts should refrain from trolling through a person's or institution's religious beliefs.").

A narrow exemption not only creates excessive intrusion, but it may also improperly prefer some types of religious organizations over others based on expressly religious considerations (*i.e.*, how religious each organization is). The Tenth Circuit Court of Appeals recently struck down a multi-factor test intended to separate *pervasively sectarian* educational institutions from other religious educational institutions, allowing the latter but not the former to participate in a state student aid program. *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). The court concluded that the pervasively sectarian test violated the First Amendment because it "necessarily and explicitly discriminate[d] among religious institutions . . . ," *id.* at 1258, and "the discrimination is expressly based on the degree of religiosity of the institution and the extent to which

that religiosity affects its operations, as defined by such things as the content of its curriculum and the religious composition of its governing board." *Id.* at 1259.

The Tenth Circuit relied in part on this Court's holding in *Larson v. Valente*, 456 U.S. 228 (1982). The state law at issue in *Larson* contained an exemption for religious organizations, but only if they received more than half of their total contributions from members or affiliated organizations. *Id.* at 231-32. Although the law nominally applied secular criteria, this Court held that the criteria created an unconstitutional religious preference because it "effectively distinguishe[d] between well-established churches that have achieved strong but not total financial support from their members . . . and churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members. . . ." *Id.* at 245 n.23 (internal citation and quotation omitted).

In short, a narrow exemption which requires government officials to weigh all significant religious and secular characteristics to determine whether an activity or organization is sufficiently religious sets government officials adrift in a sea of subjective religious determinations which they have no competence or authority to navigate. Such an exemption will inevitably produce arbitrary and discriminatory results.

D. Exemptions should apply to any organization operated primarily for bona fide religious purposes, even if such purposes are similar to secular purposes.

The question for religious exemption purposes should not be whether an organization is "sufficiently religious" as measured by the religious significance of the organization's activities, policies and affiliation. The question instead should be whether the organization is operated primarily for bona fide religious purposes. In this regard, the Third Circuit Court of Appeals recently determined that an organization qualified for the Section 702 exemption because its "primary purpose was religious." *Leboon v. Lancaster Jewish Community Center Ass'n*, 503 F.3d 217, 231 (3rd Cir. 2007).

This definition of a religious organization, based on the religious character of its primary purpose(s), is consistent with other statutory definitions. For instance, federal law provides an exemption from unemployment insurance obligations for employers which are "operated primarily for religious purposes." 26 U.S.C. § 3309(b). Similarly, the Internal Revenue Code exempts from income tax organizations which are organized and operated exclusively for religious purposes. 26 U.S.C. § 501(c)(3); *see also Widmar v. Vincent*, 454 U.S. at 271 n.9 (explaining that the distinction between religious and nonreligious speech is based on the purpose of such speech).

To determine whether an organization embraces its primary purpose(s) for religious reasons, government officials cannot (and need not) weigh the religious significance of various characteristics of the organization. But they can determine whether an organization's asserted religious beliefs and mission are merely a sham, or whether there is at least a plausible connection between the organization's activities and its stated primary purposes. For instance, the court in *University of Great Falls* held that the religious character of an organization may be determined by confirming that the organization holds itself out to the public as a religious organization. 278 F.3d at 1344. Similarly, government officials could inquire into whether an organization has consistently asserted a bona fide religious basis for its purposes or whether it is opportunistically asserting such a basis merely to claim an exemption.

Finally, an organization's primary purpose is no less religious merely because it might be embraced by other organizations for secular reasons. The court in *Leboon* rejected an argument that a Jewish Community Center was not a religious organization because it promoted principles, such as tolerance and healing the world, which are shared by nonreligious persons. The court held that "[a]lthough the [community center] itself acknowledges that some of these principles exist outside Judaism, to the extent that [the community center] followed them as Jewish principles this does not make them any less significant." *Leboon*, 503 F.3d at 230.

This precise point was also made by the court in *University of Great Falls* in response to an argument that the university was not sufficiently religious because it promoted values similar to those taught at secular institutions (*e.g.*, character, competence and community). The court observed that this fact:

> . . . says nothing about the religious nature of the University. Neither does the University's employment of non-Catholic faculty and admission of non-Catholic students disqualify it from its claimed religious character. *Religion may have as much to do with why one takes an action as it does with what action one takes.* That a secular university might share some goals and practices with a Catholic or other religious institution cannot render the actions of the latter any less religious.

278 F.3d at 1346 (emphasis added).

These cases affirm that the purposes and activities of a religious organization are no less religious merely because others may embrace similar purposes or conduct similar activities for nonreligious reasons. Put differently, *religious purposes* cannot be limited to *exclusively religious purposes* (*i.e.*, only those purposes that could not be embraced for nonreligious reasons). To hold otherwise would mean that those religious organizations whose religious duty requires them to serve tangible human needs would be required to sacrifice their religious character in order to do so. Such a result trivializes religious liberty.

CONCLUSION

This country has a long tradition of deference for churches and other associations formed around shared religious life and conviction. Our constitutional commitment to religious pluralism respects their duty to their religion, prohibits religious favoritism, and welcomes their distinct contributions to society. For these reasons, *amici* respectfully request this Court to affirm the right of CLS to receive the benefits offered to other student groups while requiring its voting members and leaders to subscribe to its statement of faith.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER
OF THE UNIVERSITY OF CALIFORNIA,
HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF *AMICI CURIAE* BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY AND THE INTERFAITH ALLIANCE FOUNDATION IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether the Constitution permits a public university law school to exclude a religious student organization from a forum for speech solely because the group requires its officers and voting members to share its core religious commitments.

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STATEMENT OF INTEREST

The Baptist Joint Committee for Religious Liberty (BJC) serves fifteen Baptist entities, including national and regional conferences and conventions, working together to promote religious liberty for all through strong support of principles of no establishment and free exercise.[1] Grounded in the historical experience of Baptists, whose religious freedom struggles figured prominently in the fight for disestablishment in the American colonies, the BJC recognizes that religion and religious liberty are best served when government neither seeks to promote nor inhibit religion, but leaves it to its own merits and the voluntary efforts of adherents.

The BJC believes that religious freedom requires noninterference by the state in matters of faith and doctrine, and that the government has an affirmative duty to avoid any sponsorship of religion. For more than seven decades, the BJC has defended the constitutional boundaries between the institutions of religion and government in Congress and the courts. The BJC supported the U.S. Supreme Court's "school prayer" decisions that prohibited government-led prayer and Bible reading in the public schools, and

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[1] The parties have consented to the filing of this brief. As required by Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *Amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

worked for passage of the Equal Access Act of 1984, defended its constitutionality, and led efforts to produce guidelines for its proper implementation. While the BJC has supported application of equal access principles for religion in contexts that do not threaten governmental sponsorship or promotion of religion, it has also vigorously opposed governmental actions that would create an official or financial connection to religion in violation of no establishment principles. The BJC has filed *Amici Curiae* briefs in more than one hundred cases in the courts, including most of the U.S. Supreme Court's cases dealing with religious freedom.

The Interfaith Alliance Foundation celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance has 185,000 members across the country made up of 75 different faith traditions as well as from no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy.

SUMMARY OF ARGUMENT

This case presents a conflict between the rights of a religious student organization and the nondiscrimination policies of a public educational

institution. The dispute, like similar ones across the country, raises concerns under a number of constitutional theories. Of special concern, however, is the way this case implicates the fundamental distinction between governmental entities and private religious entities that is essential to understanding and protecting religious liberty.

This case should be resolved in a way that best reflects and preserves religious liberty protections in its specific context – a public educational institution's limited public forum for the participation of student clubs to meet on campus and exercise First Amendment rights. A specific line of Supreme Court cases protects the First Amendment rights of speech, association, and religion for students on public school and university campuses through recognized student organizations participating in a limited public forum. The cases make clear that religious student groups, no less than groups organized around other common interests, should have equal access to the forum and the incidental means of communication provided by the forum.

The constitutional principle of equal access for a speech forum, however, is constitutionally and logically tied to principles of no establishment that protect against government sponsorship of religion. While cases protecting the equal access of religious groups to participate in a limited public forum, such as on public school and university campuses, are decided under free speech principles, they do so with an implicit (if not explicit) understanding that the

government may promote many messages, but may not promote religion. The Establishment Clause prohibits government, including public universities, from promoting religion, but other First Amendment provisions protect religious expression by individuals and the student associations they form on public school and university campuses. As this Court stated clearly in upholding the Equal Access Act of 1984, there is a "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000), *citing Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J., concurring).

Indeed, the development of equal access case law (which draws on and parallels Equal Access Act cases) reflects and is instructive for understanding the broader relationship between private religious organizations that seek to promote their religion and governmental entities that are constitutionally prohibited from promoting religion. Participation in the forum should not threaten a group's right to self-definition and expressive association. The operation of a typical limited public forum for student clubs provides no justification for interference with a religious organization's mission and leadership through the application of the school's nondiscrimination policy.

Recognition of a private religious group (including one that insists on strict conformity to particular religious beliefs) in a limited public forum does not

diminish the important rights and responsibilities of a public educational institution to avoid sponsorship or endorsement of religion. Nor does it deny a state's interest in promoting its own message of non-discrimination, which may conflict with the message of some religious student groups.

While the Constitution requires equal access to a forum for religious student clubs, it also forbids the government from funding religion. Equal access does not extend to general grants to religious student groups engaged in religious activity. Nor does it allow sponsorship or control of religious student groups by the public school or university, which would raise Establishment Clause concerns. When a university links access to a limited public forum for student organizations with financial benefits (beyond what is merely incidental to the forum and its purpose), it subverts the positive nature of equal access principles for a religious group in a limited public forum, creating confusion and constitutional risk.

Public institutions are constitutionally required to avoid sponsorship of religion. The operation of a forum for student clubs to meet on campus should not create a false connection or confusion between the identity, speech, or expressive association of the public school or university on the one hand, and the identity, speech, or expressive association of student groups on the other. The religious liberty rights of all students, as well as the integrity of public institutions, demands that public schools and universities take measures to provide a clear separation between

the schools' own speech and sponsored activities, and those of their students. That separation is also vital for maintaining a university's own nondiscrimination message that should not get clouded by the multitude of speech by private, student organizations promoting various messages through participation in a broad, diverse speech forum on campus.

Amici file this brief on behalf of neither party, urging the Court to render a decision that protects the significant religious freedom interests inherent in this dispute.

ARGUMENT

I. Public School and University Forums for Student Speech Serve Important First Amendment Interests, Including Religious Liberty for Students

Strong religious freedom interests support participation of religious student groups on public school and university campuses. Beginning with *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court has recognized the First Amendment rights of religious student organizations to meet on public school campuses and participate in forums designed to engage students in non-curricular activities. Such forums serve important purposes for student development and leadership and offer the opportunity to enjoy First Amendment rights of speech and association from a

wide variety of viewpoints.[2] Religious student organizations, like their secular counterparts, have the right to form associations based upon shared interests, views and practices, and to advance their views on campus without the suggestion of governmental endorsement. While the Establishment Clause precludes a state university from creating a special religious forum or otherwise promoting religion, an "equal access" policy that allows religious and other student groups to use state school facilities for meetings demonstrates neutrality toward religion. *Widmar*, 454 U.S. at 274 n.14.

The *Widmar* Court recognized that while the state's obligation to comply with the Establishment Clause may be "characterized as compelling," an "equal access" policy governing a forum of students for the voluntary association of a wide variety of

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[2] As this Court observed in *Widmar*,

> [t]he college classroom with its surrounding environs is peculiarly "the marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1972). Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." *Id.*, at 181-182. We therefore have held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint. *Id.*, at 181, 184.

454 U.S. at 268 n.5.

interests was not "incompatible" with that obligation. 454 U.S. at 271. The forum "does not confer any imprimatur of state approval on religious sects or practices" and any benefit to religion is only incidental. *Id.* at 274. *Widmar* demonstrates the constructive way that equal access policies facilitate religious expression and association without government promotion of religion.

A. The Federal Equal Access Act and *Widmar* Line of Equal Access Cases Rely on Separation Between Private Religious Groups and the Government

Congress acknowledged the important way equal access principles facilitate religious speech by students, without violating the Establishment Clause, when it enacted the Equal Access Act.[3] Its legislative history and statutory framework, as well as the cases applying it, are instructive. Congress made it unlawful to deny religious student clubs "equal access" to meet in public secondary schools if other non-curriculum related clubs were allowed to meet during non-instructional time on school property. The Act was a legislative response to a pattern of discrimination against religious speech by students in public schools based upon widespread misunderstanding

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[3] 20 U.S.C. §§ 4071 *et seq.*

of this Court's decisions forbidding government-sponsored prayer in public school.[4] Following the rule in *Widmar*, the statutory right to equal access is triggered by the opening of a forum for voluntary, student-initiated non-curricular student groups. Once the forum has been opened, the Act requires equal access for religious groups, but specifically limits expenditure of public funds for the forum.[5]

Whether each element of the Act is constitutionally required or statutorily mandated to provide the proper balance of student rights and government responsibilities, the Act illustrates the constitutionally significant distinction between public educational institutions and their students. In upholding the Equal Access Act in *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990), the Court made plain a fundamental principle of religious liberty when it said that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause

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[4] The United States Senate Committee on the Judiciary, in favorably reporting the Act out of committee, noted that "those administrators act not from malevolence toward religion but from ignorance of the law and erroneous legal advice. A primary source of their confusion has been the lower Federal courts." Equal Access Act, Report of the Senate Comm. on the Judiciary on S. 1059, Senate Report No. 98-357 at 6 (reprinted in U.S. Code Cong. & Ad. News, 98th Cong., 2d Sess. at 2348 (1984)).

[5] Indeed, the express terms of the Act provide that the covered schools may not sponsor religious meetings and expressly disclaims any license to influence religious activities or expend public funds beyond what is necessary for maintenance of the forum. 20 U.S.C. § 4071(c)(d).

forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 250 (O'Connor, J., concurring); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 842-43 (1995).

B. The Limited Public Forum Created by Hastings for Private Student Groups Does Not Empower It to Mandate Membership Requirements for CLS

The University of California-Hastings College of the Law ("Hastings") established a limited public forum for recognized student organizations ("RSOs") designed to facilitate "a broad range of student groups reflecting many different interests and viewpoints" and "to provide its law students with opportunities to pursue academic and social interests outside the classroom that further their education, contribute to developing leadership skills, and generally contribute to the Hastings community and experience." Rdt. Br. in Opp. to Cert. 1-2.

When this dispute arose in 2004, Hastings had approximately 60 recognized student organizations on campus, reflecting a diverse array of student interests, each with access to certain RSO privileges. Hastings emphasized that it did not sponsor or endorse the views of any RSO and requires RSOs to inform all members and third party contractors that the groups were not school sponsored. As enumerated by the parties, most of the privileges offered to RSOs

reflect access to university facilities, including its communication channels. These incidents of the forum are typical, and except for the eligibility for financial grants discussed below, are generally consistent with providing access for the student groups to meet and to communicate among themselves and to others in the campus community.

The Christian Legal Society ("CLS") was denied RSO status because it would not agree to Hastings' nondiscrimination policy, which requires student organizations to have completely open membership. CLS requires all members "to sign, affirm, and endeavor to live their lives in a manner consistent with the Statement of Faith," as interpreted by CLS and subject to disqualification for conduct that is inconsistent with the Statement of Faith. Ptr. Br. 5-7. For CLS, allowing those who would not affirm their Statement of Faith to become voting members would alter who they are. *Amici* agree with Petitioner that Hastings' policy violates its right of expressive association. "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Freedom of association plainly presupposes a freedom not to associate. *Id.* at 623. Whether viewed as a matter of free speech, free exercise or expressive association, the Constitution protects the rights of individuals to organize around

common religious principles and practices. The Court below failed to recognize that right, treating Hastings' nondiscrimination policy as a neutral rule of conduct. CLS's application of its faith statement to its members, however, is protected activity[6] that is essential to the expressive content of its meetings and preservation of the group's purpose and identity.

While the validity of Hastings' interest in nondiscrimination in education is not in dispute, application of its nondiscrimination policy to private student groups and at the expense of a religious student group's expressive association is not justified.[7] What Hastings has given with one hand – a forum for student clubs to meet around common interests in the *Widmar* equal access tradition – it has taken away with the other. By conditioning RSO status on acceptance of its nondiscrimination policy, Hastings undercuts the purpose of its forum (facilitating a broad range of student interests and viewpoints), and deprives religious organizations of its constitutional right of equal access to the forum.

As the parties stipulated, and the district court found, Hastings interprets its nondiscrimination policy

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[6] Unlike, for example, the perceived propensity of a student group to engage in violent or disruptive behavior on campus. *See Healy*, 408 U.S. at 191-94.

[7] JOAN W. HOWARTH, *Teaching Freedom: Exclusionary Rights to Student Groups*, 42 U.C. DAVIS L. REV. 889, 926-36 (2009) (detailing ways a university can protect its nondiscrimination interests without violating expressive association rights of religious student groups).

as requiring registered groups to allow any interested student to participate, become a member or seek leadership positions in the group, regardless of the student's status or beliefs. J.A. 161-63; Rdt. Br. in Opp. to Cert. 3. Hastings has concluded that this policy helps ensure that those groups to which it provides funding and other benefits are furthering the general purposes of Hastings' registration system and that the educational and social opportunities these groups offer are available to all students. It claims its policy "encourages tolerance, cooperation, and learning among students of different backgrounds and viewpoints." Rdt. Br. in Opp. to Cert. 4.

It is unremarkable that a club that is organized for legitimate religious purposes has exclusionary criteria for membership to control its message. Application of the nondiscrimination policy interferes with rights of expressive association and destroys its intended purpose of allowing student groups to meet around common interests and to encourage the exchange of ideas on campus.[8] When a public university has created a forum generally open for use by student groups, it has "assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms [. . .] [t]he Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." *Widmar*, 454 U.S. at 267-268.

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[8] *See generally Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006).

II. Direct Grants of Government Funding to Student Organizations Threaten Establishment Clause Violations and Undercut Applicability of Equal Access

A baseline assumption for the application of equal access for religious student groups on public school and university campuses is that the forum facilitates student speech and association but is conducted in a way that does not risk university sponsorship. The Establishment Clause, which has been held to not bar access to a limited public forum in *Widmar* and *Rosenberger*, prohibits direct financial aid to a religious organization engaged in religious activity. Protection of religious liberty, including the operation of a free speech forum provided by a public university, requires a clear separation between the identity and messages of the university itself and the private religious clubs it recognizes on campus. That separation is called into question by the availability of direct grants to an indisputably religious organization engaged in religious activities.

A. The Establishment Clause Prohibits Direct Funding of Religion

Although the Constitution allows the government, as a general matter, to directly subsidize private speech, religion is different. It is a fundamental principle of the Constitution that government shall not use "public funds to finance religious activities." *Rosenberger*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring). The First Amendment, made applicable to the states by the Fourteenth Amendment, prohibits

government from making laws "respecting an establishment of religion," whether by "'sponsorship, financial support [or] active involvement in religious activity.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (*quoting Walz v. Tax Comm'n of New York*, 397 U.S. 664, 668 (1970)).

Religion is different because of the Establishment Clause's prohibition against the use of public funds to advance religion, a prohibition designed to protect religious liberty.[9] This restriction on government sponsorship of religion is grounded in the historical experience of colonial disestablishment well-known to the Founders of our nation,[10] as

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[9] *See Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004) (emphasizing constitutional distinction between a state-funded scholarship program and a forum of speech designed to encourage a diversity of views from private speakers).

[10] The principle of government neutrality in matters of faith originated not with James Madison and Thomas Jefferson, or even with John Locke, but with a seventeenth-century fundamentalist Baptist preacher, Roger Williams. Williams, who founded Rhode Island as a haven for religious freedom, spoke of the need for a "hedge or wall of separation between the garden of the church and the wilderness of the world." EDWIN S. GAUSTAD, LIBERTY OF CONSCIENCE: ROGER WILLIAMS IN AMERICA 207 (1991). Colonial Baptists and other then-minority (and oft-persecuted) faiths joined Williams in his belief that government neutrality toward religion is good for both, and their like-minded descendants provided much of the grassroots support for colonial disestablishment and for the religion clauses' inclusion in the First Amendment.

evinced by the writings and public actions of Thomas Jefferson, John Madison and others.[11]

The Establishment Clause's ban on sponsoring religion is essential to accomplish the Founders' aims, insulating citizens against compulsory support of religion, and inoculating religion from the inevitable government regulation and control that appropriately follows direct government funding. It follows that this

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[11] As Justice Souter has observed:

> Madison wrote against a background in which nearly every Colony had exacted a tax for church support, the practice having become "so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence," Madison's [Memorial and Remonstrance Against Religious Assessments] captured the colonists' "conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group." Their sentiment, as expressed by Madison in Virginia, led not only to the defeat of Virginia's tax assessment bill, but also directly to passage of the Virginia Bill for Establishing Religious Freedom, written by Thomas Jefferson. That bill's preamble declared that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical" [. . .] We have "previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."

Rosenberger, 515 U.S. at 869-71 (Souter, J., dissenting) (internal citations omitted).

Court must scrutinize carefully any attempt by government to disburse public funds to religious entities.

First, "no state aid at all [may] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones." *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755 (1976); *Hunt v. McNair*, 413 U.S. 734, 743 (1973). *See also Mitchell v. Helms*, 530 U.S. 793, 818 (2000) (leaving extant the pervasively sectarian doctrine and acknowledging the "special Establishment Clause dangers when money is given to religious schools or entities directly rather than . . . indirectly"); and *Rosenberger*, 515 U.S. at 842 ("The Court of Appeals (and the dissent) are correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions").

Second, "if secular activities can be separated out, they alone may be funded." *Roemer*, 426 U.S. at 755; *Hunt*, 413 U.S. at 743. In short, only religious institutions that are not pervasively religious may receive direct federal financial assistance[12] and, then,

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[12] *Amici* acknowledge that certain types of indirect financial assistance to pervasively sectarian institutions may be constitutionally permissible. For example, this Court has upheld government-funded services to assist persons with disabilities in furthering their education at religious institutions on grounds that this is neutral assistance for individuals who may choose to study where they wish, rendering the religious institutions "only incidental beneficiaries." *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993). *Accord Witters v. Washington Dep't*

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only for activities that are wholly secular and segregated from an organization's religious activities. This Court upheld the funding at issue in *Hunt* because the funded institution was non-sectarian and the funds were not to be used for a religious purpose. *Accord Bowen v. Kendrick*, 487 U.S. 589 (1988); *Roemer*, 426 U.S. 736 (funding in the form of non-categorical grants upheld because the institution was not pervasively sectarian and there were strictures against religious use of the money); *Tilton v. Richardson*, 403 U.S. 672 (1971) (federal funding for construction of academic facilities at a university approved, but only to the extent that the funds could not be used for sectarian facilities or the advancement of religion).

Taken together, *Rosenberger* and the *Hunt* line confirm that, outside of benefits incidental to a limited public forum, the Establishment Clause precludes a public university from making direct grants to a pervasively religious entity or to otherwise fund religious activities. Instead, public university programs must avoid financial entanglement with religious organizations such as CLS.

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of Servs. for the Blind, 474 U.S. 481 (1986) (state financial vocational assistance to a blind ministerial student at a Christian college upheld).

B. *Rosenberger* Does Not Require and the Establishment Clause Prohibits Direct Funding of Religious Organizations Engaged in Religious Activities

While the Court in *Rosenberger* treated student activity fees for student clubs as a limited public forum from which a religious club could not be excluded, it did not usher in a sea change in the Court's jurisprudence on public funding for religious entities. *Rosenberger* was a nuanced application of this Court's line of student organization cases, ultimately holding that third-party reimbursements of a non-religious organization – paid out only upon satisfaction of carefully crafted criteria – do not constitute the sort of unfettered, direct funding of a pervasively religious entity that the Establishment Clause prohibits. The *Rosenberger* Court found such indirect, third-party disbursements to be practically the same as the in-kind benefits that the gamut of organizations, religious and secular alike, are afforded pursuant to equal access to the limited public forum of a registered student organization construct. The Court found, "[t]here is no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf." 515 U.S. at 843.

The funding offered by the Hastings RSO forum invites Establishment Clause concerns not raised by *Rosenberger*. Distinct characteristics present in

Rosenberger are absent from the instant case. For example, it was undisputed – and the *Rosenberger* Court found significant[13] – that the student organization at issue there was not a religious organization,[14] while no party has made such a claim about CLS. Indeed, CLS is thoroughly, unabashedly religious and devoted to a very specific set of religious beliefs and practices. Although the student organization funding structure for both Hastings and the *Rosenberger*-era University of Virginia were based on compulsory student activity fee payments, there is a key difference in the nature of the disbursements. In *Rosenberger* no money was ever directly disbursed to the student publication at issue; instead, receipts were submitted, and the Student Council paid the vendors directly for the printing costs – a fact on which the *Rosenberger* Court placed considerable emphasis.[15]

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[13] "It is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse. That is not a danger here, based on the considerations we have advanced and for the additional reason that the student publication is not a religious institution, at least in the usual sense of that term as used in our case law, and it is not a religious organization as used in the University's own regulations." *Rosenberger*, 515 U.S. at 844.

[14] The University of Virginia's guidelines for student organizations defined a "religious organization" as one "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." 515 U.S. at 826.

[15] "We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that

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Of special concern in this case is the fact that registered student organizations may apply for travel and other funding that is remitted directly to the organizations' coffers in an official Hastings student organization account. As in *Rosenberger*, the emphasis is most properly placed not on the fact that some level of funding would flow to CLS through Hastings' forum, but on the "nature of the benefit [that would be] received" by CLS. 515 U.S. at 843-44. While the constitutionality of the direct grant program in Hastings' RSO policy is not directly before this Court, this funding does not appear to be "incidental to the government's provision of secular services for secular purposes on a religion-neutral basis," under *Rosenberger*. The nature of the funding appears to be decidedly different;[16] it is not indirect, and would be disbursed to an organization that is undisputedly religious and dedicated to inherently religious activities. Such funding certainly goes beyond the bounds of this Court's decision in *Rosenberger* – a decision that was properly limited to its context and tailored to a discrete set of facts. While equal access to the forum facilitates religious expression without creating the risk of government endorsement of religion, a public university's funding of religious student groups

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is engaged in religious activity. Neither the Court of Appeals nor the dissent, we believe, takes sufficient cognizance of the undisputed fact that no public funds flow directly to [the student publication's] coffers." *Rosenberger*, 515 U.S. at 842.

[16] *See* Ptr. Br. 4 ("RSOs are entitled . . . to apply for funding to support *various group activities*") (emphasis added).

beyond the incidental kind in *Rosenberger* threatens an Establishment Clause violation and confuses the application of equal access to the forum.

The eligibility of access to direct grants of student fees alters a basic assumption of this equal access case, causing confusion between the messages promoted by Hastings and those promoted by student clubs under the RSO policy. Equal access assumes facilitation of speech and association under conditions that do not give rise to sponsorship. As discussed, the funding of a religious club engaged in religious activities raises specific constitutional concerns. CLS has no right to a public university's support of its religious principles and activities. Indeed, Hastings is constitutionally forbidden from providing such support. At the same time, Hastings cannot manufacture an interest in altering CLS's message by bundling rights of access with fees that are unrelated to the purpose of the forum, resulting in an indicia of sponsorship that threatens an Establishment Clause violation. Hastings cannot justify one constitutional incursion by creating another. While the additional factor of government funding complicates the relationship with student groups, it does not warrant interference with a religious organization's membership requirements as a condition of participation in a limited public forum designed to promote free speech of student groups.

CONCLUSION

Amici respectfully submit that this Court's ruling must sanction neither direct funding of a private religious organization for religious purposes nor authorize a state entity, under the artifice of protecting the rights for all, to curtail the expressive association rights of that same, private religious organization.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

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CHRISTIAN LEGAL SOCIETY CHAPTER
OF UNIVERSITY OF CALIFORNIA,
HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* BOY SCOUTS OF AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

Boy Scouts of America ("Boy Scouts") is a nonprofit membership organization with the mission of instilling in young people the values of the Scout Oath and Law. In furtherance of that mission, all members agree to live by the Scout Oath and Law, which include both theistic and moral values.

In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), this Court affirmed the rule that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." 530 U.S. at 648 (citation omitted). In such circumstances, the freedom to associate may be overridden only if regulation serves '"compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and such consents are being lodged herewith.

associational freedoms.'" *Id.* (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). The Court in *Dale* applied these principles to hold that the First Amendment protects Boy Scouts' selection of adult volunteers who observe the Scout Oath and Law. The state may not use nondiscrimination statutes to regulate membership choices which are sincerely related to an association's expression. Such choices constitute the group's "method of expression." *Id.* at 655.

For the state to tell a Christian group that it cannot be included in a forum intended to further speech if the Christian speech depends on an all-Christian membership is patently unconstitutional. Boy Scouts participates as *amicus* here for two reasons:

First, the principle stated in *Dale* that the state may not invoke nondiscrimination rules to force unwanted members on an expressive association is crucial to Boy Scouts.

Second, the principle stated in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), that the state cannot exclude an expressive association from a forum for speech on the basis of the association's speech is crucial to Boy Scouts. The same violation of associational rights occurs if the state forces an unwanted member on the association by direct regulation or by threatened exclusion from a forum for speech. In the case of threatened exclusion from a forum, the state accomplishes its censorship either by requiring a change in the associational speech before including the association in the forum, or by excluding the associational speech from the forum altogether.

The notion that a state agency facilitating a forum for speech may misapply nondiscrimination rules governing the state agency itself to regulate the speech of expressive associations in the forum is constitutionally infirm. State agencies have excluded Boy Scouts from public fora by arguing that the agencies themselves would be violating nondiscrimination rules that apply to the agencies if they included Boy Scouts in the fora. Yet the same agencies disavowed endorsement of any entity in the fora and indeed, for other entities, ignored their lack of inclusiveness.

A state agency that facilitates a forum for private speech does not seek to voice anything in the forum, and therefore does not voice support for the theistic or moral values of the Scout Oath and Law by including Boy Scouts in the forum. Nevertheless, Boy Scouts has been excluded. *See Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259, 1288 (S.D. Cal. 2003) (court ordered Boy Scouts excluded from the City of San Diego's leasing program open to all nonprofit lessees suitable for City properties, and currently including over 100 leases to nonprofit gender-, ethnic-, and religious-based groups and indeed churches, on the theory that the City's leases to Boy Scouts constituted an endorsement of religion because of the theistic component of the Scout Oath and Law), *aff'd in part and certifying questions*, 530 F.3d 776 (9th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3563 (U.S. Mar. 31, 2009) (No. 08-1222); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (affirming exclusion of Boy Scouts from the Connecticut employee charitable campaign forum involving no State expenditure and open to hundreds of ethnic-, gender-, age- and religious-based charities, on the argument that State statutes forbid Connecticut from supporting discrimination and Boy Scouts has to "pay a

price" for its speech), *cert. denied*, 541 U.S. 903 (2004); *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (Cal. Ct. App. 2002) (court ordered Sea Scouts excluded from a Berkeley program providing free berthing to nonprofits at the City marina, including several gender- and age-based nonprofits, on the rationale that the marina's nondiscrimination ordinance applied to Boy Scouts' internal membership policies), *aff'd*, 129 P.3d 394 (Cal.), *cert. denied*, 549 U.S. 987 (2006).

The Christian expressive association here finds itself in the same situation as Boy Scouts.

ARGUMENT

I. THE TESTS FOR DETERMINING CONSTITUTIONAL PROTECTION OF EXPRESSIVE ASSOCIATION

The *Dale* tests for what constitutes an expressive association and what constitutes interference with expressive rights are deferential to the organization asserting those rights.

Following on *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), the Court in *Dale* set forth a framework for constitutional protection of expressive association. The membership decisions of an association are constitutionally-protected if:

(1) the association is expressive, and

(2) the state's forced inclusion of an unwanted person in the association affects in a significant way the association's ability to express itself;

unless

(3) the state's interference in the membership decision serves compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means less restrictive of associational freedoms.

See Dale, 530 U.S. at 648-50; *Rotary*, 481 U.S. at 548-49; *Roberts*, 468 U.S. at 622-23.

A. Defining an Expressive Association

The right of expressive association is the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622.

A Christian student organization clearly warrants treatment as an expressive association. "It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." *Dale*, 530 U.S. at 650. Students may come together for any of the purposes identified in *Roberts*, including "religious"; and no type of student organization warrants greater protection than one involving expression afforded distinct constitutional rights.

Furthermore, there is no basis in this Court's precedent for dividing an expressive association into

leadership and membership categories, the former being entitled to more constitutional protection and the latter to less constitutional protection. The Court in *Dale* dealt with one adult volunteer leader from a total of approximately 1.2 million adult leaders, and adult leadership is the only membership category for adults who join the Boy Scouts. While there are certainly different levels of adult leadership, *e.g.*, a member of a Troop committee versus a Scoutmaster, this Court did not suggest that one type of adult leadership might be afforded greater protection than another. Similarly, the Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995), did not suggest that parade groups marching in the front of the parade might be afforded greater protection than those marching at the back.

By determining the criteria for those who join as well as those who lead, an expressive association is trying to make the same sort of "collective point" the Court identified the parade in *Hurley* as making. 515 U.S. at 568. The expressive point made by membership criteria is obvious where the expressive association desires to have the same criteria for both members and leaders. In this way, *Hurley* presented a more difficult case than the instant one, because the Court had to find constitutional protection in expression which combined "multifarious voices." *Id.* at 569. Here, however, in the basic, orthodox Christian tenets which constitute the membership criteria at issue, the association does send the "narrow, succinctly articulable message" which eluded the Court in *Hurley*. *Id.* There can be no doubt that each individual participant who joins by affirming those tenets contributes to the association's "overall

message." *Id.* at 577. *See Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981). The whole purpose of an expressive association is to associate with like-minded individuals.

B. The Interference Test

1. Interference by Requiring the Inclusion of Unwanted Members

In *Dale*, as in *Hurley* before it, this Court adopted a deferential view of what constitutes interference with associational rights when the state forces the inclusion of unwanted members. A group's right of expressive association is infringed if the presence of the unwanted person "affects in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648.

In *Dale*, the Court held that once sincere belief is found, "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent." *Id.* at 651 (citing *Democratic Party*, 450 U.S. at 124 (courts may not interfere in First Amendment freedoms "on the ground that they view a particular expression as unwise or irrational"), and *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection")).

Because the Court will "give deference to an association's assertions regarding the nature of its

expression," the Court also will "give deference to an association's view of what would impair its expression." *Id.* at 653. Therefore, the Court held that the inclusion of James Dale "as an assistant scoutmaster would . . . surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs," even if the Boy Scouts' purpose was not to affirmatively disseminate that point of view. *Id.* at 654. "[A]ssociations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Id.* at 655.

Similarly, in *Hurley* the Court held unanimously that the parade organizers for the St. Patrick's Day Parade, the veterans' Council, had the right to exclude the gay, lesbian and bisexual group as a parade contingent marching behind a banner. *See* 515 U.S. at 566. Despite the fact that "the purpose of the St. Patrick's Day parade in *Hurley* was not to espouse any views about sexual orientation," the Court held that "the parade organizers had a right to exclude certain participants nonetheless." *Dale*, 530 U.S. at 655 (stating holding in *Hurley*).

In both *Dale* and *Hurley*, as here, the proposed inclusion of persons unwanted by the group would change the message sent by the association to one preferred by the government. In *Dale*, the government would "*force the organization to send a message, both to the youth members and the world*," that the

organization did not want to send. *Id.* at 653 (emphasis added). Similarly, in *Hurley*,

> *a contingent marching behind the organization's banner would at least bear witness* to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would *suggest their view* that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals . . . .

515 U.S. at 574 (emphasis added).

In light of *Dale* and *Hurley*, there can be no doubt that a state regulation that would prohibit a Christian student group from using as membership criteria basic tenets of orthodox Christianity would interfere "in a significant way" with the group's expressive rights. *Compare* 99a-100a *with* 11a-12a, 100a-101a. The interference would be clear, even without the proposed membership of the Outlaw members apparent on this record.

2. Interference by Threatened Exclusion From a Forum

The question then becomes whether interference with expressive rights through prohibition is treated similarly under the Constitution than interference through exclusion from benefits which would otherwise be freely available, as in a forum. The answer is clearly yes.

The Court in *Dale* stated that interference with rights of expressive association may "take many forms." 530 U.S. at 648. *Dale* nowhere suggested that the freedom of expressive association is limited only to cases of direct state regulation of group membership. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) (required disclosure of the organization's membership lists was an unconstitutional burden on association even though the state had "taken no direct action . . . to restrict the right of . . . members to associate freely"); *Roberts*, 468 U.S. at 622 ("Government actions that may unconstitutionally infringe upon this freedom can take a number of forms. Among other things, government may seek to *impose penalties or withhold benefits* from individuals because of their membership in a disfavored group." (Emphasis added.)).

The state may not censor expressive association, even if accomplished through a forum for speech rather than through direct prohibition. In *Healy v. James*, 408 U.S. 169, 181-82 (1972), this Court held that a state college in Connecticut had unconstitutionally interfered with a student political organization's First Amendment freedom of association by denying official recognition and access to university facilities because of the organization's affiliation with the national Students for a Democratic Society. Noting that "[a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs," the Court held that "[t]here can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right." 408 U.S. at 181. The Court squarely rejected the

notion that only direct state interference with membership decisions falls within the scope of the First Amendment's prohibition:

> *[T]he Constitution's protection is not limited to direct interference with fundamental rights.* The requirement in *Patterson* that the NAACP disclose its membership list was found to be an impermissible, though indirect, infringement of the members' associational rights. Likewise, in this case, *the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the [State's] action.* We are not free to disregard the practical realities. Mr. Justice Stewart has made the salient point: 'Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'

Id. at 183 (emphasis added; citations omitted); *see id.* at 185-86 ("[T]he Court has consistently disapproved governmental action imposing criminal sanctions *or denying rights and privileges* solely because of a citizen's association with an unpopular organization." (Emphasis added.)).

Hurley is also instructive on this point. In one sense, the state court order requiring the contingent's participation in the Council's parade was a direct regulation of the Council's expression in the parade. However, *Hurley* was a case of conditioned inclusion:

the price of the Council's parade permit was state control over the Council's decisions concerning who could participate. This Court held that the state could not leverage permission to hold a parade in downtown Boston into control of the content of the Council's parade. *See Hurley*, 515 U.S. at 578-81.

Here, the state cannot leverage participation in a forum into control over the internal membership policies (and thus the "method of expression" and identity) of a Christian student group. *Dale*, 530 U.S. at 655. Preservation of the group's speech cannot come at the price of loss of funding and absence from a forum for speech, two results which would "significantly burden" the Christian student group's expression of orthodox Christian belief. *See id.* at 653; *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 799 (1985) ("without the funds obtained from solicitation in various fora, the organization's continuing ability to communicate its ideas and goals may be jeopardized").

C. Compelling State Interests Which Are Unrelated to Suppression of Ideas

The state may not override First Amendment rights unless the public purpose sought to be achieved is not only facially legitimate, but "compelling" and unrelated to the suppression of speech. *See, e.g., United States v. Lee*, 455 U.S. 252, 256-61 (1982); *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976); *Healy v. James*, 408 U.S. 169, 184 (1972); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958). In *Roberts*, the Court stated:

> The right to associate for expressive purposes is not, however, absolute. Infringements on

> that right may be justified by regulations adopted to serve *compelling state interests, unrelated to the suppression of ideas*, that cannot be achieved through means significantly less restrictive of associational freedoms.

468 U.S. at 623 (emphasis added); *see Dale*, 530 U.S. at 648.

Compelling state interest clearly requires more than benign legislative purpose. States routinely argue that there is a compelling reason for a regulation to trump Free Speech if the goal is, in the state's view, "beneficent." *See Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) ("Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent.").

In *Dale*, the Court held that the "state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." 530 U.S. at 659. The Court distinguished *Roberts* and *Rotary* on the fact that the application of the statutes in those cases did not "materially interfere with the ideas that the organization sought to express." *Id.* at 657. However, "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world," contrary to the preferred message of the organization. *Id.* at 653. Thus, under *Dale*, a statute invalidated on the basis of the interference test would seem to fail the compelling state interest test automatically because application of the

statute had been deemed "'[]related to the suppression of ideas.'" *Id.* at 648 (quoting *Roberts*, 468 U.S. at 623).

Similarly, in *Hurley*, the Court noted the "venerable history" of the Massachusetts public accommodations law, but ruled that the law had been applied in that case "in a peculiar way," in that it was not being applied to require participation in the parade as such, but to require expressive participation in the parade as a parade contingent marching under a banner. 515 U.S. at 571-72.

In the instant case, the state cannot claim a compelling state interest in including persons who are covered by the nondiscrimination rule because those persons, in fact, are allowed by the Christian student group to attend meetings and participate. App. 13a. The state seeks to apply the nondiscrimination rule "in a peculiar way," *i.e.* to require the Christian student group to include contrary expressive participation through voting membership and leadership. In requiring a Christian group to forego the obvious expressive value of limiting voting membership and leadership to those with shared Christian values, the state's application of the nondiscrimination rule here, as in *Hurley*, requires the Petitioner to "alter the expressive content" of the association in order to participate in the forum. 515 U.S. at 572.

It is difficult to imagine any compelling state interest in removing Christian membership criteria from a Christian membership organization. That is, given sincere belief and an obvious relationship between the membership criteria and the belief, there is no

compelling state interest in regulating private associational activity which furthers religious speech.

Finally, there is no compelling interest in application of a nondiscrimination rule to a private group in a forum explicitly intended *for speech*. First, the state has already effectively disavowed any compelling state interest in regulating each private group within a forum for speech. When the state requires each private group to make clear that the state is not sponsoring or condoning its speech and activities, as here, the state has already admitted that it has no compelling interest in getting involved in internal issues of any group. App. 83a, 85a-86a.

Second, it is also difficult to see the compelling state interest in applying rules which govern itself as a state entity to obviously private groups in a forum intended to encourage free expression, including ethnic and gender groups formed along the very protected categories covered by the nondiscrimination rules.

Third, there is no compelling state interest where there is selective or at least singular enforcement of the nondiscrimination rule that is supposedly compelling. A state which includes all manner of expressive associations, on all sorts of topics and with all sorts of advocacy and membership criteria, has no compelling state interest in singling out one of them for exclusion on the asserted rule of nondiscrimination. The state's behavior in these circumstances, far from compelling, becomes entirely arbitrary and viewpoint discrimination. *See, e.g., Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, 457 F.3d 376, 384-89 (4th Cir. 2006) ("viewpoint neutrality requires not just that a government

refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to *protect* against the improper exclusion of viewpoints") (citing *Board of Regents v. Southworth*, 529 U.S. 217, 235 (2000)).

II. PUBLIC FORUM DOCTRINE

Once the state establishes a public forum for speech, the First Amendment does not permit the state to disfavor one group's speech.

A. The Application of *Rosenberger*

The state in this case created an open forum for student organizations to engage in speech, then chose to censor one disfavored group. Yet facilitators of fora do not intend to speak through the individual participants in fora and, therefore, do not have a right to censor the speech of individual participants. *See Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995) (citing *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 806 (1985)).

In *Rosenberger*, the University of Virginia had set up a Student Activities Fund ("SAF"), paid for by students, to support a broad range of extracurricular student activities that were "related to the educational purpose of the University" and that "tend[ed] to enhance the University environment." *Id.* at 824. Eleven categories of student groups qualified for SAF funds, including "student news, information, [and] opinion." *Id.* However, religious and political activities were specifically excluded. In the 1990-1991 academic year,

135 student groups applied for SAF funds, and 118 received those funds. Of the 118, 15 were funded as student news organizations. *Id.* at 825. When the student publisher of a Christian magazine, Wide Awake Productions, attempted to use the SAF to pay its printing costs as a student news organization, it was excluded as a "religious activity." *Id.* at 827.

This Court invalidated the exclusion of Wide Awake Productions from the forum, noting that once the University opened a forum dealing with certain subject matter, it "must respect the lawful boundaries it has itself set" with respect to that subject matter. *Id.* at 829. The University may regulate content if it preserves the purposes of the forum, but it may not engage in viewpoint discrimination against perspectives on subject matter otherwise "within the forum's limitations." *Id.* at 830. The Court quoted *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), which held that a school district violated the First Amendment when it permitted school property "'to be used for the presentation of all views about family issues and childrearing except those dealing with the subject matter from a religious standpoint.'" *Id.* (quoting 508 U.S. at 393). The Court also relied on *Widmar v. Vincent*, 454 U.S. 263 (1981), in which the Court struck down a public university's exclusion of religious groups from use of school facilities made available to all other student groups:

> When the University determines the content of the education it provides, it is the University speaking, and we have permitted [it] to regulate the content of what is or is not

> expressed when it is the speaker or when it enlists private entities to convey its own message. . . .
>
> *It does not follow, however, and we did not suggest in* Widmar, *that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.* A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech. . . .
>
> . . . Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, *the University may not silence the expression of selected viewpoints.*

Rosenberger, 515 U.S. at 833-35 (emphasis added).

The state here has similarly disavowed any sponsorship of the organizations participating in the forum or endorsement of their speech. The state does not wish to engage in its own speech through the forum, but instead affirmatively claims only to "expend[] funds to encourage a diversity of views from private speakers," as in *Rosenberger*. *Id.* at 834. Rather than being a speaker itself, the state is merely a facilitator of private speech and, as such, may not become an advocate for the conflicting claims of politically-correct efforts to silence orthodox Christian viewpoints within the forum.

B. Viewpoint Discrimination

The decision below conflicts with this Court's decisions forbidding viewpoint-based deprivations. Exclusion from a forum, denial of a benefit, or imposition of a financial penalty on the basis of viewpoint violates the First Amendment. *E.g.*, *Rosenberger*, 515 U.S. at 831-32 (viewpoint discrimination to "select[] for disfavored treatment" a student religious publication by excluding it on the basis of its religious character from a forum available to speech from publications); *Good News Club v. Milford Central School*, 533 U.S. 98, 107 (2001) (viewpoint discrimination to exclude club from use of school facilities "based on its religious nature"); *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 542, 548 (2001) (conditioning grants to lawyers for indigent persons on their refusal to challenge validity of welfare laws was unconstitutional); *Lamb's Chapel*, 508 U.S. at 393-94 (viewpoint discrimination to exclude religious group because of its perspective from use of school facilities open to social and other groups, even on assumption that forum is nonpublic); *FCC v. League of Women Voters of California*, 468 U.S. 364, 402 (1984) (conditioning grants to public broadcasters on their agreement to refrain from editorializing was impermissible).

Here, it is undisputed that the Christian student organization was excluded from the forum because of orthodox Christian membership criteria reflecting the organization's views on religion and homosexual conduct. However, on the basis that the law's *purpose* was not to punish viewpoints, but only to punish conduct reflecting those viewpoints, the court below concluded

that the nondiscrimination law could be applied to exclude the organization from the forum.

Such an approach cannot be reconciled with this Court's decision in *Good News*. In *Good News*, the school board argued that it was permitted (or required) by state law to exclude groups using school premises for religious purposes. *See* 533 U.S. at 107 n.2. Without inquiring into the purpose of the state law, the Court rejected this contention: "Because we hold that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for Milford that purely religious purposes can be excluded under state law." *Id.*

That is what occurred here. The membership criteria at issue are bound up with the Christian student organization's expression. *See Dale*, 530 U.S. at 649-52. Courts may not divorce membership criteria from viewpoint, because to penalize the former is to penalize both. *See id.* at 648 (framing the issue as whether interference with membership policies "would significantly affect the Boy Scouts' ability to advocate public or private viewpoints"). To exclude religious groups from a forum based on the values they hold and the constitutionally-protected membership criteria they establish on the basis of those values is to exclude based on viewpoint and identity. That *is* viewpoint discrimination. To apply a lower standard of First Amendment analysis to an exclusion from a forum based on constitutionally-protected membership policies presents a direct conflict with this Court's forum cases.

Here, it is clear from the text of the state's nondiscrimination rules themselves that the Christian student organization has been subjected to viewpoint discrimination. The prohibition of discrimination covers only "legally impermissible, arbitrary or unreasonable discriminatory practices." App. 8a-9a, 88a. Christian membership criteria for a Christian student organization are clearly not unlawful, nor are they arbitrary, since they bear an obvious relationship to the purpose of the organization. It follows that the state has excluded the Christian student organization because it finds the membership criteria "unreasonable," a classic value judgment.

In the First Amendment context, a "nondiscrimination" restriction which extends farther than what can be prohibited as unlawful discrimination is impermissible.[2] If the University of Virginia's excuse for excluding Wide Awake Productions had been the forum's "nondiscrimination" requirement, rather than the Establishment Clause, the result of *Rosenberger* would have been the same. Wide Awake Productions published Wide Awake magazine as a form of "philosophical and religious expression" to foster a "tolerance of Christian viewpoints" and to unify Christians of multicultural backgrounds. *Rosenberger*, 515 U.S. at 825-26. Undoubtedly, Wide Awake Productions also had the right to select Christian editors and writers, to the exclusion of atheists and Wiccans. *See Corporation of the Presiding*

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2. When applied to *lawful* employment criteria or constitutionally-protected membership criteria, the term "discrimination" is merely name-calling, a moral judgment without legal import. Similarly, in rulings against Boy Scouts, courts have used the term to denigrate Boy Scouts' constitutionally-protected views in order to justify violating its rights.

Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987). Wide Awake Productions had an associational right to the selection of like-minded Christians to achieve its expressive purposes, just as a La Raza student group would have a right to the selection of Hispanic members and leaders. No "nondiscrimination" requirement can interfere with that right. *Dale* at least stands for this proposition, if not *Democratic Party of United States v. Wisconsin ex rel. LaFolette*, 450 U.S. 107 (1981), before it.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

Dated: February 4, 2010

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE CATO INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether individuals lose their right to freedom of association when they become students at a public educational institution.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. The instant case raises important issues regarding the freedom of association and thus is of central concern to Cato.

STATEMENT OF FACTS

The Christian Legal Society Chapter of the Hastings College of the Law ("CLS") is a small group of about a dozen law students who share religious views. In 2004, CLS applied to become a "registered student organization" at Hastings, a California public institution of higher learning that has about 426 students per class. Hastings has long followed a policy that offers recognition and tangible support to all student organizations on a nondiscriminatory basis. After an internal review, Hastings refused to allow

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[1] Letters from all parties consenting to the filing of this brief have been submitted to the Clerk. No counsel for any party authored this brief in whole or in part, and no persons other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

CLS to become a registered organization. That registration would have allowed CLS to receive a variety of benefits that were afforded to about 60 other student organizations that hold widely disparate views on the full range of legal, political, social, and moral issues that confront American society. These benefits include the use of the Hastings name and logo, the use of its bulletin boards and email systems, funding for activities and travel, and office space on the campus.

Hastings refused to register CLS because certain provisions of the organization's basic charter conflicted with the school's internal antidiscrimination policy. CLS requires that its members and officers abide by key tenets of the Christian faith and comport themselves in ways consistent with its fundamental mission, which is to "encourage those who identify themselves as followers of Jesus Christ to more faithfully live out their commitment in their personal and academic lives, to prepare members for future lives as Christian attorneys, and to provide a witness and outreach for Jesus Christ in the Hastings community." CLS believes that this commitment requires its members and officers to abstain from extra-marital sexual relations and bars from membership any person who engages in "unrepentant homosexual conduct." CLS imposes these restrictions only on membership and governance. Its meetings have always been open to all members of the Hastings community.

Hastings denied registration to CLS because of its own "policy against legally impermissible, arbitrary or unreasonable discriminatory practices," which includes discrimination "on the basis of race, color religion,

national origin, ancestry, disabilities, age, sex or sexual orientation." By way of offset, Hastings was prepared to allow CLS to use its facilities for certain meetings, but refused to go any further. On September 23, 2004, CLS lawyers sent Hastings a letter demanding full recognition. This suit followed when that demand was rejected. As there were no disputed issues of fact, both CLS and Hastings filed motions for summary judgment. On May 19, 2006, the district court granted Hastings's motion on the ground that its antidiscrimination policy represented a compelling state interest that trumped the associational, religious, or speech claims that CLS raised under the U.S. Constitution. The Ninth Circuit affirmed that decision in a short unreported decision. This Court granted certiorari on December 7, 2009.

SUMMARY OF ARGUMENT

This case tests the extent to which an antidiscrimination policy announced by a public institution of higher education can limit individual rights to speech, religion, and association protected under the U.S. Constitution. All three of these interests are clearly implicated in connection with "expressive" organizations of which CLS is indubitably one. CLS's claims of expressive association are at the highest level because its members interact with each other only on speech and religious issues; deeply spiritual issues that define the jealously guarded area of "intimate human relationships." *See Roberts v. United States Jaycees*, 468 U.S. 609, 617 (1984). Speech rights are implicated because the Hastings

policy burdens the communications that members have with each other and with the rest of the world. Free exercise claims arise because CLS has an exclusively religious focus, which is restricted by a conscious state preference in favor of a wide range of other groups, many of which have missions strongly opposed to CLS's. These tripartite claims properly understood trump any purported state interest in the enforcement of Hastings's nondiscrimination policy, which is sadly misaligned with any legitimate state objective. The explicit viewpoint discrimination embedded in the Hastings policy—ironically a part of its "nondiscrimination" policy—dooms it under this Court's decisions in cases such as *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). *See also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). In each of these decisions, state efforts to prevent religious groups from accessing limited public forums on university or school property were struck down as an impermissible form of viewpoint discrimination. That same conclusion follows here.

In an effort to deflect these decisive precedents, Hastings takes a wrong turn by claiming that it may impose whatever terms and conditions it wants on groups within the Law School, so long as potential group members can avoid these restrictions by going elsewhere. Its aggressive position necessarily acknowledges that this Court's decisions in cases like *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000), have explicitly held that a state antidiscrimination law must yield to the claims of private expressive groups of

freedom of speech and association on such intimate matters as personal codes of moral conduct. In reaching this result, *Dale* explicitly held that the Court had to "give deference to an association's assertions regarding the nature of its expression [and] to an association's view of what would impair its expression." *Id.* at 653.

Whatever power the state may have with respect to expressive organizations with "large and basically unselective groups" such as the Jaycees, *see Roberts*, 468 U.S. at 621, the state has no compelling interest in securing the massive disruption of the internal operation of any organization dealing with intimate personal arrangements. Yet just that forbidden result is achieved by a policy that necessarily forces CLS to admit to membership or to elect as officers people who fundamentally disagree with their program. "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Id.* at 623. In striving to uphold the Hastings policy, the district court inexcusably fails to mention CLS's rights of "intimate" association, or to distinguish CLS from large public service organizations like the Jaycees that receive a lower level of constitutional protection for their expressive activities.

This Court's general prohibition on government regulation of intimate associations is content neutral. The Boy Scouts in *Dale* were allowed to claim it for their moral beliefs on gay rights. 530 U.S. at 659. Likewise, a religious gay rights organization could exclude from its membership any individual who

rejected the sanctity of same-sex marriage. The same associational norms apply to expressive organizations that hold positions deeply antithetical to each other. In matters of faith, belief, and practice, it is not for government to adjudicate the soundness of conflicting substantive positions. Nor should the level of constitutional protection afforded to any group be dependent on whether its beliefs are judged either moderate or extreme by some common social metric. The right of expressive association grants the same measure of independence from state control to all groups that fall within its ambit.

Hastings cannot evade these ironclad constitutional principles by claiming that it "merely" imposes restrictions on admission to its law school, such that those persons who do not like the restrictions remain free to go elsewhere. That position necessarily rests on the false premise that the venerable doctrine of unconstitutional conditions has no place whatsoever in dealing with expressive organizations that wish to meet on state property. *See* Am. Summ. J. Order 41 n.7. That proposition is clearly false. Governments may own public streets and highways, but cannot condition entry onto those bodies in ways that favor one political or religious viewpoint over another. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 516 (1939). Current law lets the government rule out inappropriate places—*e.g.*, the median-strip on a public highway—from all speech or religious practice on content-neutral grounds. It may impose reasonable content-neutral restrictions that address issues of safety on the use of traditional public sites that have long been regarded as amenable to public speech. But

at no point can it decide to let in speakers to any public forum, *i.e.*, any government owned common property, with one point of view while excluding speakers who hold different points of view. The state's proprietary power over these forums does not carry with it the unlimited power to exclude; that is the hallmark of private property. Viewpoint discrimination is not tolerated in open public forums.

To be sure, Hastings's facilities are not open generally to all members of the public. In its "limited public forum," Hastings may quite properly restrict entry only to students and others who have an educational reason to be on its premises. It can also refuse to extend use of its facilities to any political or social group organized by its members. But, most emphatically, it cannot evade its constitutional obligations to all of its students with the facile argument that it is "merely imposing" conditions that students can evade by not attending the school. Nor are these viewpoint-sensitive conditions justified on the ground that other Hastings students will be forced to "subsidize" positions they reject. That argument assumes that all revenues are manna from heaven when in fact they are raised by student activity charges imposed on all students equally. It is an impermissible penalty on CLS students to deny them standard privileges otherwise available to all while asking them to foot the bill when those privileges are extended to others. It is equally impermissible to adopt other forms of differential treatment—such as waiving the fees—to make good on the exclusion of CLS from the school's programmatic benefits.

As a public entity, Hastings does not have the power to discriminate among its student organizations simply because it can exclude the public at large from its premises. The only justifications that work are those that permit the state to limit the private activities of individuals and organizations. These are typically narrow. In *United States v. O'Brien*, 391 U.S. 367, 377 (1968), for example, the Court held that the United States could punish the burning of draft cards because its need to preserve the integrity of the Selective Service system was held to be "unrelated to the suppression of free expression", or content-neutral. No such justification is remotely possible here. Similarly, in *Healy v. James*, 408 U.S. 169 (1972), this Court held that a state college was *not* justified in excluding members of SDS from the use of campus facilities when it could not show how their activities presented imminent threats of violence. By refusing to distinguish intimate from large expressive associations, the district court badly botched what should be an easy case. The Hastings nondiscrimination policy must fall before CLS's constitutionally protected rights of intimate expressive association.

ARGUMENT

I. A Broad Principle of Freedom of Association Serves a Vital Function for the Preservation and Prosperity of a Society of Free and Responsible Individuals.

One common thread that runs through this Court's decisions on associational freedom is the fundamental

role this freedom plays in the life of an organized society. *See, e.g.*, *Dale*, 530 U.S. 640; *Roberts*, 468 U.S. 609. At the outset, it is critical to state the philosophical principles that give texture and justification to this common assertion. The starting point for this analysis is, consistent with the nation's first principles, the position of individuals in the state of nature, each with his or her own desires and interests. The basic challenge of political theory is to determine how these persons should interact with each other. At root, there are only two ways in which that human interaction can take place—either through coercion or cooperation. The first must necessarily be ruled out as the basic mode of social organization because it allows an individual to make himself better off at the expense of another person. Slavery is only the most extreme version of this coercive principle.

Cooperation has exactly the opposite consequences—provided all know that they can decide *not* to associate with others. "Freedom of association therefore plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623. The exercise of these rights has consequences that differ dramatically from those of coercion. Self-interested individuals will tend to associate with others to achieve private gain. When two parties do this through a simple contract, they are both better off, and their increased wealth creates opportunities for third persons who were not involved in the original association. That principle of association, backed by the right not to associate, is not limited to groups of two people, of course. So long as a society is able to keep the transaction costs for forming voluntary associations low, group membership can

become far more inclusive. Those individuals who are excluded from one organization (by the right not to associate) are of course free to form other organizations for their own mutual advantage, which are in turn protected against subversion by the same right not to associate with others. Individuals, moreover, have this right over the full range of human wants and interests, be they economic, political, charitable, or spiritual. They are the persons who decide what goals to value and what to reject. The greater the level of activity, the higher the overall level of social welfare, as measured by the welfare of *all* members of society. There is nothing in the basic theory of association that is tied to some narrow view of "possessive individualism." *Contra* C.B. Macpherson, *The Political Theory of Possessive Individualism* (1964) (assuming falsely that the protection of individual rights is necessarily antithetical to the good of the community as a whole).

There are, of course, limitations on the principle of freedom of association, even when stated in the unqualified form articulated in *Roberts*. The principle has never been applied to protect agreements to kill, maim, or steal because of the obvious negative consequences for third persons whose personal autonomy and private property is necessarily violated. Nor has it ever been invoked to protect cartels, for the simple reason that monopolistic arrangements reduce, rather than advance, overall social welfare. *See Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). And finally, there has been a long common law tradition that subjects common carriers to a variety of reasonable and nondiscriminatory forms of

regulation to control their use of monopoly power. *See Allnutt v. Inglis*, (1810) 104 Eng. Rep. 206 (K.B.), which has worked itself explicitly into American law. *Munn v. Illinois*, 94 U.S. 113, 127 (1876). *See also Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989) (stating the modern synthesis). Nor was the principle of freedom of association ever applied to block, under the police power, bona fide regulations of health and safety. On the other hand, a broad definition of the "morals" head of the police power at one time justified the stringent regulation of all forms of sexual mores and behavior—including homosexual conduct. Such regulation fits uneasily, however, with the basic principle of associational freedom, except in those cases where the conduct in question poses health and safety risks, as in the spread of AIDS or venereal diseases.

It follows, therefore, that the only relevant limitations on freedom of association recognized as a matter of general theory relate to the risks of coercion, cartelization, monopoly, and health and safety. Consistent with this theory, the decisions of this Court in the so-called *Lochner* era (named after *Lochner v. New York*, 198 U.S. 45 (1905)) did not hedge the principle of freedom of association (or contract) with other limitations on grounds of paternalism or any supposed inequality of bargaining power. In line with that outlook, *Lochner*-era courts struck down minimum wage and collective bargaining legislation, *see Adair v. United States*, 208 U.S. 161 (1908), and *Coppage v. Kansas*, 236 U.S. 1 (1915), on the ground that it encouraged the socially destructive monopolistic practices that antitrust laws rendered illegal in other

contexts. Yet at the same time the morals head of the police power was construed to allow extensive government regulation of marriage and all forms of sexual practices. *Compare Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding Georgia's anti-sodomy statute constitutional and representing the last gasp of the broad morals power) *with Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers*).

As *Lawrence* makes clear, post-New Deal case law has inverted this Court's earlier decisions in both the economic and the moral realm. Today a high level of judicial scrutiny is imposed on decisions that regulate intimate personal behavior, while only a low level of scrutiny is given to economic regulation. Thus on the economic frontier, the Court overturned the *Lochner*-era prohibitions on labor legislation by allowing extensive regulation of minimum wage, maximum hours, and collective bargaining agreements under such statutes as the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1935), and the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1938). *See United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a minimum wage for women only).

Consistent with the gradual decline of the morals head of the police power, the freedom of association found new life in connection with intimate associations that had previously been heavily regulated under that power. *See Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down a Connecticut law prohibiting the sale and use of contraceptives). This novel set of developments amounted to the application of the

generalized principle of freedom of association to intimate human relationships. Nothing whatsoever in the New Deal decisions has undermined the proposition that voluntary association generates gains in all areas of social life. That principle of associational freedom has therefore survived in all sorts of noneconomic contexts (*see* cases cited in *Roberts*, 468 U.S. at 619), dealing with such issues as political association, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); marital privacy, *Griswold*, 381 U.S. 479; possession of obscene materials, *Stanley v. Georgia*, 394 U.S. 557 (1969); parental control over education, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); family living arrangements, *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); adoption, *Smith v. Org. of Foster Families*, 431 U.S. 816 (1977); and decriminalization of homosexual behavior, *Lawrence*, 539 U.S. 558.

CLS is entirely within its constitutional rights when it seeks to preserve the integrity of its own institutions. At the same time, it would be wholly inconsistent with fundamental principles of freedom of association for CLS to ask Hastings not to recognize groups supporting same-sex marriage on the ground that the practice offends its members' deeply held vision of sound family life. No area of individual freedom is secure if the mere offense of others, however intense, is sufficient to justify restrictions on personal liberty, as was made clear in the flag-burning cases. *See Texas v. Johnson*, 491 U.S. 397 (1989) (rejecting claim that serious audience offense is sufficient to justify restrictions on flag burning). Yet, regrettably in this case, one intervenor, Hastings

Outlaw, rests its demand that activities fees not be used to support CLS on the argument that the views of CLS members are offensive.[2] Cert. Pet. 10-11.

II. The Protection of the Expressive Rights of Intimate Association Announced in *Roberts* and *Dale* Apply with Full Force to the Hastings Antidiscrimination Policy.

The twists and turns in the judicial acceptance of the principle of freedom of association have presented this Court with the difficult task of fencing off the new concern with personal liberties and associational freedoms in ways that would do justice to the cases cited above, without re-opening the door to *Lochner*-era decisions, however faithful those may have been to our constitutional tradition of limited government and freedom of association. Most critically, the analytical framework that was once used in connection with economic liberties survives with respect to all intimate expressive associations, and the principles that support that framework require a reversal of the lower court here.

The major effort to achieve the modern synthesis is found in *Roberts*, 468 U.S. 609, which does not even

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[2] The Hastings Outlaw mission statement reads as follows: "To promote a positive atmosphere at Hastings for lesbians, gay men, bisexuals, transgendered, and queer students. This includes educating the community at large in order to alleviate and eradicate homophobia and other affronts to human dignity." Hastings OUTLAW, http://www.uchastings.edu/student-services/student-orgs/OUTLAW.html (last visited Jan. 25, 2010).

cite *Lochner*. *Roberts* draws a careful distinction between two forms of associational freedom outside the economic arena. It gives high value to the intensely personal arrangements involved here, and intimates quite clearly that the antidiscrimination law could not apply to those situations because "the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* at 617-18.

By way of an explicit and immediate contrast, the *Roberts* Court had no hesitation in applying Minnesota's public accommodation law, Minn. Stat. §§ 363.01 et seq. (1982), to the Jaycees, a broad-based service organization that exhibits none of the characteristics of small cohesive groups like CLS that hold clear substantive commitments and beliefs. *Roberts,* 468 U.S. at 621-23. The theory behind this distinction is that subjective values count for much more in intimate settings than in larger all-purpose organizations lacking such focused beliefs. *Roberts* thus held that within the class of expressive associations, those that involved intimate matters of personal belief could not be trampled by the state because of the greater violence that state action would wreak upon members of such groups. At the same time, the broader and more diffuse social and charitable objectives of the Jaycees, however worthy in themselves, received a lower level of constitutional protection.

This critical difference in the weight of the individual interests was then quickly cashed out in evaluating the strength of the competing state interest. The Court concluded that the interest against discrimination by private parties justified the application of the public accommodations law to the Jaycees, thereby forcing them to admit women. It applied a similar analysis in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), holding that a California antidiscrimination law bars Rotary Club's discrimination against women. *Dale* delineated the side of this conceptual line on which to place the Boy Scouts, a large organization with a set of moral principles more focused than that of the Jaycees. *See* 530 U.S. at 649-50 (listing Boy Scout principles). The New Jersey Supreme Court had rejected the Boy Scouts' claim of intimate association because its "large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that the organization is not 'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association." *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1221 (1999), *quoted in Dale*, 530 U.S. at 646. The New Jersey Supreme Court also held that "the reinstatement of Dale does not compel the Boy Scouts to express any message." *Dale*, 734 A.2d at 1229, *quoted in Dale*, 530 U.S. at 647.

A five-to-four majority of this Court held, however, that the core moral commitments of Scout membership counted for more than the size and diversity of its membership. Thus, the Court extended the rights of

intimate association to this group. The district court claimed that the Supreme Court did not "blindly accept" the Scouts' claim for an intimate association, but "examined the evidence" on that point. Am. Summ. J. Order 32. Yet the district court studiously avoided quoting those passages in *Dale* that evidence the low level of scrutiny this Court gave to the Scouts' articulation of its own premises. This Court emphatically and repeatedly stated that the evaluation of the group's goals and purposes necessarily resided with the group itself; and it refused to reject that position, pointing to the internal divisions within the group's ranks that led from time to time to deviations in practice from its core principles. *Dale*, 530 U.S. at 648-49 (giving extra scrutiny to the findings of the New Jersey Supreme Court to ensure that its "judgment does not unlawfully intrude on free expression"). More concretely, this Court quoted from the Boy Scouts' mission statement and took that as unassailable proof of its core beliefs. *Dale*, 530 U.S. at 649. It further held that the Scouts' right of intimate association was not lost because the Scouts had declined to include references to its opposition to homosexual activity in its handbook. Instead, the Court held that the terms "morally straight" and "clean" could cover the Scouts' opposition to homosexual activity. Far from involving the strict scrutiny that the district court applied to CLS, this Court gave the Scouts virtual *carte blanche* to define its own purposes: "The Boy Scouts says it [homosexual activity] falls into the latter category" because it is not "morally straight" or "clean." *Id.* at 650.

The dissent in *Dale* followed the line of the New Jersey Supreme Court. But even if its logic had prevailed in that case, this case should come out exactly as *Dale* did. The CLS chapter at Hastings is small and cohesive. It has no ambiguity about its meaning or purposes. It falls squarely within the class of intimate associations that every justice of this Court recognized in *Roberts* and in *Dale*. The district court sought in part to evade this obvious conclusion by insisting that the protection afforded to intimate associations extended only to speech and not to conduct. *See* Am. Summ. J. Order 8, 11-15, 20, 25. But this creative reinterpretation of the case completely misreads both *Dale* and *Roberts*. As noted earlier, *Roberts* found explicitly that the ability to accept or exclude other individuals lies at the heart of the right of associational freedom. *Roberts*, 468 U.S. at 621-23. And the entire issue in *Dale* was whether the Scouts could terminate Dale's service even though he was a model Scout in all other respects. It is thus impossible to insist that a set of prohibitions against CLS for the way in which it organizes its internal operations counts as an innocent restriction of conduct that falls within the *O'Brien* caveat—conduct of an "interest unrelated to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). And in any event, the First Amendment's Free Exercise Clause necessarily protects all sorts of conduct that individuals exercise in accordance with their religious beliefs. It takes no citation to understand that this protection covers ritual forms of conduct as well as words. There is no question, then, that CLS enjoys strong associational, speech, and

religious interests that are protected as intimate expression associations.

III. The Doctrine of Unconstitutional Conditions Prohibits Hastings from Conditioning CLS's Access to Hastings's Limited Public Forums on Its Surrender of Its Expressive Rights of Intimate Association, Speech, and Religion.

The argument thus far has examined the tension between intimate rights of association and the state's antidiscrimination law only in the context of direct regulation of private group activities on state property. Accordingly, the district court took the position that *Roberts* and *Dale* were inapplicable because the state here "merely" wishes to exclude CLS from Hastings, but has no power or interest in preventing them from doing as they please on private property. Am. Summ. J. Order 12-13, 24, 31. Yet this seductive position ignores the entire doctrine of unconstitutional conditions, which treats the government differently from private parties for two reasons: its monopoly control over certain key aspects of public life, and its ability to tax individuals and spend the proceeds of those taxes on a wide range of public purposes. *See* Richard A. Epstein, *Bargaining with the State* 10-11 (1993). The doctrine of unconstitutional conditions, which the district court wrongly dismissed out of hand, Am. Summ. J. Order 41 n.7, developed to respond to just these dual risks.

To expose the district court's error it is necessary to proceed in three stages. Accordingly, the first part of the argument articulates the classical doctrine of

unconstitutional conditions as it applied to economic interests. The second part shows how this same framework survives the demise of economic liberties in dealing with First Amendment rights of speech, association, and religion on public streets, highways, and other open public forums. The third part shows that the same logical structure applies to limited public forums such as Hastings.

A. The Classical Doctrine of Unconstitutional Conditions Limits the Power of the State to Require the Forfeiture of Constitutional Rights as a Condition for Gaining Access to Publicly Owned Property.

In *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583 (1926), this Court applied the doctrine of unconstitutional conditions in connection with the economic use of public highways by private commercial carriers. At issue was whether the California Railroad Commission could tell the private carrier defendant that it could gain access to state-owned roads only if it agreed to be regulated as a common carrier, *i.e.*, one that agreed to take all traffic under the applicable state regulations. This Court acknowledged that California could either keep the defendant's trucks off the roads or let them on as it saw fit—as had been decided in *Buck v. Kuykendall*, 267 U.S. 307 (1925)—but held that California could not use its power to exclude to force the defendant to accept any and all forms of state regulation in order to access the system. *Frost*, 271 U.S. at 599. So

construed, *Frost* worked as a counterweight to California's effective transportation monopoly through its ownership of all key elements of the transportation grid. The state could not, however, use its power promote an illicit form of economic protectionism. "Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions. Protection or conservation of the highways is not involved." *Id.* at 591.

That proposition summarizes the classical structure of the doctrine. At the time, the police power surely allowed for the protection and conservation of the highways, but it had never been construed to allow the state legislature to convert a competitive industry into a monopolistic one. If the legislature could not achieve a given regulatory objective directly, it could not use its power to admit or exclude from the highways to achieve that same illicit end. Under that rationale, for example, the common practice of giving out a single monopoly for bus or tram service to one preferred firm would not be permissible. Multiple parties would have to be allowed to operate without favoritism. If there were genuine capacity constraints on the road, every firm would have an equal opportunity to obtain the franchise, whether it is allocated by bid or by lot. No first-mover advantage is ever allowed to lock in a permanent preference with respect to the use of any common resource.

On economic matters that logic no longer holds, unfortunately, under today's broader conception of the police power in economic matters—which makes it abundantly clear that the state may use its direct powers to convert competitive industries into

monopolies. But the doctrine continues to hold with respect to all rights that currently receive a higher level of constitutional protection.

B. The Doctrine of Unconstitutional Conditions Carries Over to Limit the Power of the Government to Require the Surrender of Any Individual Constitutional Right as a Condition for Gaining Access to Public Property That Is Suitable for Use as a Public Forum.

The basic principle in *Frost* retains its direct and profound application in modern cases under the Bill of Rights even after economic liberties have been stripped of their constitutional protection. Thus, the state cannot condition admission to public roads (or even to buy things shipped on public highways) on the willingness of individuals to surrender, say, their general protections against unreasonable searches and seizures or self-incrimination. Individuals, acting rationally and alone, could easily conclude that the need to access public roads and the goods and services shipped on them is so pressing that they would eagerly waive some portion of their constitutional rights in exchange for such access. But the unconstitutional conditions doctrine has blocked states from using their ownership of the roads to eviscerate the Bill of Rights. It necessarily follows that the only conditions that should be allowed are those that are fairly directly related to the government's legitimate ends or interests, which here include the payment of tolls for maintenance and upkeep, a willingness to obey the

rules of the road, and a willingness to submit to the jurisdiction of the state for torts disputes arising out of the use of the highways (but not those arising outside the state). *See Opinion of the Justices*, 147 N.E. 681 (Mass. 1925).

These principles carry over without a hitch when public streets and parks are used as a public forum to express opinions on public issues. Thus, in *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939), the Court struck down a Jersey City municipal ordinance requiring union members who wished to conduct meetings and distribute literature in public streets and parks to first obtain a city permit. "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* at 515. The notion of the public trust effectively negates any state claim to absolute power over the public roads and parks.

Years later, in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), this Court addressed the allocation of space on the commons with regard to the placement of news racks on public streets. It held that, even though the state had a legitimate interest in controlling clutter and appearance on public ways, it could not parlay that legitimate interest in time, place, and manner regulation into an explicit preference for larger papers at the expense of smaller commercial publications, which Cincinnati asserted had lower speech value. *Id.* at 430.

The limitations on state power with respect to types of paper apply, *a fortiori*, to any state effort to impose a system of viewpoint discrimination. Unlike the situation in *Discovery Network*, there is in this case not the slightest suggestion that Hastings has any scarcity constraint in the allocation of the benefits accorded to its registered organizations. But if it did, it would have to make its allocation consistent with *Discovery Network*'s dictates. State ownership of streets does not give the government any greater right to distort competition between rival media than does direct regulation. Nor does state ownership of a law school.

Closer at hand is *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995). At issue in *Hurley* was whether the South Boston Allied War Veterans Council had to admit into its St. Patrick's Day parade the GLIB group to march as a separate contingent under its own banner as part of the Council's larger St. Patrick's Day celebration. As in the instant case, this case pitted a private organization's First Amendment associational rights against a Massachusetts statute that banned discrimination on account of sexual orientation. *See* Mass. Gen. Laws ch. 272, § 98 (1992). The Massachusetts Supreme Judicial Court held that the lack of a unified theme in the Council's parade meant the state could require it to include the GLIB contingent with its own float under its own banner that expressed solidarity with other gay, lesbian, and bisexual groups. *Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston*, 636 N.E.2d 1293, 1295-98 (Mass. 1994).

This Court reversed that decision in ways that reflect the principled limitations on the state's power to regulate the use of public facilities for expressive purposes. Any regulations that needed to assure that the parade is "peaceful and orderly" fall within the traditional power of government. But in this instance the GLIB wanted to impose its message on that of the Council, which it was not allowed to do because "a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. The Court refused to undertake any independent substantive examination to see if the Council's decision to exclude the GLIB was in any sense justified as a matter of political morality.

Hurley is, moreover, a stronger case than *Roberts* for the protection of the expressive interest because the only issue at stake in *Hurley* was the expressive interests of the Council on this one occasion. This Court's logic ensured that this public forum was open to all groups on equal terms. "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Hurley*, 515 U.S. at 569-70. The proper remedy for the GLIB was not to free-ride on the Council's efforts, but to organize its own parade.

Nor on this score did the Court draw any relevant distinction between speech and conduct, for it regarded the parade itself as an explicitly expressive activity; so too it concluded that GLIB's "participation as a unit in the parade was equally expressive." *Id.* at 570. To be sure, in *Hurley* the petitioners "disclaim[ed] any intent

to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner." *Id.* at 572. Therefore, so long as gay participants did not offer their own public message, they could not be excluded from the parade solely on the ground of their sexual orientation. For at that point, their activity no longer constituted a protected form of expression such that the Massachusetts antidiscrimination law could apply.

The relevance of these distinctions to the instant case cannot be denied. Members of CLS do not wish to travel incognito at Hastings. They wish to be recognized as an organization whose speech and conduct is constitutionally protected, at least if the logic of *Roberts*, *Dale*, and *Hurley* carries over to limited public forums, as it surely does.

C. Viewpoint Discrimination Is Not Allowed with Respect to Expressive Activities That CLS Wishes to Undertake in a Limited Public Forum—the Hastings College of the Law.

The last stage of the argument shows that the same relationship between intimate expressive rights and a state policy against antidiscrimination carries over from open to limited public forums, including the Hastings College of Law. Hastings does not conduct its law school on the public streets, of course, but does so in buildings that are dedicated for that purpose. It

claims, citing *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995), that *Dale* and *Hurley* raise "entirely distinct" issues, *see* Hastings Cert. Opp'n 28, "because they take place in the context of limited public forums, which Hastings can 'confine' to whatever topics it sees fit, so long as 'the restrictions are reasonable in light of the purpose served by the forum and viewpoint-neutral.'"

Hastings is undoubtedly a limited public forum, governed by distinctive rules needed to cover the situation. But the rule, although generally phrased, is highly viewpoint-sensitive given the disproportionate burden it places on CLS. Hastings is entirely wrong to ignore the powerful place accorded to intimate expressive associations even in limited public forums.

As an initial premise, all parties agree that no academic institution, Hastings included, could accomplish its educational mission unless it were able to limit admission to its facilities to persons connected with that mission. Yet at the same time, it does not follow that the protection of associational rights stops at Hastings's doors. Instead, it has long been established that even though Hastings may control who enters its facilities, it does not, as an instrument of the government, have the same degree of control over the activities that take place on its premises as a private owner has. The faculty and administration can decide whom to hire, whom to admit, and what to teach. And, as a limited public institution, Hastings can wall off certain subject matter areas as inappropriate to the school. It need not open its rooms to discussions of winemaking or quantum mechanics. Nor need it schedule any extracurricular activities that

disrupt its ordinary academic program. Yet by the same token, once it opens its doors to any general subject matter area, it cannot engage in any form of viewpoint discrimination. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829. The very proposition that Hastings quotes to oppose certiorari exposes the weakness of its own substantive position.

Ironically, Hastings's position is decisively undermined by *Rosenberger* and the other cases on which it relies. In *Rosenberger*, the University of Virginia was not obligated to fund any student publications at all. But once it decided to fund some publications from its student activity fund, it could not refuse to cover the printing costs of an explicitly Christian publication if it were prepared to fund printing costs for other campus publications dealing with similar religious and social issues. *Id.* at 834-35. To the extent that the university was not engaged in its distinctive academic mission, it had to treat all groups in the same fashion, without discrimination. Similarly, in *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court struck down a decision of the University of Missouri at Kansas City that denied religious groups access to its facilities after hours when it held those same facilities open to nonreligious groups to convey their messages. *Id.* at 265. On the question of justification, the Court held that the state could not override this expressive interest solely by its wish to promote a greater separation of church and state, for the principal effect of doing so was to "inhibit[]

religion," *id.* at 271 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)), even if the policy had both a strong secular purpose and did not foster excessive entanglement with religion. *Widmar*, 454 U.S. at 271. The result in that case would not have changed if the university had sought to buttress its decision with an internally generated policy against discrimination similar to Hastings's.

In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), the same basic principles prevented the Central Moriches school district from refusing to let Lamb's Chapel use its facilities after hours to run a religiously oriented film series that stressed the importance of family values. As a limited public forum, the district did not need to allow any group to use its facilities after hours. *Id.* at 389. But once the district opened its doors to some outside organizations, it could not discriminate against others. Thus, the Court held, first, that the equal access policy to this limited public forum did not create an establishment of religion, and, second, that the district's rules impermissibly authorized viewpoint discrimination that cut against Lamb's Chapel. *Id.* at 392-93. The articulation of formal regulations here did not save the policy.

These principles transfer easily to the present case. The privileges that Hastings denied to CLS in no way went to Hastings's own intellectual mission. Just as common carriers cannot exclude passengers from seats on a train or rooms at an inn, *see Rex v. Ivens*, (1835) 173 Eng. Rep. 94, 96 (N.P.) (cited in *Hurley*, 515 U.S. at 571), so Hastings cannot exclude CLS from room assignments or bulletin board spaces when it lets other

groups with divergent viewpoints use them. Thus, this principled accommodation allows the university to maintain control over its curriculum and faculty hiring, but does not allow it to play favorites among groups in conducting its routine ministerial work.

Persuaded by Hastings, the district court ignored the relevance of the unconstitutional conditions doctrine, offering this flimsy rationale: "Hastings is not directly ordering CLS to admit certain students. Rather, Hastings has merely placed conditions on using aspects of its campus as a forum and providing subsidies to organizations." Am. Order of Summ. J. 24 (relying on *Evans v. City of Berkeley*, 129 P.3d 394 (Cal. 2006)). That rationale wholly misses the point: Hastings remains a limited public forum for many purposes. Surely, Hastings could not use that rational to exclude members of CLS from the Law Review.

Hastings is not a private institution that may admit or exclude other individuals as it chooses. Private churches and schools could not survive if they had to admit all comers. Their success lies in their ability to use their own resources to advance the substantive doctrines they believe. Those who do not agree with the message can find alternative organizations to join. There is no question, therefore, that if Hastings were a private institution it could exclude CLS if its mission were incompatible with Hastings's own, just as a CLS law school could exclude groups that were incompatible with *its* mission.

The district court is also incorrect to maintain that Hastings should not be put into a position of having to "subsidize" beliefs that it does not hold. Am. Summ. J.

Order 24 (citing *Evans*, 129 P.3d at 402). If a subsidy is involved in cases of this sort, it must be applied even-handedly. The subsidy cannot be given to groups whose views Hastings supports while being withheld from others. Thus, in *Speiser v. Randall*, 357 U.S. 513 (1958), this Court held that the state could not offer a real estate tax exemption to individuals who were willing to sign loyalty oaths while denying the same privilege to those who were not. And in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), the Court struck down an Arkansas statute, Ark. Stat. Ann. § 84-1904(f) (1980), that gave tax exemptions to "religious, professional, trade, and sports" journals while denying them to general-purpose magazines. Even in the absence of clear viewpoint discrimination, the basic principle remains "better safe than sorry." A uniform tax works well enough: So long as one group got benefits that the other was denied, there was an implicit subsidization of one group in violation of the prohibition against viewpoint discrimination.

Indeed, the systematic view of this question shows that the language of "subsidy" is always inappropriate when an instrumentality of government gives a differential advantage to one group that it selectively denies to another. In this case, for example, all members of CLS contribute through taxation revenues that help support Hastings. All other law students at Hastings know that their taxes will allow them to receive the full benefits of attendance at Hastings. CLS members know all too well that they will not receive any tax or tuition rebate if they refuse to attend Hastings for reasons of conscience. Equally well, they know that Hastings has deliberately denied

them the full range of benefits made available to all other enrolled students. The burdens and benefits of state power must be evaluated as a package. Cross-subsidization on grounds of religious beliefs is flatly forbidden, even when done through the mechanism of selective exclusion from government benefits. CLS receives no subsidy when it is treated in the same fashion as all other groups whose members provide financial support to run Hastings's operations.

IV. Hastings Offers No Compelling Justification for Limiting CLS's Right of Intimate Association.

In light of the above analysis, it follows, as in the other cases just considered, that Hastings must offer a compelling justification for denying CLS, an intimate expressive association, the standard package of benefits that it routinely extends to all other groups, regardless of their point of view. Yet apart from its recitation of its general antidiscrimination policy, which proved unavailing in *Dale*, Hastings has offered none. The case clearly does not present any issues that relate to actual or incipient violence that could bring it within the rule on burning draft cards in *United States v. O'Brien*, 391 U.S. 367 (1968). There is no extra cost that CLS imposes on Hastings by running its own meetings. There is no possibility that CLS will take advantage of this standardized package of benefits to disrupt order within the school or to wield disproportionate influence over the law school's educational mission. Nor is there any risk that outsiders will be misled that Hastings as an institution

supports the policies of CLS just because it has granted CLS the standard package of privileges granted to all other groups.

Most importantly, the Hastings policy is not saved, as the district court thought, because Hastings was prepared to allow the group to use its space for meetings even though it denied CLS other privileges. Am. Summ. J. Order 26. That policy is an open admission that the total exclusion of CLS from the premises, because of CLS's refusal to follow Hastings's nondiscrimination policy, is constitutionally indefensible. It is unclear by what logic Hastings can insist that CLS should be relegated to second class status—to sit, as it were, in the back of the bus—solely because its members wish to act on the strength of their deep religious beliefs. Hastings has conceded by its conduct that it can survive when it makes limited concessions to CLS. But it offers no explanation as to how its internal operations are compromised if it extends the same operating principles to CLS as it does to Hastings Outlaw.

Requiring a government agency to adhere to a nondiscrimination principle represents no exotic departure from established principles of constitutional law. Treating Hastings as a limited public forum leaves the school free to organize its instructional program as it sees fit. It need not operate its classrooms as though they were public highways. But Hastings also conducts many activities that do not demand that same high level of discretion. If a railroad can assign seats to all comers on the basis of price or by lottery, a law school can assign bulletin board space or office space along the same lines. The

cardinal virtue of the nondiscrimination principle is that it does not require the Court to dictate how public law schools govern the use of their facilities. That choice Hastings can make for itself. But through the nondiscrimination principle, this Court has effective tools to curb the public officials' discretion without having to second-guess each and every decision they make.

This nondiscrimination principle has, for example, wide application in Dormant Commerce Clause cases whereby states are not allowed to discriminate in favor of their own producers in ways that would allow economic protectionism—the very issue at stake in *Frost*—to run wild. *See Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583 (1926). In *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), for example, this Court struck down a Madison ordinance that required all milk to be pasteurized within five miles of the city limits. The city had put forward a justification for its ordinance based on the idea of public health, which this Court promptly slapped down. "In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison [cannot discriminate] against interstate commerce . . . even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives . . . are available." *Id.* at 354.

The nondiscrimination principle also applies to taxation of newspapers and other media outlets protected by the First Amendment. The state may impose whatever tax it chooses on all newspapers, but cannot impose a higher tax on larger newspapers in

ways that alter the competitive balance among them. *See, e.g., Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983). The principle organizes much of the law under the Establishment Clause. The state may not admit the Christmas tree but exclude the menorah even if it is able (at least in some circumstances) to exclude both. *Lynch v. Donnelly*, 465 U.S. 668 (1984). The current Hastings rules work well with the other organizations that are allowed to use them. There is no question that they would work every bit as well if CLS were given equal access rights. Hastings has at best threadbare justifications for imposing its "nondiscrimination" policy in ways that consciously discriminate against CLS's exercise of its constitutionally protected rights as an intimate expressive association. The district court never once used the word "intimate" in its opinion, which has strayed far from the principles long defended in this Court.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,

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CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, aka HASTINGS CHRISTIAN FELLOWSHIP,

Petitioner,

v.

LEO P. MARTINEZ, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

Brief of *Amicus Curiae* Center for Constitutional Jurisprudence In Support of Petitioner

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QUESTION PRESENTED

May a state university discriminate against a student Christian organization based on the organization's religious beliefs?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including the proposition that the Founders intended to encourage public expressions of faith as a civic virtue. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Van Orden v. Perry*, 545 U.S. 677 (2005); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

The Center believes the issue before this court is one of special importance to the individual rights protected by the Constitution. The Religion Clauses of the First Amendment were meant to protect and enhance public expressions of faith. The decision below instead permits state suppression of that faith, based on the university's disagreement with the strictures of the faith.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

As Chief Justice Rehnquist noted, "[i]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history." *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, CJ, dissenting). Thomas Jefferson's "wall of separation" missive is referenced in more than 200 federal decisions. Repetition, however, does not validate it as an accurate representation of the original understanding of the First Amendment. Indeed, as Chief Justice Rehnquist pointed out, Jefferson was not even in the Country at the time the Religion Clauses were debated and had no role in their inclusion in the Constitution. *Id.*

Constitutional history is better understood by examining the original state constitutions that were in existence at the time United States Constitution and Bill of Rights were drafted. These constitutions show a diversity of treatment of religion, but with a clear theme for protecting and *encouraging* religious expression. The history of the federal experience after adoption of the First Amendment amplifies this theme.

The Founders were also concerned with Freedom of Association. State constitutions prohibited interference with the leadership and internal workings of religious societies and the Framers expressed concern with the idea that the government may attempt to regulate membership policies of private associations.

The University in this case has violated the First Amendment rights of Freedom of Religion and Freedom of Association of the Christian Legal

Society, and this Court should reverse the decision of the Ninth Circuit.

ARGUMENT

I

THE RELIGION CLAUSES WERE INTENDED TO PROTECT AND ENCOURAGE PUBLIC EXPRESSION OF RELIGIOUS FAITH; HASTINGS SUPPRESSION OF RELIGIOUS EXPRESSION VIOLATES THESE PROTECTIONS

A. Early State Constitutions Demonstrate Intent to Protect and Encourage Public Expression of Religious Belief

The Framers of the federal Constitution did not write on a blank slate. At the time the Constitution was drafted, many of the original thirteen states had already created their own constitutions and had substantial experience with constitutional government. In 1780, Congress ordered the printing of a compilation of these state constitutions, leading to the creation of pocket-sized editions that were widely used by delegates to constitutional conventions. Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 Hastings Const. L.Q. 199, 203 (2000); *The Constitutions of the Several Independent States of America* (Rev. William Jackson ed., 2d ed. 1783) (reproducing the congressional resolution of December 29, 1780). These state charters provide an important context that illuminates the meaning of the federal Constitution and Bill of Rights. If the First Amendment was intended to erect a wall of separation between the

federal government (and later, the state governments) and religion, there should be some indication of antipathy toward religion in the original state charters. After all, it is unlikely that representatives from states that promoted public expressions of faith would approve a federal charter that mandated hostility toward religion.

Far from aversion to public expressions of faith, however, the early state constitutions demonstrate encouragement. The Massachusetts Constitution of 1780 recognized a "duty of all men in society, publicly, and at stated seasons, to worship the Supreme Being." *Id.* at 38 (Mass. Const. part I, § 2 (1780)). The next section of the Massachusetts Constitution went on to note that "preservation of civil government, essentially depend on piety, religion, and morality" and this was best accomplished through "public worship of God, and of public instructions in piety, religion and morality." *Id.* at 39 (Mass. Const. part I, § 3). To protect the freedom of worship, however, the constitution also prohibited government interference with the governance of religious societies and further protected "every denomination of Christians demeaning themselves peaceably" by guaranteeing them equal protection of the law. *Id.* at 40 (Mass. Const. part I, § 3). This section of the constitution also forbade "subordination of any one sect or denomination to another." *Id.*

Rhode Island's constitution was initially published as an addition to the colonial charter. *Id.* at 131. The constitution itself was relatively sparse, but included a provision prohibiting religious establishments "any farther than depends upon the

voluntary choice of individuals." *Id.* (Rhode Island Charter). This freedom was apparently qualified, however, in the next sentence: "All men professing one Supreme Being are equally protected by the laws, and no particular sect can claim preeminence." *Id.*

Many early state constitutions contained some form of "free exercise" clause that guaranteed a right to worship. One example is found in New Jersey's constitution guaranteeing that "no person shall ever within this colony be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience." *Id.* at 175 (N.J. Const. art. XVIII (1776)). Similar provisions are found in the constitutions of New York, Pennsylvania, Delaware, and North Carolina. *Id.* at 162 (N.Y. Const. art. XXXVIII (1777)), 183 (Pa. Const. art. II (1776)), 212 (Del. Const. art. 29 (1776)), 294 (N.C. Const. part A, art. 19 (1776)). There does not appear to be a similar protection of lack of religious belief. Indeed, lack of belief was a disqualification from public office in a number of states.

The Maryland Constitution required office holders to subscribe "a declaration of [their] belief in the Christian religion." *Id.* at 246 (Md. Const. part A, art. XXXV (1776)). Members of the Pennsylvania Legislature were required to make a more detailed pledge: "I do believe in one God, the Creator and Governor of the Universe, the rewarder of the good, and the punisher of the wicked. And I do acknowledge the scriptures of the Old and New Testament to be given by divine inspiration." *Id.* at 191 (Pa. Const. ch. 2, § 10 (1776)). Delaware's

oath of office required the profession of a Trinitarian belief while providing a right of free exercise and prohibiting the "establishment of any one religious sect in this State in preference to another." *Id.* at 229 (Del. Const. art. 22 (1776)), 233 (Del. Const. art. 29 (1776)).

These early constitutions demonstrate that the founding generation was not intent on excluding religion from the public square. Instead, many state constitutions recognized a "duty to worship." While guaranteeing freedom to practice religion and prohibiting state establishment of a particular religious sect, the state charters nonetheless recognized the value of public worship and sought to encourage public expressions of faith.

The Religion Clauses of the First Amendment were not intended to reverse these practices, but rather to ensure that the federal government could not use its new powers to reverse these public policies.

B. The Framers of the Federal Constitution Also Sought to Protect and Encourage Public Expression of Religious Faith

John Adams, the moving force behind the Massachusetts Constitution,[2] put the Founders' special view of religious liberty most vividly when, during the War for Independence he declared the expansion of free exercise in some states "so far as to give compleat Liberty of Conscience to Dissenters" was "worth all of the Blood and Treasure which has been and will be Spent in this war." *Letter of John*

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[2] Baum & Fritz, *supra*, at 202.

Adams to James Warren, Feb. 3, 1777, *in* 6 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 202 (P.H. Smith ed., 2000). As noted in the Massachusetts state constitution, this liberty of conscience entailed public expression of faith. Jackson, *supra*, at 38. James Madison reiterated this point while opposing a bill for the establishment of the Anglican Church as the official religion of Virginia. Madison noted that religious duties take precedence, and that a man, upon entering society and a social contract with government, does not shed his responsibilities to God:

> It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe.

James Madison, *Memorial and Remonstrance*, *in* FAITH OF OUR FATHERS 142-43 (Edwin S. Gaustad ed., 1987).

For Americans in the eighteenth century, religious freedom included both the right of the individual to free exercise and the right of religious organizations to autonomy, including the ability to choose their own leaders, free from civil interference. *See* Jackson, *supra*, at 40 (Massachusetts Constitution), 209 (Pennsylvania Constitution), 244 (Maryland Constitution). The free exercise clauses in state constitutions around the time of the founding "seem to allow churches and other religious

institutions to define their own doctrine, membership, organization, and internal requirements without state interference." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1464-465 (1990). In addition, "[f]ree exercise of religion also embraced the right of the individual to join with like-minded believers in religious societies, which religious societies were free to devise their own modes of worship, articles of faith, standards of discipline, and patterns of ritual." John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 371, 395 (1996).

The founding generation did not see a conflict between prohibitions on establishment of a particular religious sect on the one hand, and encouragement of religion in citizens and public officials on the other. Instead, religion was viewed as necessary to civil society and properly functioning government, and, therefore, civil authorities would be wise to foster it as long as specific sects were not singled out for preference or punishment. Zabdiel Adams, the cousin of both John and Samuel Adams, declared that "religion and morality among the people, are an object of the magistrate's attention. As to religion, they have no farther call to interpose than is necessary to give a general encouragement." Zabdiel Adams, *An Election Sermon*, Boston, 1782, *in* 1 Charles S. Hyneman & Donald S. Lutz, AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805, at 556 (1983). George Washington's Farewell Address cautioned the country from erroneously thinking the government could function without religion among the people, and urged politicians and

citizens alike "to respect and to cherish" religion. George Washington, *Farewell Address*, Sept. 19, 1796, *in* 35 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 229 (John C. Fitzpatrick ed., 1931-1944). And Daniel Shute, an advocate of the new federal constitution at Massachusetts' ratifying convention, presented that era's views on religion's link to the public good when he stated:

> The great advantages accruing from the public social worship of the Deity may be a laudable motive to civil rulers to exert themselves to promote it . . . there is indeed such a connection between them [church and state], and their interest is so dependent upon each other, that the welfare of the community arises from things going *well* in both; and therefore both, though with such restrictions as their respective nature requires, claim the attention and care of the civil rulers of a people, whose duty it is to protect, and foster their subjects in the enjoyment of their religious rights and privileges, as well as civil, and upon the same principle of promoting their happiness.

Daniel Shute, *An Election Sermon*, Boston, 1768, *in* Hyneman & Lutz, *supra*, at 120.

The Founders' actions matched their words. Benjamin Franklin recalled that the First Continental Congress held daily supplications to Deity. 1 *The Records of the Federal Convention of 1787*, at 451-52 (Max Farrand ed., 1911). He would later scold the constitutional convention for

forgetting that "powerful Friend" who had helped them gain independence, and then moved that daily prayer be again instituted, though the motion eventually failed due to lack of funds to hire chaplains. *Id.* During the War of Independence General Washington sought funds to hire military chaplains of every denomination for his troops, and was upset when the Continental Congress planned to appoint chaplains at the brigade rather than smaller regimental level because it "in many instances would compel men to a mode of Worship which they do not profess." *Letter from George Washington to the President of Congress*, June 8, 1777, *in* 8 Fitzpatrick, *supra*, at 203.

The Continental Congress saw nothing amiss with authorizing legislative and military chaplains supported by taxes, appropriating funding from taxes for missionaries and religious school, proclaiming days of prayer, fasting, and thanksgiving, having prayers said at the opening of its sessions and on thanksgiving days, establishing diplomatic ties with the Vatican, or providing for the importation of Bibles. Arlin M. Adams & Charles J. Emmerich, *A Nation Dedicated to Religious Freedom: The Constitutional Heritage of the Religion Clauses* 10 (1990). Furthermore, the first U.S. Congress did not find it to be a violation of church-state relations to select two official chaplains (of different denominations) as a joint congressional resolution required, or to implement the Northwest Ordinance with its language that religion was "necessary to good government and the happiness of mankind." James H. Hutson, *Religion and the Founding of the American Republic* 79 (Library of Congress, 1998); 1 Stat. 52, Article III (1787); Gaustad, *supra*, at 156.

Even Thomas Jefferson, author of the infamous "wall of separation" quote, opened federal buildings to public worship. As President, Jefferson attended church services held on Sundays by numerous denominations in the House of Representatives, apparently seeing nothing wrong with Congress using its property to facilitate religious worship as long as it was open to all sects. *Manasseh Cutler to Josiah Torrey*, Jan. 3, 1803 *in* 2 LIFE JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER, LL.D. 119 (William Parker Cutler & Julia Perkins Cutler eds., 1888); *see also Forty Years of Washington Society* 13 (Gaillard Hunt ed., 1906). Jefferson decided to open the War Office and the Treasury, both buildings of the executive branch, for the use of all denominations for Sunday services starting in 1801. Hutson, *supra*, at 89. Interestingly, the Supreme Court's chambers were also used for church services during Jefferson's administration, leading to the observation that "on Sundays in Washington during Thomas Jefferson's presidency, the state became the church." *Id.* at 91. Given this history, it would be odd indeed if the government required that a sectarian religious service be open to people of other faiths or even non-believers, much the leadership of the religion, as a condition on use of the government's forum.

Quite simply, there is no support in the history of the Religion Clauses that would justify the University of California's actions in this case. The University cannot claim that it is merely insuring that it is not "establishing" a religion. Use of University property for religious exercises or religious societies is no more an establishment of religion than was Jefferson's decision to allow church

services in federal buildings. The Religion Clauses were not designed to outlaw religion, but rather to encourage and protect it, and especially its public expression.

The University's actions run contrary to the constitutional policy of protecting religious expression and violate the students' the freedom of association.

II

PETITIONER'S HAVE A FIRST AMENDMENT ASSOCIATIONAL RIGHT TO DETERMINE THE QUALIFICATIONS OF MEMBERSHIP

A. Freedom of Association Is a Key to Freedom of Expression Under the First Amendment

Founding history and Supreme Court precedent recognize the fundamental nature of the First Amendment's guarantee that Americans may gather together, informally or through civic organizations, for the purpose of forming an "expressive association."[3] This Court has further recognized that part and parcel of the right of freedom of association is the determination of the form and content of the message to be expressed. *See Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay, Lesbian & Bisexual Club of Boston*, 515 U.S. 557 (1995); *New York State Club Ass'n, Inc.*

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[3] In *Abood v. Detroit Bd. of Educ.*, this Court unequivocally recognized the importance of an individual's right to freely associate, holding, "Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments." 431 U.S. 209, 233 (1977).

v. City of New York, 487 U.S. 1 (1988); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); and *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). Included in this right, and perhaps the most fundamental tenet of the freedom of association, is the right of the association itself to determine who shall be admitted to membership. Moreover, this Court has recognized that this determination rests in the hands of the association itself; that for a law, regulation or court edict to manipulate the membership of a private association by compelling the inclusion of those who dissent from the message to be expressed is exactly the same as compelling the association to alter its expression. Under the regulation at issue, the Christian Legal Society must give up control over its beliefs and membership in order to be treated equally with other student groups for access to University facilities and student activity fees. No other student group is required to abandon their rights of association.

During debate in the convention which gave us our Constitution, Gouverneur Morris noted that "every Society from a great nation down to a club had the right of declaring the conditions on which new members should be admitted." Farrand, *supra*, at 238. The sanctity of that principal continues to be recognized to this day: "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Roberts*, 468 U.S. at 623. Professor Tribe has noted, "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being."

Laurence Tribe, *American Constitutional Law* 791 (1st ed. 1978). *See also Democratic Party of the U.S. v. Wisconsin*, 450 U.S. 107, 122 (1981), where this Court held that the freedom associate to promote shared values includes "freedom to identify the people who constitute the association, and to limit the association to those people only." Thus, "Freedom of association . . . plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623 (citing *Abood*, 431 U.S. at 234-35).

Although not absolute, the freedom to choose one's associates is particularly strong in the context of intimate and expressive associations, such as those fostered by the Christian Legal Society at issue here. This right remains crucial to the continued flourishing of this Republic by "preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Dale* 530 U.S. at 647-48. Inherent in this concern, is the protection of expressive associations from those that do not share their own views or purpose. Without such protections, the existence and mission of the association would be compromised by forced inclusion of those that wish their ideals harm. Such a result would be disastrous to the spirit of the American people, for as Alexis de Tocqueville observed more than a century and a half ago, "[the intellectual and moral associations in America] are as necessary as the [political and industrial associations] to the American people, perhaps more so." Alexis de Tocqueville, *Democracy in America* 517 (J.P. Mayer ed., George Lawrence trans., HarperPerrenial 1969) (1835).

By forcing the Christian Legal Society to open its leadership positions to those who espouse by word and deed a position contrary and adverse to the Society as a condition to equal access to University facilities and student activity fees, the University ignores the principle set forth in *Roberts*, *Rotary Club*, *New York State Club Ass'n*, and *Dale*. In each of those cases, this Court recognized that a private association could not be forced to admit members whose views were contrary to those of the organization. In *Roberts*, this Court upheld a decision requiring the Jaycees to admit women *only after* finding that the Minnesota public accommodations law did not require any change in the organization's creed or impose any restrictions on its "ability to exclude individuals with ideologies or philosophies different from those of its existing members." 468 U.S. at 627. In *Rotary Club*, this Court upheld a similar decision requiring the Rotary Clubs to admit women *only after* finding that the admission of women would not affect that organization's ability to carry out its purposes "in any significant way." 481 U.S. at 548.

Further, in *Dale* this Court held that "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." 530 U.S. at 648 (citing *New York State Club Ass'n*, 487 U.S. at 13). Like the Boy Scouts of America in *Dale*, the Christian Legal Society is founded upon a common belief in morality and faith. Should the Society be forced to open leadership positions to individuals who oppose the core beliefs of the Society, its ability to advocate public or private

viewpoints would be destroyed. The cornerstone on which all associations are built is the belief that each member will advocate for the association in a manner that furthers its purpose.

As this Court noted in *New York State Club Ass'n*: "If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end." 487 U.S. at 13. Invidious discrimination is simply not at work when the Christian Legal Society limits voting membership to Christians sharing the same religious beliefs.

"[U]nder the First Amendment, [] a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. This basic understanding is also at work in Justice O'Connor's concurrence in *Roberts*, where she noted, "[p]rotection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." 468 U.S. at 633. In this case, the University has decided to suppress the voice of the Christian Legal Society and replace it with the University's message of hostility to the group's beliefs. By imposing a requirement that the Christian Legal Society must admit to its leadership and voting membership those who oppose its core religious beliefs the University has violated students' First Amendment right of freedom of association.

It is through the common purpose that an association (i.e. club, group, etc.) finds its identity. By forcing Christian Legal Society to include as leaders and voting members those who do not share

this common interest, the University has deprived the Society of its identity and meaning. "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Roberts*, 468 U.S. at 623. In this case, however, the violation is much worse. One imagines that the Christian Legal Society genuinely hopes that all students at Hastings would be willing to make the faith commitment necessary for membership in the organization. However, by conditioning equal access to University facilities and student activity fees on the Society's acceptance, as voting members, of those who actively oppose the core religious beliefs of the group, the University destroys the ability of the group to be an expressive association. *Id.* Such an outcome negates the basic understanding of an association as an avenue for individuals to join with like-minded individuals to pursue a common purpose.

The reason that associations and other like groups require membership to share common beliefs and purpose is to ensure the safety of the association's message. This Court has long sought to protect this ideal by ensuring that membership standards be upheld. *Dale*, 530 U.S. at 653.

A regulation forcing a religious society to open leadership and voting membership positions to irreligious students destroys the organization. This regulation prohibits the message of the Christian Legal Society and instead permits only the University's message that those who share the Society's beliefs are not welcome to participate on campus.

Such an outcome strikes at the very heart of the First Amendment and the "notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood*, 431 U.S. at 235. By forcing the Christian Legal Society to abandon its religious convictions, the University is rewriting the Society's message and therefore its belief, all under a veil of viewpoint neutrality.

B. The University Engages in Unconstitutional Viewpoint Discrimination By Taxing Students for Support of Clubs and Then Dictating Beliefs and Membership Policies

By refusing university recognition, the University has discriminated against the Christian Legal Society on the basis of its Christian viewpoint. As this Court has held, viewpoint discrimination is a more deliberate and particularly "egregious form of content discrimination." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)). As such, viewpoint discrimination is presumed to be unconstitutional. For "when the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." *Morse v. Frederick*, 551 U.S. 393, 436 (2007) (quoting *Rosenberger*, 515 U.S. at 828-29). In this case, the University is attempting to regulate speech by the Christian Legal Society by conditioning the Society's access to University

facilities and student activity fees to agreement to abandon the group's faith-based principles. No other student group is subject to such prohibited viewpoint discrimination.

Just as the newspaper in *Rosenberger*, the Christian Legal Society also espouses the Christian viewpoint. This viewpoint is summarized in its Statement of Faith, which encompasses belief in Christian doctrine as written in the Bible, *available at* http://www.clsnet.org/society/about-cls/statement-faith (last visited Feb. 2, 2010). Grounded in its view of the Christian faith, this viewpoint not subject to change or mitigation. The University cannot, consistent with the First Amendment, deny the Christian Legal Society equal access to University facilities and student activity fees based solely on the organization's faith.

CONCLUSION

The Founders sought to protect and encourage religious expression. They believed that public worship and acknowledgement of a Supreme Being was a civic virtue that helped advance the goals of civil society. The University charts a different path. It would like a campus free of religious speech (or at least, free of this religious speech) and thus seeks to suppress the organization and its message.

The University's actions are contrary to the protections enshrined in the First Amendment. The Religion Clauses protect and encourage public pronouncements of faith and further protect the right of expressive association. This Court should reverse the decision of the Ninth Circuit and uphold

functioning." 531 U.S. at 543. *Velazquez* invalidated conditions on federal legal-services funding that "alter[ed] the traditional role of [subsidized] attorneys" by prohibiting them from raising certain arguments on their clients' behalf. *Id.* at 544. As *Velazquez* explained, similar reasoning appears in several other cases. For example,

> [i]n *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 [(1984)], the Court was instructed by its understanding of the dynamics of the broadcast industry in holding that prohibitions against editorializing by public radio networks were an impermissible restriction, even though the Government enacted the restriction to control the use of public funds. The First Amendment forbade the government from using the forum in an unconventional way to suppress speech inherent in the nature of the medium.

531 U.S. at 543 (citing *League of Women Voters*, 468 U.S. at 396-397). Likewise, "in *Rosenberger*, the fact that student newspapers expressed many different points of view was an important foundation for the Court's decision to invalidate viewpoint-based restrictions." 531 U.S. at 543 (citing *Rosenberger*, 515 U.S. at 836).

Similarly, to include a student organization in the benefits of a forum meant to encourage diversity of expression, but only on the condition that it be willing to accept leaders and voting members who disagree with its beliefs, is unquestionably to "distort

its usual functioning." 531 U.S. at 543. As *Roberts* put it, there can be "no clearer example of an intrusion" on a group's internal autonomy. 468 U.S. at 623. It is a travesty to require an atheist group to allow Christians to take over its presidency or lead its meetings—and the same is true for a Christian group allowing atheists. Such a requirement is certainly "unconventional," restricting decisions "inherent in the nature" of an expressive group. *Velazquez*, 531 U.S. at 543. It should not be the basis for denying access to the benefits of a forum designed to encourage student expression.

C. There is No Justification for Permitting the Exclusion of a Group from a Speech Forum Based on Its Efforts to Ensure that Leaders and Members Share Its Beliefs.

Faced with *Healy*'s holding that denying access to a student group violates its right of expressive association, the district court tried to evade it by resorting to a distinction between speech and conduct. *Healy*, the court said, only forbids a university to exclude a group based on disagreement with its philosophy, whereas CLS was excluded based on its "conduct" of violating Hastings' nondiscrimination policy. Pet. App. 43a-44a. Likewise, Professor Volokh, whose article did not address *Healy*, has since explained it as "a case in which a group was excluded

largely because of its viewpoint."[5] The district court, like Professor Volokh, pointed to *Healy*'s statement that a university may require "that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law" governing conduct. 408 U.S. at 193; Pet. App. 44a.

But a student group's right to select leaders who share its views cannot be defeated by distinguishing between viewpoint and conduct. For one thing, *Healy* in no way endorses campus rules that bar a group from making associational choices necessary to maintain and express its views. The Court said that "[j]ust as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected," and that such rules do not affect a group's "freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed." 408 U.S. at 192-193. But if a rule significantly burdens expressive association—as Hastings' policy does by barring CLS from selecting members based on their adherence to its beliefs—then the rule is more than a time, place, or manner regulation, and the Court's premise that rights of speech and assembly will be preserved does not apply. By endorsing time-place-manner regulation "[j]ust as

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[5] Eugene Volokh, Christian Legal Society v. Martinez *and the Court's University Speech Decisions*, http://volokh.com/2009/12/11/christian-legal-society-v-martinez-and-the-courts-university-speech-decisions (Dec. 11, 2009, 13:20 EST).

in the community at large," *Healy* belied any suggestion that campus rules could place dramatically greater burdens on speech than other laws, or escape scrutiny by the mere invocation of the terms "reasonable" or "conduct."

Both the *Healy* case and the Court's statements about reasonable regulations arose in the context of campus violence and disruption. The suggestion that the SDS group might be unwilling to abide by rules stemmed from its members' "equivocation" in answering inquiries "whether they would resort to violence and disruption on the CCSC campus." 408 U.S. at 191 & n.22 (quotation omitted). The Court's opinion concluded by emphasizing the need to maintain "civility and an ordered society." *Id.* at 194. CLS, of course, has in no way interfered with order or the activities of others. It simply wants to be able to express its beliefs and preserve its identity.

More fundamentally, it is simply incongruous to recognize expressive-association rights under *Dale*, *Hurley*, and *Roberts* and then, when the issue involves restriction of access to a speech forum, turn around and distinguish between (impermissible) restrictions of viewpoints and (permissible) restrictions of conduct. The premise of expressive-association doctrine is that sometimes an organization's "discriminatory" conduct is inextricable from its ability to preserve and express its viewpoints. In those cases, "[f]orcing a group to accept certain members"—that is, forbidding it to discriminate—"may impair the ability of the group to express those

views, and only those views, that it intends to express." *Dale*, 530 U.S. at 648. In petitioner's words, "where one of the central purposes of a noncommercial expressive association is the communication of a moral teaching, its choice of who will formulate and articulate that message is treated as the functional equivalent of speech itself." Pet. Br. 35. The rights of expression and association "overlap and blend; to limit the right of association places an impermissible restraint on the right of expression." *Citizens Against Rent Control/Coalition for Fair Housing* v. *City of Berkeley*, 454 U.S. 290, 300 (1981).[6]

Accordingly, if a student group may not be excluded from an expressive forum because of the viewpoint of its expression, it equally may not be excluded because of the associational choices it makes that preserve that expression.

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[6] It is ironic for the district court to divorce CLS's expressive conduct from its other constitutional interests. When the question was whether students' homosexual conduct can be divorced from their orientation, Hastings interpreted its no-orientation-discrimination rule to equate the two, and the district court summarily agreed that "this is a distinction without a difference." Pet. App. 22a n.2. But when the question was whether CLS's conduct of choosing leaders can be divorced from its protected expression of viewpoints, the district court labored to distinguish the two and held that CLS could be disfavored for its conduct as long as it was not driven from the campus. If both gay students and traditional religious believers are to be able to live out their beliefs on university campuses, university officials and courts will have to treat the two sides more consistently and give meaningful protection to each.

Professor Volokh offers two reasons for holding expressive-association rights inapplicable to claims of access to a forum for speech. But neither reason is convincing.

First, he argues that "discrimination against certain associational decisions is present in the quintessential, and largely uncontroversial, example of a permissible designation for a public forum: university programs that are open to student groups." Volokh at 1940. Limiting access to students might conflict with some associational choices, for example if a homeless-advocacy student group wanted a homeless person to join its board, or a "town-and-gown" group wanted non-student residents to join. *Id.* Since a university clearly may disfavor these associational choices, the logic goes, it may disfavor essentially any such choice.

The argument, however, misconceives the nature of CLS's interest, which is simply to ensure that its leaders and voting members share its fundamental beliefs and act according to them. CLS "discriminates" on the basis of belief and belief-related conduct, not on the basis of categories of status such as race, sex, or (purely) sexual orientation. But being a student or a non-student is a matter of status. The analogy to this case is not a school prohibiting a homeless-advocacy group from including a homeless person as board member, but a school requiring the group to accept a board member who rejects helping homeless people (belief) or who has evicted them from property he owns (conduct). For a town-and-gown

group, the interest analogous to CLS's is not in having town residents on the group's board, but rather in excluding students who have written op-ed articles attacking the townspeople (belief) or have had altercations with them (conduct). A student group can still work with non-students to advance its goals, but not if its own leaders and members do not share the goals. What CLS wants to ensure is that its leaders and members share its goals.

Second, Professor Volokh points to *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), which upheld a restriction on lobbying by tax-exempt organizations together with an exemption for lobbying by veterans' groups. This shows, he says, that the government may "subsidize a certain set of expressive associations (veterans' organizations) as a means of promoting private speech on a wide range of issues," while not subsidizing other expressive associations. Volokh at 1941. But tax exemptions are unlike expressive forums for student groups: they are not designed "to encourage a diversity of views from private speakers" (*Rosenberger*, 515 U.S. at 834). As *Velazquez* makes clear, a government benefit may be designed "to facilitate private speech," as opposed to government's own message, and still not have a speech forum's distinctive purpose of encouraging a diversity of expression. 531 U.S. at 542. Professor

Volokh's argument exemplifies the mistake of equating a forum for expression with other "subsidies."[7]

Regan is also easily distinguishable because the lobbying restrictions imposed only a modest burden on a tax-exempt organization, which can incorporate a separate entity to conduct lobbying and simply keep tax-deductible contributions from paying for lobbying. 461 U.S. at 544 n.6; *id.* at 552-53 (Blackmun, J., concurring). The burden on CLS from nonrecognition is far greater. As an expressive organization aimed at reaching fellow students, CLS may lose its ability "to remain a viable entity" if it loses access to campus communication channels (*Healy*, 408 U.S. at 181). And as Professor Volokh himself emphasizes, when leadership criteria are at issue, a group cannot "set up a nondiscriminating affiliate" that participates in the forum, for a true affiliate would have to "be controlled by the parent group's discriminatorily selected decisionmakers." Volokh at 1942-43. If the group can be excluded because of its leadership criteria, it

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[7] We emphasize that when the government creates an expressive forum, it must provide the range of benefits without unconstitutional exclusions. Hastings may not deny CLS generally available student-organization funding because of its associational criteria for leaders' beliefs, any more than it may deny generally-available access to classrooms or communication channels. *Rosenberger* teaches that equality under the First Amendment in an expressive forum extends to funding as well as other benefits. 515 U.S. at 832-35. There is no need in this case to address the scope of permissible refusals of funding outside the context of an expressive forum.

cannot create a dual structure to mitigate the effect it suffers.

II. The Exclusion of CLS Discriminated Against Its Religious Viewpoint and Religious Activities, in Violation of the Free Speech and Free Exercise Clauses.

The expressive-association right to select members and leaders is one shared by CLS with other expressive student groups. But the exclusion of CLS under Hastings' written nondiscrimination policy also singled out CLS for its religious viewpoint and its religious activity, in violation of the Free Speech Clause and the Free Exercise Clause respectively.[8]

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[8] CLS's expressive-association rights were violated under either reason that Hastings has given for its exclusion: the written nondiscrimination policy, under which CLS was excluded for engaging in religious and sexual-orientation discrimination; and the "all-comers" interpretation of the policy that Hastings officials later articulated, under which all groups must accept leaders and members without regard to their beliefs. The singling out of CLS for its religious viewpoints and activity occurred only under the written policy singling out religious discrimination for prohibition. We agree with petitioner that the "all comers" explanation is unconvincing, post hoc, and in any event unconstitutional. Pet. Br. 47-53. In this part we assume that Hastings' action was based on the specific nondiscrimination grounds from the written policy.

Under the written policy, Hastings excluded CLS not just for religious discrimination but for sexual-orientation discrimination (interpreting the policy to refer to conduct as well as orientation). We agree that this also singled out CLS for exclusion based on its moral viewpoint concerning homosexual

(Continued on following page)

A. Discrimination Against Religious Viewpoints in Violation of the Free Speech Clause.

The long line of cases already cited make clear that viewpoint discrimination against religious organizations in a forum for student speech is judged by the strictest standards. *Good News Club*; *Rosenberger*; *Lamb's Chapel*; *Widmar*. Time after time, this Court has rejected efforts to argue that a certain exclusion was not really viewpoint discriminatory. It should do so again here.

As petitioner states, a provision that student organizations make membership open to students of all religious views is uncontroversial concerning most organizations. "But when applied to groups that are organized around shared religious beliefs, this prohibition is unfair, counterproductive, disabling, and unconstitutional." Pet. Br. 36-37.

Religions are themselves beliefs and viewpoints, as we have already emphasized. The prohibition on religious discrimination singles out religious beliefs and viewpoints as the only kind that a student organization may not enforce through standards for leadership or membership. Correspondingly, only groups whose animating beliefs are religious are denied the ability to preserve their beliefs by requiring

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conduct, since any other moral view concerning conduct could be applied by a student group without violating the written policy. See Pet. Br. 39-40.

leaders and voting members to adhere to them. "Hastings' written Policy does not tell the environmentalist club to let climate change skeptics conduct its discussion groups." Pet. Br. 37. As Hastings once conceded, the policy "permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs" (J.A. 93). Religious groups alone are denied that freedom.

To allow a public institution to exclude religious groups because of their religious criteria for leaders and members would eviscerate this Court's decisions from *Widmar* through *Good News Club*. See Pet. Br. 38. Schools could once again single out religious organizations for exclusion by the simple expedient of requiring them to turn their meetings and publications over to students with opposing beliefs—while all other organizations remained free to condition membership so as to protect their (nonreligious) points of view. Therefore, just as much as in the cases from *Widmar* through *Good News Club*, the exclusion of CLS threatens the evil posed by viewpoint discrimination: "the specter that the government may effectively drive certain ideas or viewpoints from the marketplace," in this case the quintessential marketplace of a university's forum for student speech. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (citation omitted).

Despite this patent discrimination against organizations espousing religious beliefs and viewpoints,

the district court upheld Hastings' policy on the grounds that it regulated conduct, not speech or belief, and was viewpoint-neutral. See, e.g., Pet. App. 21a, 32a. Likewise, Professor Volokh argues that excluding a religious group because of its religious criterion for leaders and members is not viewpoint-discriminatory, because it rests on the group's conduct and has only a disparate impact on its ideas. Volokh at 1931. But these arguments cannot evade the reality of viewpoint discrimination.

First, a regulation can govern conduct and still be viewpoint discriminatory. The government could not forbid racial discrimination only when groups espousing religious beliefs engage in it. See Volokh at 1931 ("If a government agency were to apply its anti-discrimination rules only to groups that express certain viewpoints, this viewpoint discrimination would be unconstitutional."). As the Court stated in *R.A.V. v. City of St. Paul*, even categories of unprotected activity may not "be made the vehicles for content discrimination unrelated to their distinctively proscribable content." 505 U.S. 377, 383-84 (1992).

When this case is viewed in the relevant perspective—an expressive group's selection of the leaders and members who express its beliefs and determine its course—Hastings' exclusion of CLS is exactly the kind of selective restriction that *R.A.V.* condemns. Even if discrimination is generally unprotected conduct, Hastings' policy prohibits an expressive group from discriminating based on its

belief in one case only: where the belief is religious. Applying this rule to bona fide religious organizations also bears little relation—indeed, it undercuts—the rationale for proscribing religious discrimination in the first place.

A religious nondiscrimination provision has the general purpose of assuring opportunity to people of varying faiths. See *Estate of Thornton v. Caldor*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring); Volokh at 1926 (a university may wish to ensure that the "influence or credentials" that student-organization offices can provide are "distributed without regard to the students' race, religion, and the like"). But applying the nondiscrimination rule to religious organizations constricts opportunities for students of varying faiths by threatening the existence of groups through which they can live their religious commitments. Because "[f]or many individuals, religious activity derives meaning in large measure from participation in a larger religious community" (*Amos*, 483 U.S. at 342 (Brennan, J., concurring)), students who take their beliefs seriously have an interest in forming and maintaining groups that do the same. Attacks on such groups' identities and existence therefore reduce religious students' opportunities both to live out their faith and to develop experience and credentials through groups that interest them.

In short, the inclusion of religion in nondiscrimination rules is meant "to protect religious faith," but applying the rule to religious groups "singles out religion as belief for uniquely unfavorable treatment."

Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889, 916 (2009). Applying the rule to religious groups therefore undercuts its very purpose and should be recognized as viewpoint discrimination. *Id.*[9]

Contrary to the district court and Professor Volokh, this case involves much more than a disparate impact on religious organizations. Hastings' policy on its face refers to religious beliefs and viewpoints in stating that a student organization may not discriminate based on them. By its terms and in its structure, it singles out religion as the one category of beliefs an organization may not apply in choosing members and leaders. The policy therefore is non-neutral between religious and other viewpoints

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[9] Professor Volokh also cites President Kennedy's defense of Title VI of the Civil Rights Act, which as paraphrased to apply to religion would state that "'public funds, to which all taxpayers of all [religions] contribute, [should] not be spent in any fashion which . . . subsidizes . . . [religious] discrimination.'" Volokh at 1927 (quoting Special Message to the Congress on Civil Rights and Job Opportunities, 1 Pub. Papers 483, 492 (June 19, 1963)). Of course, Title VI, like many other statutes, does allow public support of some kind to go to religious institutions that apply religion-based criteria. In any event, the general civil-rights rationale has little or no application to this context, where the government facilitates a wide diversity of private speech, where every aspect of access could be labeled a "subsidy" (including basic means such as meeting rooms and communication channels), and where the religious "discrimination" in question is simply a religious group's effort to define itself as other idea-based groups do.

by its very nature, not just its impact. It follows that the policy discriminates by its nature against religious organizations, since they are the ones that use religious belief and viewpoint as the criterion for their identity—that is the definition of a religious organization.

Professor Volokh acknowledges that this selective regulation of religious viewpoints is "closer to facial content discrimination" (Volokh at 1932). But it fails to qualify, he claims, because a no-religious-discrimination rule "focuses on the prospective members' beliefs, not on the regulated groups' speech or beliefs." *Id.* at 1933 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). But when "the regulated group" is a bona fide religious group, these are just two sides of the same coin. The group sets its own beliefs as criteria for prospective members, and then it declines to accept students with different beliefs as members or leaders.

Even if Hastings' policy does not discriminate against religious viewpoints on its face, it clearly does so when applied to religious groups. In previous cases from *Lamb's Chapel* through *Good News Club*, this Court has looked beyond a policy's face and a school's characterization and found that its application to a religious group was viewpoint-discriminatory. In *Lamb's Chapel*, the school district described its rule as forbidding any group to use facilities "for religious purposes" (which arguably does not single out speech on its face). 508 U.S. at 387. But the Court determined that the policy was being used to exclude a

film on child-rearing, an otherwise allowable subject, because of its religious perspective; the policy thus "was unconstitutionally applied in this case." *Id.* at 393-94. Similarly, in *Good News Club* the district described its rule as barring any group from conducting "quintessentially religious" activities such as Bible studies, hymns, and prayer; but the Court concluded that the group in question addressed "moral and character development," as other groups did, from a religious perspective. The Court again found viewpoint discrimination in the circumstances of the case, without discussing whether the school policy forbidding uses for religious purposes would be unconstitutional in all cases. *Good News Club*, 533 U.S. at 107 n.2, 112 n.4; see *id.* at 137-38 (Souter, J., dissenting).

Here, again, this Court should recognize that applying the policy to religious organizations singles them out among all belief-based groups and is unconstitutional.

The artificiality of denying the viewpoint discrimination here is especially apparent in the argument that "the ban on religious discrimination applies to all groups, whatever their ideologies may be." Volokh at 1933; *accord* D. Ct. Op., Pet. App. 32a (calling the religious-nondiscrimination rule neutral because it is "imposed on all student organizations"). The same could have been said in *Widmar*, *Lamb's Chapel*, *Rosenberger*, and *Good News Club*: all organizations were prohibited from explicit religious language and activity, and one might argue that a religious group

could speak on issues from a religious motivation but using nonreligious language (as some religiously motivated social-service or humanitarian groups do). This Court of course would have rejected the argument out of hand as discriminatory against religious viewpoints. But the notion that a religious group should ignore religion in choosing leaders, because nonreligious groups must also, is just as incongruous as the notion that a religious group should use nonreligious language because nonreligious groups do so.

B. Discrimination Against Religion in Violation of the Free Exercise Clause.

Similar analysis supports CLS's claim that its exclusion violated the Free Exercise Clause. See Pet. Br. 40-41. Because religion is the one set of animating beliefs that an organization may not enforce concerning its leaders and members, Hastings' action is neither neutral toward religion nor generally applicable. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Div. v. Smith*, 494 U.S. 872 (1990).

Again, Professor Volokh argues that the no-religious-discrimination policy is neutral because it "applies, both facially and in practice, to all groups, religious or otherwise." Volokh at 1936-1937. But this Court made clear in *Lukumi* that "[f]acial neutrality is not determinative"; the Free Exercise Clause "forbids subtle departures from neutrality" too. 508 U.S. at 534 (quotation omitted). *Lukumi* held that

ordinances prohibiting the ritual sacrifice of animals were neither neutral nor generally applicable, not just because of their text but because of their "real operation" in conjunction with other laws: they prohibited Santeria sacrifices while leaving unpunished "killings that are no more necessary or humane in almost all other circumstances." *Id.* at 535-36. Similarly, in its "real operation" Hastings' policy bars a religious student group from limiting leadership to those who share its beliefs, but allows "almost all other" groups to do so. As we argued above (pp. 35-36), this involves more than a disparate impact on religious groups; the very text of the policy singles out "religion" as the one belief on which a group may not discriminate.

As we also showed in discussing free speech, it makes no difference that "religion" in the policy could be said to refer to the beliefs of the prospective leader or member rather than the group (see Volokh at 1937): the policy still singles out religion as the one animating belief system a group may not enforce. Again, if the government has actually singled out religion, it does not matter whether its motive was hostility or not. See *Lukumi*, 508 U.S. at 540-42 (section on legislative motive reflecting only plurality); *id.* at 559 (Scalia, J., concurring in part and concurring in the judgment).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,
Petitioner,

v.

LEO P. MARTINEZ, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF COMMISSIONED II LOVE, CORNERSTONE AT BOISE STATE UNIVERSITY, and KAPPA UPSILON CHI, in support of the *Petitioners*.

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INTEREST OF *AMICI CURIAE*[1]

Amici are all Christian student organizations that have faced opposition due to their Christian-only composition.

Commissioned II Love Outreach Ministries ("C2L") is a Christian student organization with Chapters on three of America's historically Black universities. C2L seeks to provide Christian fellowship to those who have already embraced Christianity and to preach the Gospel to other students. C2L has faced opposition on two of those campuses and was forced to file a lawsuit against Savannah State University after having its Recognized Student Organization status revoked for engaging in evangelism and other distinctively Christian activities. *Commissioned II Love v. Yarbourgh*, No. 07-036 (S.D. Ga. 2007). Savannah State settled the lawsuit and restored C2L's recognized status. Unfortunately, C2L has been pushed to the brink of litigation on several other occasions before university administrators relented from other unconstitutional policies.

Cornerstone at Boise State University is a religious student organization that seeks to provide spiritual resources for students' hearts and minds,

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[1] The parties have consented to the filing of this Brief. Copies of the letters of consent from Counsel for the Petitioner and Respondent-Intervenor accompany this Brief. The letter of consent from Counsel for the Respondent has been lodged with the Court. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amicus Curiae*, its members, and its counsel.

supplying Christian educational materials to students, faculty, and other Christian student groups at Boise State and organizing Bible studies and other events to encourage students to develop a Biblical worldview. Cornerstone strives to be biblically based in all it does, theologically sound and morally pure. In 2007 several Cornerstone members and other students challenged the complete exclusion of religious student groups from student activity fee funding from Boise State, which exclusion was based upon an Idaho constitutional requirement. *Cordova v. Laliberte*, 08-543 (D. Id. 2008). BSU decided to remove this viewpoint discriminatory restriction and make other changes to comply with this Court's *Board of Regents v. Southworth*, 529 U.S. 217 (2000) decision, but while doing so derecognized Cornerstone and threatened derecognition of other religious student groups because of their faith and conduct standards for their leaders. After five months of derecognition, Boise State ultimately exempted them from this requirement and restored Cornerstone's status.

Kappa Upsilon Chi ("KYX"), is a national Christian fraternity that exists to bring Christian males together on college campuses to experience biblical Christian accountability within the confines of a brotherhood, and to share the message of Jesus Christ with other students. KYX currently operates on fifteen campuses across seven states. KYX requires that its members be Christian men that hold to traditional beliefs and teachings found within the Bible. Several universities, including the University of New Mexico, the University of Central Florida, and the University of Florida, have refused to recognize KYX as a registered student

organization because KYX's religious-based membership requirements do not comply with the respective university's non-discrimination clause. KYX's religious goals, purpose and message would be compromised if the group was forced to abide by a non-discrimination clause that requires KYX to admit members regardless of religious belief or sexual orientation.

SUMMARY OF THE ARGUMENT

This case can be decided in a straight forward manner. The Respondents (hereinafter "Hastings") have given the Petitioner (hereinafter "CLS") an ultimatum: Allow us to tell you who you must accept as members and officers or lose 15 benefits. Because Hastings could not impose its membership mandate directly, it may not do so indirectly. Thus, this Court should hold that Hastings' ultimatum violates the unconstitutional conditions doctrine and should reverse the judgment of the Ninth Circuit.

However, in the face of the unconstitutional conditions doctrine, Hastings nonetheless insists it can enforce its ultimatum. In aid of this erroneous position, Hastings, Respondent-Intervenor, Hastings Outlaw, and their *amici* at the Ninth Circuit, invoke numerous sources that—taken out-of-context—may appear at first blush to be persuasive. This Brief will explain why these sources do not, in fact, salvage Hastings' position.

ARGUMENT

I. HASTINGS' POLICY VIOLATES THE UNCONSTITUTIONAL CONDITIONS DOCTRINE BECAUSE IT USES INDIRECT COERCION.

Hastings;, Hastings Outlaw; and their *amici* below make this case out to be more complicated than it is.

As CLS has asserted, Hastings' Policy places unconstitutional conditions on the receipt of benefits. (Petr.'s Br. 54-55.) Indeed, Hastings insists that CLS must accept as voting members Hastings students whose views are diametrically opposed to its own or lose 15 benefits. *See Christian Legal Society v. Kane*, No. 04-04484, 2006 U.S. Dist. LEXIS 27347, at *5-6 (N.D. Cal. Apr. 17, 2006) (listing 13 enumerated benefits (a-m) and describing 2 others). Under this Court's unconstitutional conditions jurisprudence, Hastings cannot impose this requirement.

The test is clear:

> For at least a quarter-century [now, "for at least fifty-three years"], this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his

> interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972).

Significantly, as the above quotation shows, the unconstitutional conditions doctrine applies to both the freedom of speech and the freedom of association. Thus, whether this Court views this case to be about speech or expressive association or both, Hastings' policy fails because it forces CLS to send a message it does not want to send, forces it to associate with persons it does not wish to associate with, or both.

Hastings tacitly admits this when, for example, it writes

> *[Boy Scouts of America v.] Dale*[, 530 U.S. 640 (2000)] recognized that government action may unconstitutionally burden associational freedom when it constitutes an "intrusion into the internal structure or affairs of an association," such as a "regulation that forces the group to

> accept members it does not desire." This case, in contrast, does not involve any such *direct* legal compulsion.

(Resp't Br. in Opp'n to Pet. For Writ of Cert. (hereinafter "Resp't Br. in Opp'n") 26 (emphasis added) (citations omitted).)

Thus, Hastings is relying upon the distinction between direct and indirect coercion. This reliance is clear, but it is also curious, since this tacit admission is fatal. In fact, the whole point of the unconstitutional conditions doctrine is, as noted above, that government cannot do indirectly what it cannot do directly. This black letter proposition was reiterated by this court as recently as 2006 in *Rumsfeld v. FAIR*, 547 U.S. 47, 59-60 (2006).

II. HASTINGS ERRONEOUSLY INVOKES *RUMSFELD V. FAIR* TO MASK ITS IMPOSITION OF AN UNCONSTITUTIONAL CONDITION.

Thus, when Hastings quotes this Court's *FAIR* opinion as supporting its position, it ignores the context from which the quote is wrenched. Hastings claims that CLS

> had a choice: if it wished to participate in Hastings' forum, thereby gaining access to eligibility for funding and certain law school resources, it could agree to comply with the law school's nondiscrimination policy. If not, it could continue to meet on campus and to exclude whichever students it chose.

(Resp't Br. in Opp'n 27.)

Hastings then cites *FAIR* and quotes it as follows: "'The Solomon Amendment gives universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds.'" (*Id.* at 27 (quoting *FAIR*, 547 U.S. at 58).)

Hastings fails to realize (or at least fails to alert this Court) that this statement comes after this Court had already declared that

> [u]nder . . . the unconstitutional conditions doctrine, the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students.
>
> Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.

FAIR, 547 U.S. at 58.

This Court then explained that Congress could directly impose the access because

> The Constitution grants Congress the power to "provide for the common Defence," "[t]o raise and support Armies, " and "[t]o provide and

> maintain a Navy." Art. I, § 8, cls. 1, 12-13. Congress' power in this area "is broad and sweeping," *[United States v.] O'Brien,* 391 U.S. [367,] 377, and there is no dispute in this case that it includes the authority to require campus access for military recruiters.

Id. (first two alterations original). This Court put even a finer point on it: "'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies." *Id.* (citations omitted).

Because Congress could have *directly* legislated access to college campuses under the Article I, § 8 clauses, it was permissible for Congress to legislate access *indirectly* through the Spending Clause. *Id. In that context*, this Court wrote the language that Hastings quoted: "The Solomon Amendment gives universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds." *FAIR,* 547 U.S. at 58.

In the instant case, Hastings would have this Court jump to the same downstream conclusion by ignoring all of the upstream prerequisites—prerequisites that are missing in this case. Congress *can* compel campus access directly; Hastings *cannot* compel CLS to accept members or officers directly. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) ("[A] corollary of the right to associate is the right not to associate.")

Against this clear teaching, Hastings, Hastings Outlaw, and their *amici* level additional inapposite quotations and a parade of horribles.

This Brief will examine each in turn, noting the errors in each one.

III. HASTINGS ATTEMPTS TO—BUT CANNOT—AVOID THE APPLICATION OF *DALE* AND *HURLEY*.

First, Hastings writes that, in addition to not involving direct compulsion, *Dale* and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) are also inapplicable because neither involves access to public fora or to government subsidies. (Resp't Br. in Opp'n 28.) Thus, Hastings asserts, *Dale* and *Hurley* "are entirely distinct from this Court's public forum decisions . . . ." (*Id.*) This assertion is belied by two sources that Hastings, Hastings Outlaw, and their *amici* have relied on extensively here and at the Ninth Circuit, namely the Second Circuit's decision in *Boy Scouts of American v. Wyman*, 335 F.3d 80 (2d Cir. 2003), and Professor Volokh's law review article, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919 (2006). (*See* Resp't Br. in Opp'n 23, 29, 34; Brief of Defendents-Appellees at 29-30, 33, 38-41, 44-45, *Christian Legal Society v. Kane*, 319 Fed. Appx. 645 (9th Cir. 2009) (No. 06-15956); Brief of Defendents-Intervenors-Appellees Hastings Outlaw at 4, 20, 24-25, 31-38, *Christian Legal Society v. Kane*, 319 Fed. Appx. 645 (9th Cir. 2009) (No. 06-15956); Brief of *Amici Curiae* American Civil Liberties Union, *et al.* at 5, 18, *Christian Legal Society v. Kane*, 319 Fed. Appx. 645 (9th Cir. 2009) (No. 06-15956).) Both *Wyman* and Professor Volokh are clear that *Dale* and *Hurley* are relevant to cases such as the instant one.

While your *Amici* disagree with the ultimate conclusions of *Wyman* and Professor Volokh, their forthrightness about the applicability of *Dale* and *Hurley* is commendable.

Indeed, Hastings' assertion here seems incompatible with a portion of the opinion from *Wyman* that Hastings quoted in its Ninth Circuit brief:

> While *Dale*'s recognition of the Boy Scouts' expressive-associational right to exclude a gay activist from a leadership position sets the stage for the issues in this case, it does not determine their resolution. *Dale* considered New Jersey's attempt *to require* the Boy Scouts to admit a person who, [this] Court found, would compromise the Boy Scouts' message. Not surprisingly, [this] Court held that such state compulsion "directly and immediately affects . . . associational rights that enjoy First Amendment protection" and imposes a "serious burden" on them. The effect of Connecticut's removal of the BSA from the Campaign is neither direct nor immediate, since its conditioned exclusion does not rise to the level of compulsion.

Id. at 91 (citation omitted; ellipses original). (*See* Brief of Defendents-Appellees at 39, *Christian Legal Society v. Kane*, 319 Fed. Appx. 645 (9th Cir. 2009) (No. 06-15956).)

The reason that the *Wyman* court believed that *Dale* did not control had nothing to do with the fact that it was not a forum or subsidy case. Rather, the reason was that, like Hastings, the *Wyman* court bought into the false direct-indirect dichotomy, as demonstrated by this sentence that follows immediately after the end of Hastings' quotation of the case: "*Consequently*, *Dale* does not, *by itself*, mandate a result in the current case." *Wyman*, 335 F.3d at 91. Not surprisingly, the *Wyman* court interacted with *Dale* and *Hurley* scores of times.

Similarly, Professor Volokh believes that the unconstitutional conditions doctrine does not preclude policies such as Hastings'. Volokh, *supra*, at 1944. However, he clearly explains that there is an argument to the contrary and that it is based upon *Dale*:

> Here, then, is the simplest form of expressive groups' argument for equal access to various benefit programs: The programs—whether they provide access to property, to funding, or to tax exemptions - are public fora designated for the expression of a diversity of private views. *Boy Scouts v. Dale* recognizes that our discriminatory selection decisions are necessary for us to speak effectively, and are thus part of our Free Speech Clause rights. Under *Rosenberger v. Rector* [515 U.S. 819 (1995)], the government may not discriminate based on content within public fora, so long as the speech is within the

> forum's purpose, and the government may not discriminate based on viewpoint at all in these fora (or even in nonpublic fora). Therefore, the government may not discriminate based on our exercise of our expressive association rights, either. *Boy Scouts* plus *Rosenberger* equals we win.

Volokh, *supra*, at 1929 (footnotes omitted).

Thus, two of Hastings' most relied upon sources stand four square against the proposition that *Dale* and *Hurley* are inapplicable here. Furthermore, the *Wyman* court is clear that *Dale* is relevant, though not controlling, precisely *because* this case "lies at the intersection of" the forum line of cases and the unconstitutional doctrine line of cases, *Wyman*, 335 F.3d at 92.

It is worth noting in passing that Professor Volokh's comments also highlight why Hastings is incorrect to claim that *Rosenberger* supports its position since it is doing nothing but enforcing reasonable restrictions, (Resp't Br. in Opp'n 28.) Quite to the contrary, Hastings is, at a minimum, "discriminat[ing] based on [CLS's] exercise of [its] expressive association." Volokh, *supra*, at 1929.

IV. HASTINGS AND ITS *AMICI* FURTHER MUDDY THE WATER THROUGH THEIR TREATMENT OF RACIAL AND GENDER DISCRIMINATION CASES.

However, further attention is required regarding Hastings' subsidy argument. Once Hastings dispatches *Dale* and *Hurly*, it blithely

claims that "[t]he decision below is entirely consistent with this Court's government subsidy precedents." (Resp't Br. in Opp'n 28.) In support of the claim, Hastings cites several cases, including two from this Court—*Bob Jones v. University v. United States*, 461 U.S. 574 (1983) and *Grove City College v. Bell*, 465 U.S. 555 (1984)—purporting to stand for the proposition that government may enforce anti-discrimination restrictions as a condition for receipt of subsidies. Elsewhere, Hastings' *amici* take this anti-discrimination argument and turn it into a parade of horrible. According to *amici* American Civil Liberties Union, *et al.*, should this Court rule in CLS's favor, "any student organization that claimed an ideological opposition to including women, African Americans, gays and lesbians, or people with disabilities, for example, would be entitled to force a public university to grant it official recognition not withstanding university policies to the contrary." Brief of *Amici Curiae* American Civil Liberties Union, *et al.* at 19, *Christian Legal Society v. Kane*, 319 Fed. Appx. 645 (9th Cir. 2009) (No. 06-15956).). Additionally, the American Civil Liberties Union cites several other cases—*Norwood v. Harrison*, 413 U.S. 455 (1973); and *Runyon v. McCrary*, 427 U.S. 160 (1976)—for the less-than-surprising proposition that discrimination in education is not a good thing. Brief of *Amici Curiae* American Civil Liberties Union, *et al.* at 10-11, *Christian Legal Society v. Kane*, 319 Fed. Appx. 645 (9th Cir. 2009) (No. 06-15956).). These cases involve racial discrimination in settings that are altogether different from the one involved in the instant case, yet the implication is that should this Court rule in CLS's favor, all of this

Court's anti-racial discrimination protections would be removed.

All of these arguments are problematic. For example, the each of the race and gender discrimination cases appear to be either a parade of horribles, an attempt to tar CLS with the brush of racism, or the application of a legal principle at too high a level of abstraction.

First, *Bob Jones* is easily distinguishable. The issue in that case was whether educational institutions that discriminated on the basis of race (including prohibiting interracial dating and marriage among applicants) should be eligible to receive federal tax exemptions. The case turned on statutory construction with this Court explaining that tax exemptions originated in the law of charitable trusts. *Id.* at 585-92. Therefore, this Court concluded that schools that discriminated on the basis of race did not fall within the definition of a charity since charitable trust law always included the idea that the charity must not operate in violation of public policy. *Id.* Given the federal government's long standing public policy to end racial discrimination, this Court determined that tax exemption could be withheld. *Id.* However, this Court cautioned against making such determinations cavalierly:

> We are bound to approach these questions with full awareness that determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected; a declaration that a given institution is not "charitable" should be

> made only where there can be *no doubt* that the activity involved is contrary to a fundamental public policy.

Id. at 592 (emphasis added). Lest there be any confusion over the "no doubt" standard, this Court explained: "Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education." *Id.* at 593. There is no comparable firm national policy with regard to homosexuality.

Grove City College is just as easily distinguished. When this Court articulated the unconstitutional conditions doctrine in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), it noted that government may deny a "benefit for any number of reasons, [but] there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." Grove City is simply a case in which no justice of this Court believed that any constitutionally protected interests were at stake. And that is easy to understand. Grove City's argument smacked of the quintessential kitchen sink argument. As noted by the Third Circuit when the case was before it, Grove City's supposed First Amendment interest was as follows:

> "Since its founding, Grove City College has professed deeply held beliefs regarding the proper role of the individual, government and private education. For over a century, the

> College has steadfastly maintained a strict independence from governmental funding, holding that the ideals embodied in its educational philosophy draw their essence from the practice of institutional self-sufficiency and autonomy. A similar philosophy guides the political and economic teaching of the College's faculty. Moreover, the College has continued its strong espousal of religious principles. Although it is not controlled or operated by any church, it retains its Christian conscience. It does not discriminate; it does maintain its programs to give equal opportunity to students, faculty and staff. The College has undertaken to do what is morally right without government compulsion."

Grove City College v. Bell, 687 F.2d 684 (3d Cir.) (quoting Grove City's Brief).

What Grove City objected to was, in effect, having to report any information to the federal government—the relief it sought was an injunction that would allow its students to continue to receive federal financial aid while it could stop reporting to the government. This contextual setting makes it clear that Grove City's purported interest—despite its out-of-place reference to its "Christian conscience"—is tantamount to a claim that people and institutions ought to be free from all government reporting.

Under *those* circumstances government certainly may attach anti-discrimination strings to

funding. But those are not the circumstances of this case. CLS is not asserting a putative right to be free from reporting requirements; it is claiming a right to speak, assemble, exercise its religion, and indeed to continue to exist.

Norwood is even less applicable, as the opinion itself plainly states: "This case does not raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race, or religion or of the authority of a State to allow such schools." 413 U.S. at 457-58. Its invocation by the American Civil Liberties Union is hard to understand. The crux of the case was that the textbook subsidy program at issue was Mississippi's way of "induc[ing], encourage[ing] or promot[ing] private persons to accomplish what it is constitutionally forbidden to accomplish," namely fighting desegregation. *Id.* at 731 (internal quotation marks and citation omitted). There is no *governmental* discrimination in the instant case and *Norwood* is simply not relevant here.

Similarly, *Runyon's* context has been ignored. *Runyon* involved racially segregated private schools, but once again, this Court went to great lengths to be clear what the case was *not* about, and one is left wondering why *amici* have invoked it here:

> It is worth noting at the outset some of the questions that these cases do not present. They do not present any question of the right of a private social organization to limit its membership on racial or any other grounds. They do not present any question of the right of a

> private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity. They do not even present the application of § 1981 to private sectarian schools that practice racial exclusion on religious grounds. Rather, these cases present only two basic questions: whether § 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes, and, if so, whether that federal law is constitutional as so applied.

427 U.S. at 167-68. (footnotes omitted).

Furthermore, this Court added a footnote pointing out that "[n]othing in this record suggests that [either of the private schools] excludes applicants on religious grounds, and the Free Exercise Clause of the First Amendment is thus in no way here involved." *Id.* at 168 n.6. Of course, the Free Exercise Clause is front and center in the instant case and that makes all the difference.

In light of the inappositeness of the above racial and gender discrimination cases, this Court should not allow its analysis to be impacted by parades of horrible, putative slippery slopes, or spectres of racism, none of which are real. Hastings *has* imposed indirectly a condition that it could not impose directly. And no amount of camouflage can hide the fact.

V. HASTINGS ATTEMPTS TO—BUT CANNOT---HIDE ITS UNCONSTITUTIONAL CONDITION BEHIND *LOCKE* AND *AMERICAN LIBRARY ASSOCIATION*.

However, there are other red herrings in the arguments of Hastings, Hastings Outlaw and their *amici* as well.

For example, at the Ninth Circuit, *amicus* Americans United for Separation of Church and State argued that the situation in the instant case is like that in *Locke v. Davey*, 540 U.S. 712 (2004), and in *United States v. American Library Association*, 539 U.S. 194 (2003). *See* Brief of *Amicus Curiae* Americans United for Separation of Church and State at 13, *Christian Legal Society v. Kane*, 319 Fed. Appx. 645 (9th Cir. 2009) (No. 06-15956).) It is certainly true, as Americans United argues, that the *Locke* majority opined that benefits available to "secular students [are] *not* part of the baseline against which burdens on religion are measured." *Id.* at 13 (quoting *Locke*, 540 U.S. at 721 (internal quotation marks omitted)). It is also true, as Americans United argues, that the *American Library Association* plurality (as had other courts before it) opined that "[a] refusal to fund protected activity, without more, cannot be equated with imposition of a 'penalty' on that activity." *Id.* (*quoting Am. Library Assoc.*, 539 U.S. at 212 (plurality) (internal quotation marks and citations omitted). What is *not* true, is that these quotations have anything to do with what Hastings has done.

In *Locke*, the State of Washington did not want to change students' behavior, speech, or

thoughts. It simply wanted to assist with funding of secular education. Here, Hastings *wants* to change students' behavior, their speech, or more likely, their thoughts. After all, it claims a compelling interest in eradicating discrimination. (Resp't Br. in Opp'n 30 n.13 (stating "that conclusion is not open to serious question.")) While the behavior/speech issue may be important for other parts of this Court's analysis of this case, it is not important here—Hastings cannot do *any* of these things directly, see *supra*, p. 8, so it has tried to do so indirectly through inducement (or punishment). This, of course, runs Hastings afoul of the unconstitutional conditions doctrine. The only mystery is why Hastings and its amicus Americans United cannot see that.

Nor is this case like *American Library Association*. The most important difference is that this Court refused to employ forum analysis in *American Library Association*. *Id.* at 205-06 (plurality); *id.* at 215 (Breyer, J., concurring). Here, however, the parties agree that a forum of some sort is at issue. (Resp't Br. in Opp'n 25; Petr.'s Br. 21.) Although this Court also noted briefly that the scholarship program in *Locke* was not a forum, 540 U.S. at 721 n.3, this Court emphasized the lack of forum analysis point much more strongly in *American Library Association*. The significance is this: In *American Library Association*, libraries could accept or reject the money. But even if a library altered its preferred course of action, to obtain the money, it would not have given up a constitutionally protected right. There is no constitutional right to provide unfiltered Internet access. *Am. Library Assoc.*, 539 U.S. at 211-12 (plurality). However, by the very nature of a forum,

any altered course of action will impact one or more constitutionally protected rights: free exercise of religion, freedom of speech, freedom of association. And that is what makes Hastings' policy unconstitutional.

VI. A SIMPLE ILLUSTRATION OF THE UNCONSTITUTIONALITY OF HASTINGS' POLICY.

Once the obfuscating false complexity is cleared away, this case becomes quite simple. Your *Amici* suggest that the unconstitutional nature of Hastings' policy's condition is not at all difficult to see. One method for bringing clarity to the situation is to recall the constitutional provision that was at issue in *Speiser v. Randall*, 357 U.S. 513, 516 (U.S. 1958). There, the California Constitution provided that

> Notwithstanding any other provision of this Constitution, no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:
>
> . . . .
>
> (b) Receive any exemption from any tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau,

> commission or other public agency of this State.

Making appropriate substitutions for the facts of this case, Hastings' policy might be paraphrased as follows: "Notwithstanding any other rule of this University, no organization that refuses to abide by the Non-Discrimination Policy shall receive any of the 15 benefits to which it would otherwise be entitled." This Court has already given its opinion on such governmental arm twisting, and so this Brief ends where it began:

> For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972).

CONCLUSION

For the foregoing reasons and for other reasons stated in CLS's Brief, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,
this 4th day of February, 2010,

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AMICUS CURIAE BRIEF

No. 08-1371

IN THE

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,
Petitioner,

v.

LEO P. MARTINEZ, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS AND THE STATES OF MARYLAND, NEW JERSEY, AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS AND THE STATES OF MARYLAND, NEW JERSEY, AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

The Commonwealth of Massachusetts and the States of Maryland, New Jersey, and Vermont respectfully submit this brief as *amici curiae* in support of respondents.[1]

INTEREST OF *AMICI CURIAE*

This case implicates a State's authority to refuse to subsidize conduct that is contrary to its public policy. *Amici* have a unique perspective on that issue. Many States, including *Amici*, have state laws that condition public funding—including public funding of education—on nondiscrimination. *Amici* submit this brief to emphasize the importance of these laws and to urge this Court to affirm that States are not constitutionally obligated to subsidize conduct that is contrary to their nondiscrimination policies.

SUMMARY OF ARGUMENT

A majority of States has enacted laws that prohibit the disbursement of state funds to organizations that discriminate on the basis of grounds that

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

are contrary to state policy. These laws further the States' vital interest in ensuring that funds collected from all taxpayers do not support discrimination against some. That interest is particularly strong in the area of education. Allocating funding to organizations that do not discriminate on prohibited grounds furthers a State's overriding interest in affording equal educational opportunity to all of its students.

Petitioner suggests that States may pursue this interest only when an organization engages in racial or perhaps gender discrimination. That conception of the State's interest, however, is far too narrow. Some States have chosen not to subsidize discrimination based on religion; others have chosen not to subsidize discrimination based on sexual orientation; and still others have chosen not to subsidize discrimination on political, economic, and other grounds. Although *Amici* have different views on the forms of discrimination that should not be subsidized as a matter of public policy, *Amici* are in agreement that States should have leeway to determine what conduct should and should not be subsidized by state funds.

The Court's cases support that conclusion. They establish that States have broad discretion to reserve scarce funds for activities that promote the State's policies. That funding authority may not be challenged under the Constitution simply because an organization that practices discrimination wishes to do so in order to further its own First Amendment interests. The First Amendment gives an organization a right to choose its own ideology. But it does

not entitle an organization that discriminates to demand that the State subsidize the discrimination.

Finally, while petitioner's state *amici* claim that a ruling in petitioner's favor would encourage more speech, precisely the opposite could well occur. Given the State's strong interest in not subsidizing discrimination, a State forced to choose between subsidizing discriminatory private activity, and not subsidizing a particular activity at all, might choose the latter. The Court's precedents caution against such an "all-or-nothing regime under which 'nothing' could be a State's easiest response." *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 44 (1999) (Ginsburg, J., concurring). Instead, the Court's cases give States flexibility to fund activities that further state policies, without forcing them to fund activities that are contrary to state policy as well.

ARGUMENT

STATES HAVE BROAD DISCRETION UNDER THE CONSTITUTION TO REFUSE TO SUBSIDIZE ORGANIZATIONS THAT DISCRIMINATE ON GROUNDS THAT ARE CONTRARY TO STATE POLICY

Most States have laws that deny funding to organizations that discriminate on grounds that are contrary to state policy. Those laws reflect the States' overriding interest in ensuring that funds collected from all taxpayers are not used to support discrimination that is contrary to state policy. The Court should affirm the constitutionality of those laws.

A. Most States Condition Public Funding on Nondiscrimination

1. Most States have laws that prohibit the disbursement of state funds to organizations that engage in discrimination that is contrary to state policy. Indeed, more than 30 States have enacted such statutes.[2]

These laws are especially common in the context of public education.[3] The California Education Code,

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[2] *E.g.*, Alaska Stat. § 47.80.010; Ariz. Rev. Stat. Ann. § 15-1184(G); Ark. Code Ann. § 26-73-108(a)(1); Cal. Educ. Code §§ 220, 66270; Colo. Rev. Stat. § 27-10.5-112(1); Conn. Gen. Stat. § 10-16p(f); Del. Code Ann. tit. 29, § 6962(d)(7); Fla. Stat. Ann. § 287.134(2); Haw. Rev. Stat. § 368-1.5(a); 20 Ill. Comp. Stat. § 301/30-5(c); Iowa Code § 16.9(1); Ky. Rev. Stat. Ann. § 45.570(1)-(2)(a); La. Rev. Stat. Ann. § 46:2254(A); Me. Rev. Stat. Ann. tit. 5, § 784(2)(A); Md. Code Ann., State Fin. & Proc. §§ 19-104, 19-115; Mass. Gen. Laws ch. 151B § 4(6); Miss. Code Ann. § 93-21-107(3); Mo. Ann. Stat. § 455.220(3); Mont. Code Ann. § 49-3-206; Neb. Rev. Stat. § 43-2624; N.J. Stat. Ann. § 10:5-9.1; N.Y. Civ. Rights Law § 18-a; N.D. Cent. Code § 50-24.4-19(5); Ohio Rev. Code Ann. § 3113.36(B); Or. Rev. Stat. § 458.505(4)(h); 32 Pa. Cons. Stat. § 5408; R.I. Gen. Laws § 42-87-2; S.C. Code Ann. § 44-7-345; Tenn. Code Ann. § 49-11-105; Tex. Gov't Code Ann. § 2306.065; Va. Code Ann. § 51.5-42; Wash. Rev. Code § 28B.04.120; W. Va. Code § 10-5-2a; Wis. Stat. § 106.56(1); Wyo. Stat. Ann. § 14-4-201(f).

[3] *See, e.g.*, Ariz. Rev. Stat. Ann. § 15-1184(G); Md. Code Ann. Educ. § 9-102; Mass. Gen. Laws ch. 71, § 89(f); N.H. Rev. Stat. Ann. § 194-B:8; N.J. Stat. Ann. § 18A:36A-7; Tenn. Code Ann. § 49-13-111; *see also Ellis v. Oregon Dep't of Educ.*, 967 P.2d 912, 916 (Or. Ct. App. 1998) (finding sufficient evidence that a private alternative education program understood "that compliance with the nondiscrimination rule is required and that continued funding depends on continued compliance with the rule"); *cf. Zelman v. Simmons-Harris*, 536 U.S. 639, 645, 653-54 (2002) (noting the nondiscrimination conditions of the

for example, establishes that "[n]o person shall be subjected to discrimination on the basis of disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any characteristic listed [in other specified statutes] . . . in any program or activity conducted by any postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid." Cal. Educ. Code § 66270.

State laws prohibiting the use of public funds to discriminate are by no means limited to the context of education. Arizona, for example, prohibits the disbursement of public funds to "shelter[s] for victims of domestic violence" that engage in discrimination contrary to public policy.[4] Hawaii requires applicants to whom a "Foundation for Culture and the Arts" grant has been awarded to agree to comply with "state laws prohibiting discrimination."[5] Iowa requires that any "[h]ousing financed or otherwise assisted by the [Iowa Finance] [A]uthority . . . be open to all persons," without discrimination contrary to state policy.[6] And Mississippi will not provide assistance to an otherwise qualified health center unless the center certifies "that it will not discriminate" on specified grounds.[7]

Cleveland voucher program at issue in affirming its constitutionality).

[4] Ariz. Rev. Stat. § 36-3005(B).

[5] Haw. Rev. Stat. § 9-12.

[6] Iowa Code Ann. § 16.9(1).

[7] Miss. Code Ann. § 41-99-5(9).

Many States have also established agencies that are charged with enforcing their laws that condition funding on nondiscrimination. *See, e.g.*, Colo. Rev. Stat. Ann. § 24-34-301 *et seq.* (establishing the Colorado Civil Rights Commission); *see also* Richard A. Leiter, *Civil Laws Rights and Privileges*, 50 State Statutory Surveys (2007). As a consequence, State executive branch officials, like state courts, are charged with enforcing funding conditions that prohibit discrimination.

These state laws are matters of great importance to *Amici*. They are based on the fundamental notion, which also underlies Title VI of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000d, "that 'taxpayers' money, which is collected without discrimination, shall be spent without discrimination.'" *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 599 (1983) (opinion of White, J.) (quoting 110 Cong. Rec. 7064 (statement of Sen. Ribicoff)); *accord* President John F. Kennedy, Special Message to the Congress on Civil Rights and Job Opportunities (June 19, 1963). And they reflect the judgment that state funding of organizations that engage in discrimination that is contrary to state policy can "aid and abet [the] discrimination." 110 Cong. Rec. 1519, 2467 (1964) (statement of Rep. Celler) (discussing Title VI). By forbidding States to subsidize discrimination that is contrary to state policy, these state laws serve the vital state interest of breaking the link between the State and the discrimination.

B. A State's Decision Not To Subsidize a Particular Form of Discrimination Is Entitled to Deference

Petitioner does not challenge a State's authority to prohibit the disbursement of state funds to organizations that discriminate on the basis of race or possibly gender. *See* Pet'r Br. at 43. State laws conditioning funding on nondiscrimination, however, extend far beyond the categories of race and gender. More than 20 States have enacted laws that condition the receipt of public funds on an agreement not to discriminate on the basis of religion.[8] At least 11 States have enacted statutes prohibiting organizations that receive government funds from discriminating on the basis of sexual orientation.[9] Other

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[8] *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 15-1184(G), 36-3005(B); Ark. Code Ann. § 26-73-108(a)(1); Cal. Educ. Code §§ 220, 66270; Conn. Gen. Stat. Ann. §§ 8-294(c), 46a-81n(b); Fla. Stat. Ann. § 287.134(2); Haw. Rev. Stat. §§ 6E-35, 9-12, 42F-103, 346-102(b)(3); Iowa Code Ann. § 16.9(1); Ky. Rev. Stat. Ann. § 45.570(2)(a); La. Rev. Stat. § 39:1411; Me. Rev. Stat. Ann. tit. 5, § 784(2)(A); Md. Code Ann., State Fin. & Proc. §§ 19-104, 19-115; Miss. Code Ann. §§ 41-99-5(9), 93-21-107(3); Mo. Stat. Ann. §§ 161.223(3), 215.110; 455.220; Mont. Code Ann. §§ 49-3-206, 53-21-1012; N.J. Stat. Ann. § 10:5-9.1; N.Y. Labor Law § 831; Ohio Rev. Code Ann. § 3113.36(B); 32 Pa. Cons. Stat. § 5408; 73 Pa. Cons. Stat. § 390.8; S.C. Code Ann. § 11-9-15; Tenn. Code Ann. § 49-13-111; Va. Code Ann. § 2.2-4343.1(E); Wash. Rev. Code § 28B.04.120; Wyo. Stat. Ann. § 14-4-201(f).

[9] *See, e.g.*, Cal. Educ. Code § 220; Conn. Gen. Stat. § 46a-81n; 29 Del. Code Ann. § 6962(d)(7); Haw. Rev. Stat. §§ 6E-35, 42F-103, 368-1; Mass. Gen. Laws ch. 151B § 4(6); Me. Rev. Stat. Ann. tit. 5, § 4602(4)(A); Md. Code Ann., State Fin. & Proc. §§ 19-104, 19-114, 19-115; Neb. Rev. Stat. § 71-7611; Nev. Rev. Stat. Ann. § 338.125(1); N.J. Stat. Ann. § 10:5-9.1; Or. Rev. Stat. § 458.505(4)(h).

States have prohibited recipients of public funds from discriminating on the basis of characteristics as varied as disability,[10] economic status,[11] HIV-positive status,[12] pregnancy,[13] politics,[14] "familial status,"[15] and "gender identity or expression."[16]

Amici have differing views on the forms of discrimination that are contrary to public policy and therefore should not be supported by State funds. *Amici* are in agreement, however, that States should have latitude to decide what conduct should and should not be subsidized by state funds. The determination is properly left to the political process, and courts should defer to those funding decisions and policy choices.

This Court's cases firmly support that conclusion. The Court has explained that "[g]overnmental decisions to spend money to improve the general public welfare in one way and not another are not confided to the courts." *Bowen v. Owens*, 476 U.S. 340, 345 (1986) (citations and internal quotation marks omitted). Instead, that "discretion belongs to [the legislature], unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Id.* A State's decision to fund only organizations that do

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[10] Ariz. Rev. Stat. Ann. § 15-1184(C).

[11] Conn. Gen. Stat. § 28-15.

[12] Fla. Stat. § 760.50(4)(b).

[13] Me. Rev. Stat. Ann. tit. 5, § 4602(1)(C).

[14] Mont. Code Ann. § 49-3-206.

[15] N.J. Stat. Ann. § 10:5-9.1.

[16] *Id.*

not discriminate on grounds that are inconsistent with state policy falls squarely within the scope of that funding authority.

The exercise of that discretion is not subject to challenge simply because the group practicing discrimination in violation of state policy claims to be exercising its First Amendment rights. In several different contexts, the Court has held that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983).

For example, in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the Court upheld a statute that provides federal funds to candidates who enter primary campaigns, but not to candidates who do not run in party primaries. Relying on the principle that a legislature has broad discretion to determine what activities it will fund, the Court rejected a First Amendment challenge to the statute. *Id.* at 92-108. Similarly, in *Regan*, the Court upheld a tax exemption for the lobbying activities of veterans' organizations, but not for charitable organizations. The Court explained that "[c]ongressional selection of particular entities or persons for entitlement to this sort of largesse is obviously a matter of policy and discretion" that generally is "not open to judicial review." *Regan*, 461 U.S. at 549 (citations and internal quotation marks omitted).

Those principles apply no less to the funding decisions made by State legislatures. This Court has held that a state "legislature's decision not to subsidize the exercise of a fundamental right . . . is not

subject to strict scrutiny.'" *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1098 (2009) (quoting *Regan*, 461 U.S. at 549). Moreover, as Justice Kennedy has observed, "[n]o State has unlimited resources, and each must make hard decisions on how much to allocate" to different programs. *Olmstead v. L.C. by Zimring*, 527 U.S. 581, 611 (1999) (Kennedy, J., concurring in judgment). And there are real "federalism costs inherent in referring state decisions regarding . . . the allocation of resources to the reviewing authority of the federal courts." *Id.* at 610.

That is certainly the case in the context of public education, where resources are increasingly limited. By channeling public educational funds to organizations that do not exclude particular groups of students, States further their overriding interest in ensuring equal educational opportunity for all students. *See, e.g.*, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 149 (2d Cir. 2007) (a State has "a substantial interest in making sure that its resources are available to all its students"); *see also* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919, 1926 (2005) (A State "may legitimately want to make sure that when its subsidies help enhance students' influence or credentials, this help is distributed without regard to the students' race, religion, and the like."); Br. of *Amici* State Universities and State University Systems (discussing public universities' interest in ensuring that educational and leadership opportunities are available to all students on equal terms and in avoiding perception that state schools support discriminatory groups in institutions of higher learning).

Courts have no warrant to interfere with that vital interest.

Petitioner's state *amici* do not as a general matter deny the state interest in limiting the disbursement of public funds so as not to subsidize discrimination. *See* Br. of *Amici Curiae* States of Michigan, *et al.*, ("Michigan Br.") at 17-18 (arguing that the "policy . . . to prohibit discrimination" on public campus "is laudable" and suggesting that universities have an "interest in prohibiting discrimination when the discrimination is unrelated to . . . expressive activity"). Those States argue, however, that application of such funding conditions to groups like petitioner violate the First Amendment because they are viewpoint discriminatory and aimed at "modifying the expressive activity" of the group. *Id.* at 18.

To be sure, this Court has made clear that a State may not "discriminate invidiously in its subsidies in such a way as to aim[] at the suppression of dangerous ideas." *Regan*, 461 U.S. at 548 (citation and internal quotation marks omitted; alteration in original). But laws that condition funding on nondiscrimination do not run afoul of that principle. State statutes limiting public disbursements to those organizations that do not engage in discriminatory conduct are not aimed at suppressing any ideas. Instead, as discussed above, they seek to ensure that the taxes that are collected from all taxpayers are not channeled to organizations that exclude individuals from the benefits of those funds on grounds that are inconsistent with state policy. And they seek to ensure that the States themselves do not become instruments of such discrimination.

Thus, contrary to petitioner's argument, a State is not required to subsidize organizations that violate its nondiscrimination policies. Organizations have a right to speak in accordance with their own values. But they have no constitutional right to demand that a State subsidize discriminatory conduct that is contrary to state policy.

C. A Decision in Petitioner's Favor Could Well Result in Less State Funding of Speech

Petitioner's state *amici* contend that nondiscrimination funding conditions limit "diversity of thought and robust debate" and thereby decrease the level of private speech as a general matter. *See* Michigan Br. at 12-13; *see also* Pet'r Br. at 50 (asserting that "[f]ree association, including the right to exclude, better facilitates the goal of promoting an exchange of ideas"). That assertion ignores the States' strong interest in refusing to subsidize discrimination and the practical reality of a rule that would force States to do so.

If forced to choose between subsidizing discriminatory private activity, and not subsidizing a particular activity at all, States might well choose the latter course. Thus, far from promoting vigorous and robust exchange, a ruling in petitioner's favor could easily "dampen[] the vigor and limit[] the variety of public debate." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 681 (1998) (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 656 (1994)) (internal quotation marks omitted). Indeed, States might even be required to eliminate subsidy programs pursuant to laws that prohibit them from engaging in

discrimination against specified classes of individuals. *See, e.g., Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 97 (2d Cir. 2003) ("[T]he [Connecticut Commission on Human Rights and Opportunities] concluded that the state was sufficiently involved in the [state employees' charitable] Campaign to trigger the provisions of Connecticut law that prohibit state agencies from supporting organizations that discriminate on the basis of sexual orientation," if Boy Scouts were permitted to participate in the campaign.) (citing Conn. Gen. Stat. §§ 46a-81i, 46a-81*l*, 46a-81n), *cert. denied*, 541 U.S. 903 (2004).

This Court's precedents caution against rules that would subject States to such "all-or-nothing regime[s] under which 'nothing' could be a state's easiest response." *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 44 (1999) (Ginsburg, J., concurring); *see, e.g., Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1138 (2009) (observing that, "if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations"). They instead favor rules that allow the States sufficient flexibility to fund "expressive activity" without having to confront such an "all-or-nothing choice." *Forbes*, 523 U.S. at 680.

Petitioner has provided no justification for adopting an all-or-nothing rule here. The Court should therefore reaffirm that States are not required to expend scarce public resources on discriminatory activities when that may make States unwilling to subsidize private activities at all.

CONCLUSION

For the reasons discussed, States have broad discretion under the Constitution to refuse to subsidize organizations that discriminate on grounds that are contrary to state policy.

Respectfully submitted,

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March 15, 2010

AMICUS CURIAE BRIEF

(18)

No. 08-1371

IN THE

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Constitution permits a public university law school to exclude a religious student organization from a forum for speech solely because the group requires its officers and voting members to share its core religious commitments.

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No. 08-1371

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum ELDF")[1] files this

[1] Eagle Forum ELDF obtained written consent to file this *amicus* brief from all parties. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae*, its members, and its

(Footnote cont'd on next page)

brief in support of petitioner, the Christian Legal Society chapter ("CLS") at respondent University of California Hastings College of the Law ("Hastings").

INTEREST OF AMICUS CURIAE

Eagle Forum Education and Legal Defense Fund is an Illinois nonprofit corporation organized in 1981. For over twenty years it has defended principles of limited government, individual liberty, and moral virtue. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the Constitution be interpreted according to its original meaning. Eagle Forum, an affiliated organization, maintains chapters that face potential impairment of First Amendment rights by state and local governments seeking to silence debate and dissent through regulation.

Eagle Forum ELDF filed *amicus* briefs on the prevailing side in several cases implicated here, including *California Democratic Party v. Jones*, 530 U.S. 567 (2000), *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. ("FAIR")*, 547

(Footnote cont'd from previous page.)

counsel make a monetary contribution to the preparation or submission of this brief.

U.S. 47 (2006). The President of Eagle Forum ELDF, Phyllis Schlafly, has also written about the issues that culminated in another precedent at issue here: *Board of Regents v. Southworth*, 529 U.S. 217 (2000).

For the foregoing reasons, Eagle Forum ELDF has a direct and vital interest in the issues presented before this Court.

SUMMARY OF ARGUMENT

A government requirement of open membership for a private group is incompatible with the basic First Amendment right of freedom of association. Open membership causes internal conflict, which can detract from productivity. A mob has open membership, with regrettable results. At the other end of the spectrum, the Twelve Apostles comprised a selective private association that was not open to the public. As Alexis de Tocqueville observed:

> [A]ssociations are born to resist enemies of an entirely ideological nature and to share the fight against social excesses. In the United States, [private] associations aim to promote public safety, business, industry, morality, and religion. There is nothing the human will despairs of attaining through the free action of the combined power of individuals.

Alexis de Tocqueville, *et al.*, DEMOCRACY IN AMERICA: AND TWO ESSAYS ON AMERICA 120 (Penguin: 2003).

Hastings' refusal to recognize a private student group because it lacked open membership violates the First Amendment. The Seventh Circuit properly struck down a university policy similar to the one upheld by the Ninth Circuit below. *Compare Christian Legal Soc. v. Walker*, 453 F.3d 853 (7th Cir. 2006 ("*CLS v. Walker*") *with Christian Legal Soc. v. Kane*, 319 Fed. Appx. 645 (9th Cir. 2009) ("*CLS v. Kane*").[2] Hastings acted unconstitutionally in insisting that recognized school groups welcome everyone to their membership, and accept as members folks who are diametrically opposed to core values and goals of the other members.

Hastings' policy does not survive the test set forth in *Dale*: (1) whether CLS engages in activities protected by the First Amendment, (2) whether forced inclusion of members would significantly impair CLS's rights under the First Amendment, and (3) whether Hastings' interests in preventing discrimination outweigh CLS's rights under the First Amendment. The *Dale* criteria are plainly met by CLS in challenging Hastings' policy here; the First

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[2] The Ninth Circuit's two-sentence *CLS v. Kane* decision relies entirely on *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 649-50 (9th Cir. 2008). *See CLS v. Kane*, 319 Fed. Appx. at 645-46. Thus, comparison of *CLS v. Walker* and *CLS v. Kane* necessarily requires consideration of the Ninth Circuit's *Truth* decision.

Amendment inherently favors speech and association while also disfavoring regulation of content and viewpoint. Freedom of association necessarily includes the right not to associate, and as a public university Hastings has nowhere near the interest required to burden private associations.

Neither this Court nor Hastings should give a few students the equivalent of a heckler's veto over the right of other students to associate with each other, a right that falls within the traditionally protected spheres of free expression. Speech codes and anti-discrimination policies like Hastings' violate the First Amendment's requirement for content and viewpoint neutrality by public universities.

ARGUMENT

I. GOVERNMENT CANNOT IMPOSE THE EQUIVALENT OF A HECKLER'S VETO TO INFRINGE ON FIRST AMENDMENT RIGHTS

There is no First Amendment right to heckle, or for one faction to silence another. *See, e.g., Pleasant Grove City, Utah v. Summum,* 129 S.Ct. 1125, 1131 (2009). By extension, there is a First Amendment right to meet and associate free of a government-imposed heckler's veto. Yet that is what Hastings' accept-all-comers-as-members policy is: this policy requires every recognized school group to throw open its membership to everyone, including diehard opponents and potential hecklers.

In various ways, this Court has consistently invalidated government policies that allow a

heckler's veto. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) ("declin[ing] to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive"); *Pleasant Grove City*, 129 S.Ct. at 1131 (declining to give each taxpayer "a First Amendment heckler's veto" over government speech with which the taxpayer disagrees). As *law students*, other groups like Hastings Outlaw are in an even better position than the "small children" in *Good News Club* to realize that Hastings' recognizing CLS does not imply approval of CLS's message. And as a *law school*, Hastings itself should recognize that it had no right to discriminate on the basis of content and viewpoint in a designated public forum.

Allegedly tender adult ears, eyes, and feelings provide no basis for universities to trammel expression in the name of civility, political correctness, or even the avoidance of harassment. *Bd. of Regents of the Univ. of Wisconsin System v. Southworth*, 529 U.S. 217, 233 (2000) ("the principal standard of protection for objecting students ... is the requirement of viewpoint neutrality in the allocation of funding support"); *Gooding v. Wilson*, 405 U.S. 518, 521-22 (1972) ("[t]he constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech'") (*quoting Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942)). Thus, "[i]f there is a bedrock principle underlying the First

Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Street v. New York*, 394 U.S. 576, 592 (1969) ("[i]t is firmly settled that ... the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers").

The above rulings apply with particular force to a "university campus [that], at least as to its students, possesses many of the characteristics of a traditional public forum." *Cornelius* v. *NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 803 (1985) (*citing Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981)); *Healy v. James*, 408 U.S. 169, 180 (1972) ("[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas'"). Indeed, "the university is a traditional sphere of free expression ... fundamental to the functioning of our society." *Rust v. Sullivan*, 500 U.S. 173, 200 (1991); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("[t]he essentiality of freedom in the community of American universities is almost self-evident").

Ironically, some of the student activists who toppled the old-school decorum in the name of free speech have returned as administrators to impose new-school speech codes in the name of diversity and political correctness. Of course, such "campus speech codes that, in the name of preventing a hostile educational environment" easily "may infringe students' First Amendment rights." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 682 (1999)

(Kennedy, J., dissenting). Although the lower appellate courts have often invalidated these speech codes on First Amendment grounds, *see, e.g., Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1182-84 (6th Cir. 1995); *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993); *Saxe v. State College Area School Dist.*, 240 F.3d 200, 207 (3d Cir. 2001), those rulings are often grounded on defects of vagueness rather than viewpoint discrimination. *See Dambrot*, 55 F.3d at 1183-84. The Hastings policy has picked sides in the ongoing disagreement about homosexuality-related issues, and *Southworth* compels invalidation of such a viewpoint-based preference by a public university. 529 U.S. at 233.

Just as "[t]hose who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth," *Thornhill, infra*, the First Amendment is there to protect the freedom of CLS and other private associations.

II. THE FIRST AMENDMENT COMPELS EXACTING REVIEW AND INVALIDATION OF HASTINGS' POLICY

The Government violates the First Amendment by "giv[ing] one side of a debatable public question an advantage in expressing its views." *Bellotti, infra*, 435 U.S. at 785-86, or by ordaining the "permissible subjects for public debate" and thereby "control[ling] ... the search for political truth." *Consolidated Edison*

Co. of N.Y. v. Public Serv. Comm'n of N.Y., 447 U.S. 530, 538 (1980). This Court has been especially diligent in striking down subversion of the First Amendment by government, and this case presents another prime example.

Beginning with "We the People," the U.S. Constitution embodies a unique vision regarding the sovereignty of the People and the means by which our People exercise that sovereignty. This Court has often recognized the First Amendment as the premier safeguard of this genuine self-government and free consent of the People:

> [S]peech concerning public affairs is more than self-expression; it is the essence of self-government.... And self-government suffers when those in power suppress competing views on public issues from diverse and antagonistic sources.

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 n.12 (1978) (internal quotations omitted).

The First Amendment plays a "structural role" in "securing and fostering our republican system of self-government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980). Under that system, it remains "essential to free government" to "safeguard[] these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

As this Court explained in *Thornhill*:

> Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.

Id.

Grounded in this constitutional foundation, the exacting standard of strict scrutiny applies against Hastings' policy, and it cannot survive.

A. Strict Scrutiny Applies to Speech Restrictions on CLS at Hastings

The Ninth Circuit erred in using a reasonableness test to uphold Hastings' policy, when in fact strict scrutiny should have applied to invalidate it.

The Seventh Circuit's *CLS v. Walker* decision correctly treated the school's actions as restrictions on groups within the dedicated public forum established by the school. As such, the Seventh Circuit evaluated *CLS v. Walker* under strict scrutiny. 453 F.3d at 861-62.

The Ninth Circuit assumed in *Truth* (and thus in *CLS v. Kane*) that the school's open-membership rule placed the Truth group outside the limits imposed on the school's dedicated public forum. *Truth*, 542 F.3d at 652 (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-30 (1995)). As such, the Ninth Circuit evaluated *Truth* (and thus *CLS v. Kane*) under reasonableness review. *Id.*

This was error by the Ninth Circuit in viewing *Rosenberger* to hold that the reasonableness test applied, *Truth*, 542 F.3d at 652. The *Rosenberger* Court, in fact, did not reach that issue because it did not need to reach that issue. While *Rosenberger* described that test in surveying First Amendment law in general, *see* CLS Br. at 22 (quoting *Rosenberger*, 515 U.S. at 829), *Rosenberger* cited *Lamb's Chapel* as the "most recent and most apposite case." *Rosenberger*, 515 U.S. at 830. In *Lamb's Chapel*, this Court struck down restrictions on religious content under the strict-scrutiny review for content discrimination by assuming *arguendo* that the school had limited its designated public forum. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 391-92 (1993); *see also Good News Club*, 533 U.S. at 106 (same). Nothing in *Rosenberger* suggests otherwise and strict scrutiny must be the applicable standard here.

B. HASTINGS' FORCED INCLUSION, AS APPLIED, TARGETS CLS'S PROTECTED VIEWPOINTS

The Ninth Circuit reasoned that because "all groups must accept all comers as voting members even if those individuals disagree with the mission of the group," Hastings' policy was "viewpoint neutral." *CLS v. Kane,* 319 Fed. Appx. at 645-46. In its two short sentences, the Ninth Circuit made two key errors: (1) it confused viewpoint neutrality with content neutrality, and (2) it confused facial challenges with as-applied challenges. Just as a mandate that the Constitutional Convention "accept all comers" would have had predictably dire and biased consequences with respect to the content of its speech, Hastings' policy is not content neutral.

As to the Ninth Circuit's first error, strict scrutiny applies to *content discrimination. See Roberts v. United States Jaycees,* 468 U.S. 609, 623 (1984) ("any restriction based on the content of the speech must satisfy strict scrutiny, ... and restrictions based on viewpoint are prohibited"). "[C]ontent-based regulations of speech are presumptively invalid" because they raise[] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Davenport v. Washington Educ. Ass'n,* 551 U.S. 177, 188 (2007) (internal quotations omitted).

At some level, of course, "[v]iewpoint discrimination is ... an egregious form of content discrimination." *Rosenberger,* 515 U.S. at 828-829. Regulation of the subject matter of messages, though

not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation. *Consolidated Edison,* 447 U.S. at 538. Thus, Hastings presumably could eliminate all student clubs or maybe only student clubs "with the intent to intimidate," *Virginia v. Black,* 538 U.S. 343, 363 (2003), but Hastings cannot eliminate only student clubs that dispute Hastings' preferred views on sexual orientation. *Compare R.A.V. v. St. Paul,* 505 U.S. 377, 391 (1992) (striking viewpoint-specific cross-burning prohibition) *with Black,* 538 U.S. at 360-63 (upholding across-the-board cross-burning prohibition).

Hastings simply cannot "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 96 (1972). When government does so, the plaintiff need not prove animus to prevail. *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 429 (1993).

When governments adopt facially neutral rules that burden speech "because of disagreement with the message it conveys" or enforce such rules discriminatorily because of such a disagreement, those governments violate the First Amendment, notwithstanding facial neutrality. *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). Here, Hastings singled CLS out for enforcement and adopted its *post-hoc* open-membership policy to defend its pro-homosexual, anti-orthodox-Christian

policy, which suggests both discrimination and animus.

As to the Ninth Circuit's second error, it ignored that CLS has brought both a facial and an as-applied challenge. For an as-applied challenge, facial neutrality is irrelevant: "[t]hat the regulation may be invalid as applied ... does not mean that the regulation is facially invalid," and vice versa. *INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 188 (1991). A statute that is facially neutral under the First Amendment obviously still can violate the First Amendment as applied. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 624-25 (1988) (Kennedy, J., concurring).

Contrary to the Ninth Circuit's reasoning, therefore, Hastings' policy discriminates on content and viewpoint, and CLS could challenge even facially neutral rules as applied that discriminate against CLS's First Amendment rights. Clearing away the Ninth Circuit's doctrinal errors, it becomes clear both that Hastings' actual policy is neither content neutral nor viewpoint neutral and that Hastings' litigation position (the open-membership policy) is unconstitutional.

Compelling the "presence [of homosexuals] in the [organization] would, at the very least, force the organization to send a message, both to ... members and the world, that the [organization] accepts homosexual conduct as a legitimate form of behavior." *Dale*, 530 U.S. at 653. Significantly, *R.A.V.* struck down an ordinance that punished cross

burning that knowingly would "arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" as impermissible viewpoint discrimination because, for example, it did not cover "[t]hose who wish to use 'fighting words' in connection with other ideas – to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality." 505 U.S. at 391 (interior quotations omitted). Even if it could limit *content* concerning homosexuality, Hastings cannot tilt the scales on viewpoints *about* homosexuality.

As a litigation position,[3] Hastings' open-membership policy is dubious, but it fails constitutionally because, unlike Hastings' viewpoint discrimination, it bears no relationship to a government interest. "It is the absence of a neutral justification for its selective ban ... that prevents the [government] from defending its [challenged] policy as content neutral." *Discovery Network,* 507 U.S. at 429-30. Thus, for example, if the government interest is residential privacy, such interest cannot support a ban on non-labor picketing that exempts labor

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[3] The open-membership policy that the parties incorporated into their stipulated facts surfaced in depositions and contradicted prior evidence. *See* CLS Br. at 47-48. "The all-comers policy has never been incorporated in the College's written Nondiscrimination Policy and, so far as the record shows, has never been applied to any student group." *Id.* at 47.

picketing because "nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy." *Carey v. Brown,* 447 U.S. 455, 465 (1980). Even under the reasonableness test's intermediate scrutiny, government regulation of protected First Amendment conduct must promote a *significant* government interest. *Ward v. Rock Against Racism,* 491 U.S. 781, 799 (1989). Leaving aside Hastings' unlawful and discriminatory favoring of homosexual viewpoints over opposing viewpoints, Hastings simply has not identified (and cannot identify) a "significant government interest" to support its open-membership requirement.

III. THE *DALE* CRITERIA PROHIBIT HASTINGS FROM FORCING CLS TO ASSOCIATE WITH ITS ADVERSARIES

CLS satisfies all the criteria set forth in *Dale* in order to enjoy full freedom of association rights without governmental inference.

CLS indeed engages in activities protected by the First Amendment, which no party seriously questions or could seriously question. *Rosenberger,* 515 U.S. at 834; *Healy,* 408 U.S. at 181; *Roberts,* 468 U.S. at 622. Associating for educational, speech, advocacy, religious, and expressive purposes easily qualifies.

Another *Dale* criterion likewise resolves easily in favor of CLS: whether applying Hastings' policy to compel including those who engage in or affirm homosexual conduct would significantly affect CLS's

ability to express its disapproval of homosexual activity. As the Seventh Circuit explained, "[t]o ask this question is very nearly to answer it." *CLS v. Walker,* 453 F.3d at 862. In general, courts defer to associations' claims "of what would impair [their] expression." *Dale,* 530 U.S. at 653; *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 123-124 (1981) (with respect to government's burdening a group's associational rights, "a State, or a court, may not constitutionally substitute its own judgment for that of the [group]").

The final *Dale* criterion is whether Hastings' interests outweigh CLS's First Amendment rights. But the government's power to tamper with First Amendment rights is exceedingly confined. Under the First Amendment, the People "are entitled to speak as they please on matters vital to them." *Wood v. Georgia,* 370 U.S. 375, 388-89 (1962). Any "errors in judgment or unsubstantiated opinions may be exposed, of course," but "[u]nder our system of government, counterargument and education are the weapons available to expose these matters, not abridgment of the rights of free speech and assembly." *Id.* Moreover, that freedom to speak unmistakably includes the freedom to associate: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460 (1958).

"With full knowledge" that unfettered expression "may be dangerous to the status quo," "the Framers rested our First Amendment on the premise that the slightest suppression of thought, speech, press, or public assembly is still more dangerous." *Wieman v. Updegraff*, 344 U.S. 183, 193-94 (1952) (Black, J., concurring). Because they trusted the People's wisdom to evaluate issues of debate, the Framers limited government's ability to silence or (even worse) tilt the debate:

> [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment. In sum, [any] restriction so destructive of the right of public discussion [as the challenged law], without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment.

Bellotti, 435 U.S. at 791-92 (footnotes, citations, and interior quotations omitted). "This means that individuals are guaranteed an undiluted and unequivocal right to express themselves on questions of current public interest. It means that Americans discuss such questions as of right and not on

sufferance of legislatures, courts or any other governmental agencies." *Updegraff*, 344 U.S. at 193-94 (Black, J., concurring). Hastings has no more right than California or Congress to weaken the First Amendment.

The government's power to restrict debate is exceedingly confined. "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is ... dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209-10 (1975) (internal quotations omitted, alteration in original). "Any broader view" of the government's authority to restrict First Amendment freedoms "would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Id.*

Government interference with private First Amendment expression "puts the head of the camel inside the tent and enables administration after administration to toy with [expression] in order to serve its sordid or its benevolent ends." *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 154 (1973) (Douglas, J., concurring). Under the Equal Protection Clause, this Court recognizes that there is no such thing as good discrimination and bad discrimination, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995), and that recognition applies even more strongly to content and viewpoint discrimination under the First Amendment. The government cannot select the

approved topics – much less pick the winners and losers – in matters of public debate.

A. Forced Inclusion Impairs CLS's Rights under the First Amendment

There is no question that the "freedom of association ... plainly presupposes a freedom not to associate," or that "forced inclusion of an unwanted person in a group" can "infringe[] the group's freedom of expressive association." *Dale*, 530 U.S. at 648. The original members of groups like CLS face the real prospect that compelled members not only will limit the original members' First Amendment rights but also will sweep aside the original members. At least when antagonist groups can use an open-membership rule to hijack a group, that impairs the original group's First Amendment rights.

The prospect of compelled members (and thus the prospect of compelled officers) who do not share a group's mission threatens the very existence of a group. Indeed, "a single election in which the [officers are] selected by [such compelled 'members'] could be enough to destroy [a group]." *California Democratic Party v. Jones*, 530 U.S. 567, 579 (2000). As this Court explained in *California Democratic Party*:

> In the 1860 Presidential election, if opponents of the fledgling Republican Party had been able to cause its nomination of a proslavery candidate in place of Abraham Lincoln, the coalition of intraparty factions

> forming behind him likely would have disintegrated, endangering the party's survival and thwarting its effort to fill the vacuum left by the dissolution of the Whigs.

Id. (*citing* 1 *Political Parties & Elections in the United States: An Encyclopedia* 398-408, 587 (L. Maisel ed. 1991)).

Humorous but likewise harmful effects can result from compelled membership. For example, meat eaters could take over a vegetarian's club or hunters could take over an anti-vivisection group; there is no shortage of pranksters. *See* Anne C. Mulkern, *U.S. Chamber Sues Activists Over Climate Stunt,* N.Y. TIMES, Oct. 27, 2009 (impostor activist group holds fake press conference and launches fake website to announce Chamber of Commerce's allegedly changed position on global warming); *see also* CLS Br. at 29 n.4 (citing instances of groups' hijacking rival groups). Members unaligned with a group's mission – or even aligned *against* that mission – pose a serious threat to small groups' ability to engage in expressive association.

But some of the harm is far from funny. Homosexual activism has included vandalism, physical violence, and even death threats. *Hollingsworth v. Perry,* 130 S.Ct. 705, 707 (2010); *Citizens United v. Fed. Election Comm'n,* __ S.Ct. __; 2010 WL 183856, 97 (2010) (Thomas, J., concurring in part and dissenting in part); Carlton, *Gay Activists Boycott Backers of Prop 8,* WALL STREET JOURNAL, Dec. 27, 2008, A3. At a law school, one

hopes that not many compelled student members would threaten original student members so directly, but the release of group information to the larger activist community could. The retaliation against some supporters of Proposition 8 in California included very serious intimidation.

Outside the context of "requiring the dissemination of purely factual and uncontroversial information" in commercial advertising, government "may not compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-American Gay*, 515 U.S. 557, 573 (1995) (internal quotations omitted); *cf. New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988) ("[i]f a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the [city law] erects no obstacle to this end"). The facts here easily meet the *Dale* test by significantly threatening CLS's ability to associate, speak, and advocate its mission.

B. Hastings Lacks a Compelling Basis To Justify Impairing CLS's Rights

In contrast with CLS's unquestioned and broad rights under the First Amendment, Hastings has an extremely limited right to burden First Amendment freedoms. At the outset, content discrimination in traditional and designated public fora is presumptively impermissible. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991).

Nor does it help Hastings that CLS might offend either Hastings' sensibilities or those of some Hastings students: the "point ... of all speech protection ... is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley*, 515 U.S. at 574. Hastings "may not restrict speech or association simply because it finds the views expressed by [CLS] to be abhorrent." *Healy*, 408 U.S. at 187-88. "[T]he freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Id.* (citation and internal quotations omitted). Accordingly, "invoking neutrality is a prudent way of keeping sight of something the Framers of the First Amendment thought important." *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 875-76 (2005).

Because CLS remains a private group, for which Hastings has no derivative liability, Hastings cannot use its government status to leverage anti-discrimination laws against CLS. *Rosenberger*, 515 U.S. at 842-43; *Hurley*, 515 U.S. at 566 ("the guarantees of free speech and equal protection guard only against encroachment by the government and 'erec[t] no shield against merely private conduct'") (*quoting Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 543-44 (1987) ("[t]he fact that [the Government] granted [an entity its] corporate charter does not render the [entity] a Government agent"); *id.* at 547 ("[b]ecause the USOC

is not a governmental actor, [petitioner's] claim that the USOC has enforced its rights in a discriminatory manner must fail").

Indeed, as CLS explains, both the United States and California exempt religious organizations from anti-discrimination statutes. *See* CLS Br. at 44. Without repeating the authorities cited by CLS, *amicus* Eagle Forum ELDF considers it significant that the very California statute that prohibits sexual-orientation discrimination in post-secondary education exempts religious schools if the law's "application would not be consistent with the religious tenets of that organization." CAL. EDUC. CODE §66271. If California exempts religious schools, Hastings cannot have a truly significant interest in applying its policies to religious groups.

Indeed, in the rare instances that this Court has found that government anti-discrimination interests outweigh private associational rights, the private interest not only lacked any particular indicia of privacy but also occurred within the commercial or economic sphere. Thus, in *Roberts*, the state's interest that the Court recognized was in "assuring its citizens equal access to publicly available goods and services." 468 U.S. at 624; *see also id.* at 632 (O'Connor, J., concurring in part and concurring in the judgment) (referring to the "goal of ensuring nondiscriminatory access to commercial opportunities"). Likewise in *New York State Club Association*, the interest was described as providing all persons "a fair and equal opportunity to participate in the business and professional life of

the city." 487 U.S. at 5 (interior quotations omitted). Nothing of that sort exists here.

CONCLUSION

For the foregoing reasons, this Court should hold that Hastings has violated the First Amendment by imposing an open-membership requirement on recognized school groups.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER
OF UNIVERSITY OF CALIFORNIA,
HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* EVANGELICAL SCHOLARS (OFFICERS AND 24 FORMER PRESIDENTS OF THE EVANGELICAL THEOLOGICAL SOCIETY), EVANGELICALS FOR SOCIAL ACTION, AND NATIONAL ASSOCIATION OF EVANGELICALS, IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The signatories to this brief include the five current officers plus 24 former presidents of the Evangelical Theological Society.[2] The Evangelical Theological Society, founded in 1949, is the largest academic society for evangelical scholars in theology and biblical studies in the United States. It currently has 2,370 full members (Th.M. or Ph.D. degree). It promotes evangelical scholarship by holding national and regional meetings and by publishing a leading peer-reviewed scholarly journal, the *Journal of the Evangelical Theological Society*. Election as president is for a term of one year and represents the recognition of distinguished contributions to the academic study of the Bible and theology.

Evangelicals for Social Action ("ESA") is a national organization of Christians seeking to promote biblical faith in the churches and justice and freedom in society. ESA believes that freedom for everyone, especially freedom of religion, is a gift from God that the state does not create but should protect. ESA is grateful for the long American constitutional tradition respecting religious freedom and believes that rich heritage should be maintained in this case.

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[1] Letters from all parties consenting to the filing of this brief have been submitted to the Clerk. No counsel for any party authored this brief in whole or in part, and no persons or entities other than *amici* or their counsel made a monetary contribution to its preparation or submission, except for Heartland Academy Community Church, Newark, Missouri, which contributed monetarily to printing and production costs.

[2] The names of the officers and former presidents are listed in the Appendix hereto.

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 50 member denominations and associations, representing 45,000 local churches and over 30 million Christians. NAE serves as the collective voice of evangelical churches and other religious ministries. Religious speech as the first target of the censor goes at least as far back as John Milton's *Areopagitica* (1644). Its protection is imperative. NAE also believes that religious freedom is a gift of God and the exercise of that freedom is essential to limiting the government that is our federalist constitutional republic.

The signatories are united in the belief that a public university law school should not be allowed to exclude a religious student organization from a forum for speech solely because the group requires its officers and voting members to share its core religious commitments, which include proscriptions on sexual activity outside traditional marriage.

SUMMARY OF ARGUMENT

The Christian Legal Society ("CLS") requires its officers (and voting members, who elect the officers) to meet certain standards of belief and personal conduct. These standards include affirmation of a personal saving faith in Jesus Christ and agreement with a Statement of Faith, part of which affirms belief in the Bible as "the inspired Word of God." CLS interprets belief in the Bible as "the inspired Word of God" to require "certain Biblical standards for sexual morality," and, specifically, says that biblical standards prohibit "all acts of sexual conduct outside of God's design for marriage between one man and one woman, which acts include fornication, adultery, and homosexual conduct." CLS board of directors: Resolution 3-25-04, J.A. 146.

The interpretation by CLS of its Statement of Faith also states: "In view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from membership." *Ibid.*

During the 2004-2005 academic year, Hastings College of Law ("Hastings") denied Petitioner the status of "Registered Student Organization" because the College determined that CLS's constitution violated the religion and sexual orientation provisions of Hastings' Nondiscrimination Policy. The result was that CLS was denied access to communication channels, reserved meeting space, and funding that are available to other student organizations.

The primary purpose of this brief is to demonstrate that the CLS Statement of Faith and its interpretation as set forth above are consistent with the core beliefs and practices of the vast majority of churches and Christian organizations throughout history who have held the same view of the Bible as "the inspired Word of God." From New Testament times (1st century A.D.) until today, Christian groups have commonly required their leaders (as well as regular participants or voting members) to believe in the Bible as the inspired Word of God and to refrain from immoral sexual conduct (which would include sexual intercourse outside of marriage regardless of the gender of the sexual partner).

The evangelical scholars and organizations submitting this brief, like Petitioner, are part of this religious tradition, which bases its requirements regarding sexual morality of leaders and voting members not on personal preference but on core beliefs as to biblical authority.

ARGUMENT

A. Evangelical belief concerning the Bible

Evangelical groups believe that the Bible is the inspired Word of God in the sense that it speaks to people with absolute divine authority. The words of the Bible are understood to be not only the words of the human authors but also (simultaneously) words that God speaks as his own words.

A principal reason for this evangelical belief is found in acceptance of the Bible's own claims for its divine authority. Many Jewish prophets in the Old Testament prefaced their prophecies with, "Thus says the Lord." 1 Samuel 10:18; and 416 times in the Old Testament. In the New Testament, Jesus referred to the Old Testament as "every word that comes from the mouth of God." Matthew 4:4. The apostle Paul said, "All Scripture is breathed out by God." 2 Timothy 3:16. Of his own writing he could say, "The things I am writing to you are a command of the Lord." 1 Corinthians 14:37. And the apostle Peter, writing about Scripture, said, "men spoke from God as they were carried along by the Holy Spirit." 2 Peter 1:21.

Accordingly, evangelicals understand the Bible to speak with the authority of God himself.

B. Evangelical belief in standards of conduct for leaders and regular members

Evangelical groups believe that the Bible requires certain standards of conduct for Christian leaders. Paul writes, regarding the office of "overseer" (or elder):

> If anyone aspires to the office of overseer, he desires a noble task. Therefore an overseer must

> be above reproach, the husband of one wife, sober-minded, self-controlled, respectable, hospitable, able to teach, not a drunkard, not violent but gentle, not quarrelsome, not a lover of money.

1 Timothy 3:1-3; (the expression "above reproach" means that he does not engage in conduct that violates biblical moral standards). Elsewhere in the New Testament, leaders are expected to live lives worthy of imitation by others. Paul tells the church at Corinth, "*Be imitators of me*, as I am of Christ." 1 Corinthians 11:1. He told his young associate Timothy, "*Set the believers an example* in speech, in conduct, in love, in faith, in purity." 1 Timothy 4:12. He told another associate, Titus, "Show yourself in all respects to be *a model of good works*, and in your teaching show integrity, dignity . . ." Titus 2:7. The apostle Peter told the elders in hundreds of churches in Asia Minor that they should live as "not domineering over those in your charge, but *being examples to the flock*." 1 Peter 5:3; emphasis added in all four verses.

These requirements assume that leaders teach not only by their words but also by their lives. In accepting a person for a leadership role, a Christian organization is saying, in effect, "This person's life is worthy of imitation by others in the organization." Therefore a Christian organization cannot establish in leadership anyone whose known conduct involves unrepentant violation of the moral standards of the Bible.

But standards of conduct are not required only of leaders. The New Testament goes further and establishes a system of church discipline for members who openly violate biblical moral stan-

dards. Paul wrote to the Corinthian church regarding a situation of incest:

> It is actually reported that there is sexual immorality among you, and of a kind that is not tolerated even among pagans, for a man has his father's wife. And you are arrogant! Ought you not rather to mourn? Let him who has done this be removed from among you.

1 Corinthians 5:1-2.

Jesus himself established a system of church discipline that would increase in intensity until the wayward person either repented or was excluded from the church:

> If your brother sins against you, go and tell him his fault, between you and him alone. If he listens to you, you have gained your brother. But if he does not listen, take one or two others along with you, that every charge may be established by the evidence of two or three witnesses. If he refuses to listen to them, tell it to the church. And if he refuses to listen even to the church, let him be to you as a Gentile and a tax collector.

Matthew 18:15-17. To be treated like "a Gentile and a tax collector" means to be excluded from the fellowship of the church and considered an outsider.

C. Interpretation and application of the moral commands of the Bible to the present

Among evangelical Christians there is some disagreement about the way in which many commands given in the Old Testament apply (or do not apply) to Christians today. But there is widespread consensus among evangelicals that the explicit moral commands about sexual conduct

written to the New Testament churches are directly applicable today.

D. Not based on animosity

There is no animosity or malice toward any group of people (such as adulterers or homosexuals) that has played any role in the formulation of the CLS Statement of Faith and its interpretation, or in the practice of similar policies by Christian groups throughout history, or in the inclusion of these moral standards in the Bible in the first place. Indeed, animosity toward any such group would be contrary to the Bible itself, for it would violate the command of Jesus to "love your neighbor as yourself" (Matthew 22:39) and even to "[l]ove your enemies, do good to those who hate you, bless those who curse you, pray for those who abuse you" (Luke 6:27).

Therefore it would not be surprising that a student who was known to engage in homosexual conduct would nonetheless be regularly welcomed at CLS meetings at Hastings College of Law, though not invited to become a voting member. This is exactly what one would expect from Christian students seeking to be obedient to both the biblical standards of sexual conduct for leaders and members and the biblical commands to love one's neighbor.

E. A distinction between desires and conduct is common in evangelical ethical thinking.

CLS's interpretation of its Statement of Faith stipulates that "unrepentant *participation in* or *advocacy of* a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith and consequently may be regarded by CLS as disqualifying such an individual from CLS membership." (emphasis added). The CLS interpre-

tation focuses on conduct and verbally expressed belief, but does not exclude anyone from membership on the basis of internal desires.

Such a distinction between inward desires and outward conduct is a common one in evangelical thinking and would apply in many areas of moral conduct. Here is one recent explanation, taken from the section "Biblical Ethics: An Overview" in the 2008 *ESV [English Standard Version] Study Bible*, which is widely used by evangelicals:

> Though all sin is wrong and brings legal guilt before God (*cf.* James 2:10-11), a distinction between wrongful desires and wrongful actions can be made with regard to many areas of life. Hatred of another person is wrong in God's sight, but murdering the person is far more harmful. Coveting a neighbor's farm animals is wrong, but actually stealing them is much more harmful. And lustful desires for adultery are wrong, but actually committing adultery is far more harmful. Similarly, homosexual desires are wrong in God's sight, but actually committing homosexual acts is far more harmful.[3]

Such a distinction is proper in establishing criteria for membership in an organization, for actions and verbal affirmations of belief can be determined with sufficient accuracy. By contrast, attempting to determine someone's inward desires would be excessively difficult. Such a distinction is also consistent with the New Testament, because the

---

[3] *ESV [English Standard Version] Study Bible* (Wheaton, Illinois: Crossway Books, 2008), pp. 2548-49. Ninety-five experts in various fields of study contributed to its notes and essays. The ESV translation was first published in 2001.

New Testament character qualifications for church leaders noted in Part B *supra* emphasize a person's actions and observable pattern of life.

F. The Bible's teaching on sexual conduct

The Bible consistently teaches certain moral standards for sexual conduct: it forbids fornication, adultery, and homosexual conduct (all of which are set forth in the CLS interpretation), as well as other acts (prostitution, incest, etc.). CLS's interpretation of its Statement of Faith is consistent with mainstream evangelical biblical interpretation on sexual morality.

Regarding the specific sexual sins mentioned by the CLS interpretation, namely, "fornication, adultery, and homosexual conduct," these are regularly considered to be immoral by evangelical groups. The following summary of arguments for these biblical moral standards for sexual conduct, again from the *ESV Study Bible*, represents mainstream orthodox evangelical thinking:

> **Sexual Intimacy and Moral Standards for Marriage**
>
> The Bible views sexual intimacy in marriage as a blessing from God. God said to Adam and Eve, "Be fruitful and multiply and fill the earth" (Gen. 1:28), which implies that God created them so that they would have sexual intercourse together and thereby bear children (cf. Gen. 1:31). Sex is seen within the context of marriage ("his wife," Gen. 2:24) from the very beginning of creation. After the fall, sexual intimacy in marriage is still

> viewed positively (see Prov. 5:15-19; Song of Solomon; 1 Cor. 7:2-5).[4]

The article then discusses adultery, which is specified in the CLS interpretation:

> Why is adultery wrong? (1) Because God says it is wrong: "You shall not commit adultery" (Ex. 20:14) [several other reasons follow] . . . . (6) Adultery is thus frequently and understandably pictured in Scripture as destroying a person's life: "He does not know that it will cost him his life" (Prov. 7:23; cf. 5:3-14; 6:27-29, 32-33; 7:21-23).[5]

Next, the article discusses sexual intercourse between unmarried persons (what is technically called "fornication," also specified by CLS):

> Sexual intercourse between unmarried persons is also consistently viewed as morally wrong throughout Scripture, from the laws of Moses (Ex. 22:16-17; Deut. 22:13-21) to the teachings of Jesus, who implicitly rebuked the woman at the well for living with someone to whom she was not married (John 4:16-18; cf. also Gen. 38:24; Matt. 15:19 [*porneia* or "sexual immorality" is distinguished from adultery, and the 1st-century understanding of the word would certainly include any sexual intercourse outside of marriage]; John 8:41; Acts 15:20; 1 Cor. 6:18; 7:2, 9; 1 Thess. 4:3; note the imagery in 2 Cor. 11:2).[6]

---

[4] *Ibid.*, p. 2544.

[5] *Ibid.*

[6] *Ibid.*

Then the article discusses homosexual conduct, the third action specified by CLS. First, the teachings of the Old Testament are considered:

> Homosexual conduct is also viewed as a sin (something contrary to God's will) in several passages of the Bible. Leviticus 18:22 says, "You shall not lie with a male as with a woman; it is an abomination [Hb. *to'ebah*, actions that are extremely displeasing to God]." Similarly, "If a man lies with a male as with a woman, both of them have committed an abomination" (Lev. 20:13; cf. Genesis 19; also Jude 7). These absolute Levitical prohibitions are grouped with other relevant sex proscriptions (incest, adultery, bestiality) and are considered first-tier sexual offenses that are grouped together in Leviticus 20:10-16.[7]

Next, teachings from the New Testament are considered, beginning with Romans 1:

> In the NT, Paul speaks of homosexual conduct:
>
> > For this reason God gave them up to dishonorable passions. For their women exchanged natural relations for those that are contrary to nature; and the men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men and receiving in themselves the due penalty for their error (Rom. 1:26-27).
>
> The phrase "contrary to nature" means that homosexual conduct does not represent what God intended when he made men and women with

---

[7] *Ibid.*, p. 2548.

> physical bodies that have a "natural" way of interacting with each other and "natural" desires for each other. (See note on Rom. 1:26-27; cf. also Rom. 1:19-20, that the truth about God and his moral law is visible and apparent in the material creation.) . . . .[8]

The article also discusses other New Testament verses, especially 1 Corinthians 6:9 and 1 Timothy 1:10:

> In a long list of sins, Paul also includes "men who practice homosexuality" (1 Cor. 6:9). This phrase translates two different Greek terms: *malakos* means "soft" or "effeminate" and was commonly used in the Greco-Roman world to refer to the "passive" partner in homosexual acts, while *arsenokoitēs* is a combination of Gk. *arsēn* (meaning "man") and *koitē* (here meaning "sexual intercourse"). The term *arsenokoitēs* was apparently coined by Paul from the Septuagint (Greek translation) of Leviticus 20:13, and means (in plural) "men who have intercourse with men." In 1 Timothy 1:10 Paul uses the same word *arsenokoitēs* in the midst of vices derived from "the law" (here, the second half of the Ten Commandments), which means that this verse also should be interpreted as an absolute prohibition of male-with-male intercourse, in keeping with Leviticus 18:22; 20:13. Early Jewish interpretation of Leviticus 18:22 and 20:13, and early Christian interpretation of 1 Corinthians 6:9 and 1 Timothy 1:10, also show that these verses were understood as absolute prohibitions against all types of homosexual conduct . . . .

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[8] *Ibid.*

> It is important that the Christian community always show love and compassion toward those engaged in homosexual conduct, and also extend friendship toward them where opportunities arise, though not in a way that signals approval of homosexual practice.[9]

Finally, the article considers alternative interpretations that have been proposed in recent years:

> Numerous objections have been presented against the view that homosexuality is morally wrong . . . [One] objection is to say that the biblical passages concerning homosexuality only prohibit certain kinds of homosexual conduct, such as homosexual prostitution or pedophilia, or unfaithful homosexual relationships . . . But there is no legitimate evidence in the words of any of these verses, or their contexts, or in evidence from the ancient world, to prove that the verses were referring to anything less than all kinds of homosexual conduct by all kinds of people. Two biblical counterarguments against . . . [this] "exploitation argument" may be briefly mentioned: (1) In Romans 1:23-27 Paul clearly echoes Genesis 1:27, indicating that Paul viewed any sexual relationship that did not conform to the creation paradigm of "male and female" to be a violation of God's will, irrespective of whether the relationship is loving. (2) Paul's absolute indictment against all forms of homosexuality is underscored by his mention of lesbian intercourse in Romans 1:26, since this form of intercourse in the ancient world was not typically characterized by sex with adolescents, slaves, or prostitutes . . .

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[9] *Ibid.*

> Some object that the phrase "contrary to nature" in Romans 1:26-27 shows that Paul is only talking about people who "naturally" feel desires toward a person of the opposite sex but who then practice homosexuality. Paul says, "For their women exchanged natural relations for those that are contrary to nature; and the men likewise gave up natural relations with women and were consumed with passion for one another" (Rom. 1:26-27). According to this view, Paul is not saying anything about people who "naturally" feel desires for a person of the same sex, for such desires would not be "contrary to that person's nature." However, this is reading into the text a restriction that has no basis in the actual words that Paul wrote. He does not say "contrary to their nature," but "contrary to nature" (Gk. *para physin*), a phrase that is used several times in literature outside the Bible to speak of all kinds of homosexual conduct as something contrary to the natural order of the world. In other words, Paul is not saying in Romans 1:24-27 that some people switched their innate heterosexual urges for contrived homosexual urges, but rather that people exchanged or left behind sexual relations with a true sexual complement (someone of the other sex) to gratify their inward urges for sex with members of the same sex. Paul sees such people as choosing to follow their desires over God-ordained creation structures . . . .[10]

The conclusion for this section on homosexual conduct is as follows:

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[10] *Ibid.*, pp. 2549-50.

> Homosexual conduct of all kinds is consistently viewed as sin in the Bible, and recent reinterpretations of the Bible that have been raised as objections to that view do not give a satisfactory explanation of the words or the context of the relevant verses. Sexual intimacy is to be confined to marriage, and marriage is to be only between one man and one woman, following the pattern established by God in creation. The church should always act with love and compassion toward homosexuals, yet never affirm homosexual conduct as morally right. The gospel of Jesus Christ offers the "good news" of forgiveness of sins and real hope for a transformed life to homosexuals as well as to all sinners.[11]

G. Agreement among evangelical groups

Evangelical churches and organizations widely (and uniformly) agree regarding these standards for sexual morality among leaders.

This agreement among evangelicals becomes evident in the tragic situations where a high-profile leader of a large church or evangelical organization is caught in sexual sin, and consequently dismissed from a leadership position.

For example, televangelist Jim Bakker was forced to resign as head of his organization, PTL, and to leave his nationwide television broadcast on March 19, 1987, because of allegations of sexual misconduct with Jessica Hahn (who claimed that he had raped her), as well as financial misconduct. Bakker allegedly gave Hahn $279,000 to silence her about their

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[11] *Ibid.*, p. 2550.

affair.[12] He was sentenced to 45 years in prison, a term that was eventually reduced.[13]

Also in 1987, Gordon MacDonald resigned from the presidency of InterVarsity Christian Fellowship (a nationwide evangelical ministry to college and university campuses) because of disclosure of an adulterous affair.[14]

In November, 2006, Ted Haggard had to resign as pastor of New Life Church in Colorado Springs, Colorado, and from the presidency of the National Association of Evangelicals, because of media disclosure of his soliciting a male prostitute.[15] He later also admitted to an inappropriate relationship with a 20 year old male volunteer.[16]

While these examples involved evangelical leaders with national visibility, they could be multiplied many times over in stories of individual pastors or youth leaders in local churches and parachurch organizations. (Gordon MacDonald had

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[12] Richard Ostling, "Jim Bakker's Crumbling World," *Time*, December 19, 1988. http://www.time.com/time/magazine/article/0,9171,956551,00.html.

[13] George James, "Bakker's 45 Year Prison Term Set Aside," *New York Times*, February 13, 1991. http://www.nytimes.com/1991/02/13/us/bakker-s-45-year-prison-term-set-aside.html.

[14] Marc Fisher, "Clinton's Pastor with a Past," *Washington Post*, September 28, 1998. http://www.washingtonpost.com/wp-srv/style/daily/clinpastor0928.htm.

[15] "Church Forces Out Haggard for 'Sexually Immoral Conduct,'" *CNN.com*, November 4, 2006. http://www.cnn.com/2006/US/11/03/haggard.allegations/index.html.

[16] "Disgraced Pastor Haggard Admits Second Relationship with Man," *CNN.com*, January 30, 2009. http://www.cnn.com/2009/ US/01/29/lkl.ted.haggard/.

to step down from leadership in a parachurch organization, InterVarsity Christian Fellowship, and Ted Haggard from another parachurch organization, the National Association of Evangelicals.) Sexual misconduct of the type specified in CLS's interpretation of its Statement of Faith regularly disqualifies a person from leadership positions in evangelical churches and organizations. In the vast majority of cases where such a dismissal from leadership has occurred, it has been for heterosexual, not homosexual, relations, but both types have occurred.

H. CLS's belief concerning the Bible leads to its Statement of Faith and its interpretation of the Statement.

The requirement to uphold these standards of belief and conduct is an entirely proper consequence of belief in the Bible as the "inspired Word of God." If CLS believes in the Bible as "the inspired Word of God" and follows the approach to interpreting the Bible most commonly accepted by evangelicals (what is commonly called "grammatical-historical exegesis"), CLS has no other exegetically responsible choice than to uphold its standards.

I. An attempt to compel disobedience to the Word of God

The Hastings College of Law, in attempting to require CLS to accept officers and voting members who violate its biblical standards of sexual morality, is attempting to compel CLS to disobey what it sincerely believes to be the Word of God, and specifically the moral commands of God found in the Bible. Hastings is attempting to compel CLS to recant, and betray its deepest core beliefs.

J. Evangelical Christian churches and organizations cannot comply with such a nondiscrimination policy.

Not only CLS, but all other evangelical organizations which similarly hold the Bible as the inspired Word of God, will find it impossible to comply with a nondiscrimination policy like the one in the case at bar, and thus they will be forced to suffer exclusion from recognized status as a student organization. For orthodox Christians, God's commands are prior to positive law. This is so widely known as to appear in the first paragraph of James Madison's *Memorial and Remonstrance Against Religious Assessments* (1785):

> religion or the duty which we owe to our Creator . . . is unalienable also, because what is here a right towards men, is a duty towards the Creator . . . The duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.[17]

K. Broader implications

The implications of this case go far beyond CLS. If this policy of Hastings College of Law to exclude CLS from recognition as a campus organization is upheld, it will allow every public college and university in the United States to exclude all evangelical Christian organizations (such as Campus Crusade for Christ, InterVarsity Christian Fellowship, the Navigators, the Reformed University Fellowship, Baptist Campus Ministries, and others), from recognition for a similar reason. This will

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[17] http://religiousfreedom.lib.virginia.edu/sacred/Madison_m&r_1785.html.

effectively remove evangelical organizations from state college and university campuses throughout the United States. This would be seen by most evangelicals (15 to 30 percent of the U.S. population) as a deeply troubling result – a policy permitting access to many diverse viewpoints but censoring the evangelical Christian viewpoint.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,

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APPENDIX

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1999 President

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AMICUS CURIAE BRIEF

(15)

No. 08-1371

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IN THE

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Pursuant to Rule 37 of the Supreme Court Rules, the Foundation for Individual Rights in Education ("FIRE") and Students For Liberty ("SFL") submit this brief as *amici curiae* in support of Plaintiff/Petitioner.[1] *Amici* FIRE and SFL join Petitioner in asserting that the United States Court of Appeals for the Ninth Circuit erred in forgoing analysis of Petitioners' expressive association claim, and that allowing the Ninth Circuit's decision to stand would prove disastrous for student groups holding disfavored or minority viewpoints on public campuses.

FIRE is a national, secular, non-partisan, 501(c)(3) non-profit educational and civil liberties organization working to defend and promote individual rights at our nation's colleges and universities. These rights include freedom of speech, legal equality, due process, religious freedom, and sanctity of conscience—the essential qualities of individual liberty and dignity. FIRE believes that, for our nation's colleges and universities to best prepare students for success in our modern liberal democracy, the law must remain clearly and vigorously on the side of student rights. During its more than ten years of existence, FIRE has advocated on behalf of the fundamental liberties of campus organizations in

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

multiple states and on multiple campuses, including the right to freedom of association.

SFL is a national, secular, non-partisan, 501(c)(3) non-profit educational organization dedicated to providing organizational support for students and student organizations devoted to liberty. Founded and operated by college students, SFL defines liberty as encompassing the economic freedom to choose how to provide for one's life; the social freedom to choose how to live one's life; and intellectual and academic freedom. To promote this understanding of liberty, SFL supports student organizations across the ideological spectrum by providing resources and training to campus leaders and student groups.

Both *amici* believe that if not reversed, the Ninth Circuit's opinion will seriously threaten the expressive and associational rights of student groups on campuses across the country, contradicting decades of this Court's precedents and undermining the role of the public university as what this Court has deemed "peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted).

SUMMARY OF ARGUMENT

The fundamental question in this case is straightforward but profoundly important: May belief-based student organizations participate in the life of a public university without being forced to alter or abandon their core beliefs? This question arises in an associational context: May a religious student organization—or any other belief-based organization,

the Christian Legal Society's right to set its own membership policies.

DATED: February, 2010.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CENTER FOR INQUIRY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Center for Inquiry ("CFI") is a nonprofit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of Church and State is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy. The *amicus* submits this brief because the boundaries between government and religion are an essential part of our free society, and because ensuring that viewpoint-neutral laws and policies apply equally to the religious and non-religious alike is critical to maintaining those boundaries.

SUMMARY OF ARGUMENT

James Madison, drafter of the First Amendment, stated in his oft-cited *Remonstrance* that a people asserting freedom of religious belief "cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced [them]."

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

James Madison, *Memorial and Remonstrance Against Religious Assessments* (reprinted in *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 app. at 66 (1947)). Contrary to this admonition, Petitioner, the Christian Legal Society Chapter of University of California, Hastings College of the Law, seeks for religious student organizations the right to deny equal access to classmates who do not accept Petitioner's principles. In the name of religious equality, Petitioner seeks for religious groups a right they would deny secular groups—to receive state funds while discriminating on the basis of religious beliefs and status. Nothing in the Constitution compels this result.

At the outset, it is important to understand the facts involved in this case. For more than fifteen years prior to this litigation, Respondent Hastings College of the Law required that all student organizations seeking official recognition pledge to abide by a non-discrimination policy that prohibits, *inter alia*, exclusion of students from holding voting positions on the basis of a student's religion or sexual orientation. *See* J.A. 220-21.[2] For ten

[2] As Respondent Hastings shows, the policy at issue in this litigation—the "All-Comers Policy"—requires that "a student organization's bylaws . . . provide that its membership is open to all students." Br. of Hastings College of the Law Resp'ts ("Resp. Br.") at 19-23. Here, *amicus* focuses on the constitutionality of a subset of this policy, namely a rule prohibiting discrimination solely on the basis of an enumerated list of characteristics such as race, color, religion, national origin, ancestry, disability, age, sex, or sexual orientation (a "Non-Discrimination Policy" or "Policy"). *Amicus*

years, Petitioner's predecessor complied and was recognized as an official group. J.A. 223-25. In the 2004-2005 school year, however, Petitioner reorganized itself and for the first time sought an exemption—never before requested by or granted to any other student organization—from its obligation to refrain from discrimination on the basis of religion or sexual orientation. J.A. 227-28. Fundamentally, then, this case involves a student group seeking—based solely on the strength of its religious beliefs—an exemption from the well-established boundaries that govern participation in a limited public forum.

Cognizant that this Court has been reluctant to excuse compliance with generally applicable laws on the basis of individual religious beliefs, *see generally Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 876-88 (1990), Petitioner attempts to obtain its exemption through *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). But *Rosenberger* and other limited public forum cases offer little, if any, support to Petitioner. In seeking an exemption, Petitioner ignores that the government is not required to open a limited public forum for all purposes or to any and all comers. To the contrary, this Court has always required that a challenging

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argues that a Non-Discrimination Policy is constitutional, contrary to Petitioner's arguments throughout most of its brief. *See* Br. for Pet'r ("Pet. Br.") at 1-46, 54-58. It is *amicus*' position that arguments sustaining the constitutionality of a Non-Discrimination Policy apply to Hastings' All-Comers Policy.

group meet the threshold recognition requirements applicable to all would-be forum participants before that group can demand viewpoint neutrality.

To be sure, *Rosenberger* requires that a school opening a limited public forum to a particular group manage that forum in a way that is content- and viewpoint-neutral. But the Policy does not discriminate against speech of any kind, religious or non-religious; it applies only to the *conduct* of discriminating. Moreover, even if viewed as targeting speech, the Policy is viewpoint-neutral because it is not justified based upon the viewpoint of the alleged speaker (in this case the group refusing a student); rather, it is justified upon the status of the refused student. Nor does the Policy impose any appreciable burden on Petitioner's ability to convey its message—Petitioner remains free to say what it wants, but is simply barred from discriminating. Finally, should Petitioner feel that either a Non-Discrimination Policy or the All-Comers Policy threatens its existence, it may avail itself of a host of measures to ensure that student applicants do not overtake its message without discriminating on the basis of status or beliefs.

Once the pretense that *Rosenberger* controls this case is eliminated, Petitioner's request for a blanket exemption on the basis of its religious status becomes even more far-fetched. Under Free Exercise jurisprudence, the Policy is plainly neutral towards religion on its face, and is not motivated by bias against, or animus towards, religion. Thus, Petitioner's challenge *a fortiori* fails

the tests articulated in *Smith* and *Locke v. Davey*, 540 U.S. 712 (2004). And, as in *Davey*, the Policy does not impermissibly burden religious beliefs because it does not require Petitioner's members to choose between an act compelled by their beliefs and a government benefit. Finally, Petitioner's invitation to ignore an unbroken line of precedent denying groups exemptions from generally applicable laws based solely on religious beliefs should be rejected because, as this Court has recognized, such exemptions would make every man "a law unto himself," *Smith*, 494 U.S. at 879 (citation omitted), and render our legal system unworkable. Worse, Petitioner's proposed approach—that the exemption benefit only "well-established" religions—would have the unwelcome and untoward consequence of making the federal courts arbiters of which beliefs are bona fide and which are not.

The Constitution neither requires granting Petitioner an exemption from a generally applicable regulation nor confers upon it the right—not enjoyed by any secular group in a limited public forum—to receive state funding while discriminating against students with certain beliefs or of a certain status. The Court should decline Petitioner's invitation both to extend public forum precedent and to misapply Free Exercise principles in order to obtain such an exemption.

ARGUMENT

I. THE POLICY DOES NOT VIOLATE THE FREE SPEECH CLAUSE

Respondents' Policy prohibits all student groups from denying voting membership to a student on the basis of, *inter alia*, that student's religious beliefs or sexual orientation. Because it regulates conduct, not the dissemination of ideas, and imposes a functionally non-existent burden on the exercise of speech, the Policy is consistent with the Free Speech Clause of the First Amendment. Petitioner nevertheless argues that the Policy violates the principles of *Rosenberger*. Petitioner's attempt to extend that case to the easily distinguishable facts here is, in essence, an unabashed effort to obtain—solely on the basis of religious beliefs—a constitutionally mandated exemption from these generally applicable regulations, an exemption not available to secular groups. Cognizant that, as shown in Part II, no such exemption is available under the Free Exercise Clause, Petitioner turns to *Rosenberger* to obtain its exemption. Neither that case nor the Constitution requires one.

A. Petitioner's *Rosenberger* Argument Ignores The 'Otherwise Eligible' Threshold Requirement Of This Court's Limited Public Forum Case Law

In an unbroken line of cases dealing with student group access to limited public fora, the Court has consistently reaffirmed an educational institution's ability to enforce reasonable and generally applicable restrictions.[3] In all of these cases, only if the group was, as an initial matter, "in conformity with the [forum's] requirements," *Healy v. James*, 408 U.S. 169, 184 (1972), did the Court apply constitutional scrutiny to the school's decision to restrict access. Thus, in *Rosenberger* the Court held it an "important consideration" that the group requesting equal access had qualified as a student organization in the first place by complying with "certain procedural requirements." 515 U.S. at 823, 826 (internal citation omitted). Notably, the forum in *Rosenberger* required—as did the forum in *Healy*—that a group, among other things, "pledge not to discriminate in its membership" as a prerequisite to recognition as an official student organization. *See id.* at 823 (internal citation omitted); *see also*

[3] Petitioner glosses over the type of forum at issue in this case, *see* Pet. Br. at 22-23, but it is apparent that Hastings has created a "limited public forum" for use by student organizations, on which reasonable restrictions on access are necessary and permitted, because the forum is not open to a ty or all potential participants, *see* J.A. 219-20, Cert. Pet. App. 8a, 83a.

Healy, 408 U.S. at 184 n.11.[4] The Court thus explicitly limited its holding in *Rosenberger* to regulations "directed against speech *otherwise within* the forum's limitations." 515 U.S. at 830 (emphasis added).

Petitioner pays lip service to the "otherwise eligible" requirement, *see* Pet. Br. at 18, 25-26, but otherwise avoids any discussion of this threshold inquiry. Tellingly, Petitioner altogether ignores analysis of whether *Rosenberger* is applicable and fast-forwards to the nature of the burden it claims to have suffered. *See id.* at 23-26. This cart-before-the-horse approach betrays Petitioner's understanding that it fails to meet *Rosenberger*'s basic requirements.

Under the facts stipulated before the district court, J.A. 213-306, the Policy applies to all student organizations, and no group has ever sought an exemption, *see* J.A. 220-21. Hastings Christian Legal Society ("HCLS"), Petitioner's predecessor,[5] abided by the Policy from its inception at Hastings in 1994 through the end of the 2003-2004 school year; HCLS was thus granted access on equal footing with all other groups.

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[4] *Cf. Widmar v. Vincent*, 454 U.S. 263, 274 n.5 (1981) (noting that a school may "impose reasonable regulations compatible with [its] mission upon the use of its campus and facilities" and that, for example, a university is not required to "make all of its facilities equally available to students and nonstudents alike").

[5] HCLS was also known as the Hastings Christian Fellowship. *See* J.A. 222-23.

J.A. 223-24. Then, during the 2004-2005 school year, Petitioner amended its bylaws and decided that it would no longer abide by the Policy. J.A. 226-28. Petitioner's failure to respect that generally applicable boundary unsurprisingly resulted in its exclusion, and Petitioner cannot be heard to complain about the natural consequences of its own conduct. As the Ninth Circuit succinctly observed, Petitioner knew that participation in the forum was conditioned on "accept[ing] all comers as voting members even if those individuals disagree with the mission of the group." *Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane*, 319 Fed. App'x 645, 645-46 (9th Cir. 2009). No more need be said; the salient point is that Petitioner's reliance on *Healy*, *Rosenberger*, and *Widmar*, *see* Pet. Br. at 21-22, 24-25, is at the outset misplaced because none of those cases involved an organization seeking an exemption from generally applicable threshold procedural requirements, *see, e.g.*, *Rosenberger*, 515 U.S. at 823-26. Hastings has simply "reserv[ed] [its forum] for certain groups," *id.* at 829, namely, groups that abide by its Policy.[6] In light of this,

[6] This reading is consistent with the Court's own analysis of limited public forum cases, such as *Rosenberger* and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). In *Good News Club v. Milford Central School*, the Court characterized those cases as involving prohibitions against "otherwise permissible" activities conducted from a religious viewpoint. 533 U.S. 98, 111-12 (2001). In this case, by contrast, excluding a student on the basis of his or her religious beliefs or sexual orientation is not "otherwise permissible" to student groups—even if they do it for non-religious reasons. *See* J.A. 220-21.

Petitioner's attempt to characterize this case as involving simply the exclusion of a group of religious students is disingenuous. *See* Pet. Br. at 2.

B. The Policy Is Constitutional Even Under *Rosenberger* Because It Is Content- And Viewpoint-Neutral.

Despite this initial shortcoming, Petitioner seeks to extend *Rosenberger* beyond its stated boundaries and use it to analyze generally applicable threshold requirements, such as the Policy, that a school sets for its limited public forum. This analysis also fails.

Under *Rosenberger*, in a limited public forum, a regulation that constitutes content discrimination "may be permissible if it preserves the purposes of that limited forum"; viewpoint discrimination, by contrast, "is presumed impermissible when directed against speech otherwise within the forum's limitations." 515 U.S. at 830. Petitioner's unwavering return to *Rosenberger* is an unavailing effort to fit a square peg into a round hole. The principles of that case are not implicated here because the Policy, unlike those in *Rosenberger* and its companions, is neither content- nor viewpoint-discriminatory.

1. The Policy is Content-Neutral Because It Targets Conduct, Not Speech

First, the Policy is not content-discriminatory because it is "justified without reference to the content of the regulated speech." *Ward v. Rock*

Against Racism, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). In fact, the Policy is justified without reference to speech. Although Petitioner attempts to characterize its exclusion of certain students as speech, the Court has consistently held that antidiscrimination provisions are content-neutral regulations of conduct. In *Roberts v. United States Jaycees*, the Court noted that a statute prohibiting places of public accommodation from denying equal access to voting positions "because of race, color, creed, religion, disability, national origin or sex" was not "aim[ed] at the suppression of speech" or at "distinguish[ing] between prohibited and permitted activity on the basis of viewpoint." 468 U.S. 609, 615, 623 (1984) (citation omitted). In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Court noted that a similar antidiscrimination law "[did] not, on its face, target speech or discriminate on the basis of its content." 515 U.S. 557, 572 (1995). And this was the unanimous holding of the Court in *Wisconsin v. Mitchell*, which challenged a law providing enhanced penalties for acts committed "because of [a person's] race, religion, color, disability, [or] sexual orientation" as an impermissible regulation of speech. 508 U.S. 476, 480, 481 n.1 (1993) (citation omitted). The Court rejected that characterization, holding instead that such laws constitute "permissible content-neutral regulation of conduct." *Id.* at 487; *see also Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (noting that law banning discrimination on the

basis of race regulates conduct, not speech). The Policy is indistinguishable from the anti-discrimination policies of the above-mentioned cases in that it targets only *acts* motivated by bias against people on account of their status. Accordingly, the Policy cannot be said to impermissibly target speech.[7] The Policy is therefore content-neutral and *a fortiori* constitutional under *Rosenberger*.[8]

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[7] Because the Policy plainly targets conduct it must be analyzed under the test established in *United States v. O'Brien*, 391 U.S. 367 (1968), as Respondent Hastings has argued before this Court. *See* Resp. Br. at 28 n.5. In particular, the Policy is unarguably in furtherance of an important governmental interest, is unrelated to the suppression of speech, and imposes only an incidental restriction on alleged First Amendment freedoms. *See O'Brien*, 391 U.S. at 377. The remainder of Part I analyzes why the Policy is consistent with limited public forum cases even if the Court determines that *O'Brien* is inapplicable.

[8] To avoid this straightforward result, Petitioner makes the convoluted argument that its membership rule is speech rather than conduct because it targets the beliefs of a potential applicant. *See* Pet. Br. at 34-36. This argument is easily disposed of in light of *Roberts* and *Mitchell*, which Petitioner tellingly ignores. In *Roberts*, the determination that an antidiscrimination law did not "aim at the suppression of speech" did not turn on whether the group acted on the basis of a targeted person's speech, conduct, or beliefs. *See Roberts*, 468 U.S. at 623. In other words, the anti-gender discrimination provision would not suddenly target speech if the Jaycees attempted to exclude only women with certain viewpoints about their status as women. Similarly, the Court's holding in *Mitchell* that a hate-crime enhancement was content-neutral did not turn on whether Mitchell targeted only people of particular beliefs about their race. Simply put,

2. The Policy is Viewpoint-Neutral Because It Requires Religious and Non-Religious Groups Alike to Refrain from the Same Conduct

Because the Policy is content-neutral it is presumptively viewpoint-neutral: viewpoint discrimination is "a subset or particular instance of the more general phenomenon of content discrimination." *Rosenberger*, 515 U.S. at 830-31 (quoting *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992)).

In any event, even if the Policy does not meet the content-neutrality test—which it does—it plainly meets the viewpoint-neutrality principle reaffirmed in *Lamb's Chapel*, 508 U.S. at 392-93, and in *Rosenberger*. Under this test, a policy is viewpoint-discriminatory "when the specific motivating ideology or the opinion or perspective *of the speaker* is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829 (citation omitted) (emphasis added). Petitioner cannot seriously argue that only a particular kind of student group is, under the Policy, prohibited from excluding students on the basis of religion or sexual orientation. To the contrary, both religious and

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the content-neutrality of an antidiscrimination standard cannot turn on an issue as cosmetic as whether a discriminatory individual targets status, beliefs, or both. In this sense, Petitioner's feeble attempt to recast their exclusionary rule as targeting only homosexual conduct is irrelevant. The conduct is a direct proxy for the *status* the Policy seeks to protect.

secular groups alike are prohibited from denying membership to students based on "whatever views the individuals hold about God, the afterlife, and the like." Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1933 (2006). Likewise, no group may exclude gay members, and no group may exclude straight members—the Policy makes no reference to or distinction based upon a group's motivations for doing so. *See* J.A. 220.

For these reasons, Petitioner's and its *amici's* heavy reliance on *Lamb's Chapel*, *Rosenberger*, and *Good News Club* is beside the point. *See, e.g.*, Pet. Br. at 22-25, 37-38; Br. of *Amici Curiae* States of Michigan in Supp. of Pet'r at 19-24. In *Lamb's Chapel*, for example, the Court dealt with a regulation that prohibited screening a film on school property "*solely because* the [film] dealt with [a] subject from a religious standpoint." 508 U.S. at 394 (emphasis added). In *Rosenberger*, the University of Virginia reimbursed costs of publications discussing issues from a secular viewpoint, but not those covering the same issue from a religious perspective. 515 U.S. at 829, 832. Finally, in *Good News Club* the Court held that a school's policy of prohibiting storytelling from a religious perspective but not a secular standpoint was also impermissible viewpoint discrimination. *See* 533 U.S. at 112.

None of these cases is remotely similar to this case—the Policy does not permit secular groups to discriminate on the basis of religion or sexual orientation any more than it allows religious

groups to do so. Instead, the Policy simply establishes categories upon which a group may not base its decision—in other words the Policy is concerned only with the status of the *applicant*—regardless of an organization's motivations. *See* Volokh, *supra* at 1932-33. That an environmental group is allowed to impede "climate change skeptics [from] conduct[ing] its discussion groups," Pet. Br. at 37, is a *non sequitur*. Petitioner would be allowed to do so under a Non-Discrimination Policy on a religion-neutral basis; conversely, the environmental group would also be prohibited from denying membership to climate change skeptics on the basis of an applicant's religious beliefs.[9] In marked contrast to the petitioner in *Good News Club*, who sought "to address a subject otherwise permitted under the rule . . . from a religious standpoint," 533 U.S. at 109, Petitioner here seeks to engage in *conduct not otherwise permitted* to any group.

To avoid this straightforward result, Petitioner again attempts to warp the meaning of *Rosenberger*, arguing that it is disadvantaged, *vis-à-vis* other student groups, in its ability to control its message by controlling the makeup of its voting membership. *See, e.g.*, Pet. Br. at 38. This argument fails in several key respects. First, it ignores that *Rosenberger* was about a student organization's

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[9] Tellingly, Petitioner abandons any serious argument that the All-Comers Policy is not viewpoint-neutral, *see* Pet. Br. at 51-52, because it is apparent that the environmental group could not impede climate change skeptics at all under the All-Comers Policy.

right of equal access to the benefits of a limited public forum, such as funding, not its ability to control its membership. Nothing in *Rosenberger* or its companion cases, for example, prevents Hastings from requiring that organizations exclude non-students as voting members.[10]

Second, this argument, if accepted, would allow Petitioner to obtain for itself a constitutional right not afforded to any group—namely the right to discriminate on the basis of religious beliefs or sexual orientation and receive state funding to do so. Petitioner admits as much in its brief, overtly stating that non-religious groups should not be exempted from the Policy while requesting such an exemption for itself. *See id.* at 36-37. Neither *Rosenberger* nor the Free Speech Clause should be

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[10] One of Petitioner's *amici*, relying on *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), suggests that WAP would have been within its rights to limit the publication's editors and writers to professed Christians. *See* Br. of *Amicus Curiae* Boy Scouts of America in Supp. of Pet'r at 21-22. But *Amos* held only that the Establishment Clause was not offended by providing a religious exemption to Title VII's prohibition against religious discrimination in employment, not that the exemption was constitutionally required. *See* 483 U.S. at 327-28. Similarly, Petitioner and its *amici* argue that the prohibition against discrimination based on sexual orientation must be evaluated in light of statutes exempting religious organizations from complying with such prohibitions. *See* Pet. Br. at 46. Again, however, this argument erroneously implies that because legislatures may be "solicitous" of "the negative protection accorded [by the Constitution] to religious belief," those statutory exemptions are "constitutionally required." *Smith*, 494 U.S. at 890.

construed to command such an absurd result. To the contrary, *Rosenberger* involved a group seeking a right enjoyed by all other groups: to discuss a subject from their own particular viewpoint. Here, by contrast, Petitioner seeks a right not enjoyed by any group: the right to discriminate on the basis of certain criteria.

Finally, Petitioner's argument erroneously implies that a law is viewpoint-discriminatory simply because it affects one group more than others. This argument has been rejected by the Court. *See, e.g.*, *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) (noting that simply because injunction affected a particular viewpoint did not mean it was "content- or viewpoint-based"); Volokh, *supra* at 1931-33. Were it not so, the Court would have invalidated the statutes at issue in *Roberts* and *Mitchell*, as they unarguably burdened sexist and racist viewpoints more than others.[11]

Petitioner's viewpoint argument boils down to this: the Non-Discrimination Policy is viewpoint-

[11] Nor is Petitioner's argument that it is disproportionately burdened *vis-à-vis* secular groups correct. The Non-Discrimination Policy specifically prohibits a feminist group from rejecting, as an example, 'unrepentant fornicating males' on the basis that such acts oppress women and are thus contrary to the group's views, just as much as it prohibits Petitioner from excluding such males on the basis that it is compelled to do so by its religious beliefs. Simply put, one can think of many secular groups that may wish to reject students with viewpoints tied to their race, gender, or national origin, for example, and those groups are as barred from discriminating on those grounds as religious groups are.

discriminatory because it affects religious organizations more than secular ones, and thus religious groups are constitutionally exempted from complying. Petitioner asks the Court to require neither equal access to the forum regardless of viewpoint, which is protected by *Lamb's Chapel* and *Widmar*, nor equal access to the benefits of the forum regardless of viewpoint, which is protected by *Rosenberger*, but favored treatment in the form of an exemption from the boundaries of the forum. This Court should decline Petitioner's request to extend *Rosenberger* to place a constitutional imprimatur on the discriminatory conduct in which Petitioner seeks to engage.

C. The Policy Is Reasonable And Imposes No Significant Burden On Petitioner's Ability To Express Its Message

Neither a Non-Discrimination Policy nor the All-Comers Policy burdens Petitioner's ability to convey its message. Thus, they are plainly "reasonable in light of the purpose served by the forum." *Rosenberger*, 515 U.S. at 829 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 804-06 (1985)).

1. The Policy is a Reasonable Boundary of the Limited Public Forum Created by Hastings

Even assuming the Policy regulates speech—which it does not, *see supra* Part I.B—it is plainly reasonable. *See Rosenberger*, 515 U.S. at 829.

Hastings has opened a limited public forum to promote "tolerance, cooperation, and learning among students of different backgrounds and viewpoints." J.A. 349. In addition, an important purpose of the student-group forum is to help a student build interpersonal and professional relationships to advance his or her standing in the law school community and thus benefit his or her career after law school. In light of these goals, it is plainly reasonable to desire that all students be granted access to membership and leadership positions—which are particularly important on a student's résumé—regardless of such student's religion, sexual orientation, or beliefs related thereto. *See* Volokh, *supra* at 1926.

2. The Policy Has No Discernible Impact on Petitioner's Ability to Express Its Message

More importantly, even with the Policy in place, Petitioner remains free to say whatever it wants about non-Christian religions and homosexuality. This was not the case in *Rosenberger*, where the student organization, Wide Awake Productions ("WAP")—itself subject to a nondiscrimination policy—was denied funding to publish its newspaper because of the publication's religious viewpoint. *See Rosenberger*, 515 U.S. at 822-23, 827. In *Rosenberger*, "[t]he prohibited perspective . . . resulted in the refusal to make third-party payments." *Id.* at 831. Even more to the point, in *Roberts* the Court recognized the ability of a group

to continue to express its message despite the inclusion into its voting ranks of members it viewed as contrary to that message. *See* 468 U.S. at 627; *see also* Volokh, *supra* at 1930 n.40. There is no reason why petitioner should receive an exemption from that general rule.

Unlike the plaintiffs in *Good News*, *Rosenberger*, *Lamb's Chapel*, and *Widmar*, Petitioner remains free to express its religious message and has not been denied funding for doing so. Petitioner is free to advance its view that homosexuality is morally wrong or, as Petitioner now frames it, that "all acts of sexual conduct outside of God's design for marriage between one man and one woman" are inconsistent with its statement of faith, *see* Pet. Br. at 7 (citation omitted), or to advance its view that non-Christian religions are wayward. Petitioner makes much of the fact that the mission statements of other student groups allegedly allow them to exclude members who, for example, refuse to abide by "the goals set out by the leadership [of the organization]," *id.* at 12-13, 28 (internal citations omitted). This argument is plainly incorrect under the All-Comers Policy, and unavailing to attack a Non-Discrimination Policy, because such a rule does not forbid Petitioner from requiring, for example, that its members attend a weekly prayer service, or that they conduct the Bible classes in a certain way. *Cf. Roberts*, 468 U.S. at 627. Importantly, as Petitioner repeatedly points out, although most other student groups have mission statements requiring members to participate in the

activities of the group, no other student group has run afoul of either rule while enforcing those requirements. *See* J.A. 221-22.

Moreover, as in *Roberts*, it is debatable whether the burden on Petitioner's speech from admitting students that are "unrepentant homosexuals" or that hold certain religious views is great in light of Petitioner's conceded admission of such students into the majority of its activities. *See Roberts*, 468 U.S. at 627; *see also* Pet. Br. at 5, 7-8; J.A. 224, 227, 231, 280; Cert. Pet. App. 88a (Petitioner admits all Hastings students, regardless of religion or sexual orientation, to participate in its meetings and most other activities, including leading prayer groups through at least the 2004-2005 school year). In fact, Petitioner's position unfairly stereotypes all students of a particular sexual orientation or religion as thinking uniformly about their own status or beliefs. *Cf. Roberts*, 468 U.S. at 627-28 (rejecting decisionmaking based on "unsupported generalizations about the relative interests and perspectives of men and women" and "declin[ing] to indulge in the sexual stereotyping that underlies [the argument that] by allowing women to vote, [the law at issue] will change the content or impact of the organization's speech"); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (noting that the Constitution does not condone decisions "based on the assumption that race or ethnicity determines how [people] act or think"). Worse, Petitioner's undue assumption ignores the existence of individuals belonging to

groups such as Jews for Jesus or Exodus International, organizations comprised of individuals of a particular religion or sexual orientation that wish to eschew or change their status for one presumably more aligned with Petitioner's beliefs.[12]

Perhaps recognizing that the Policy does not prevent Petitioner from disseminating whatever viewpoint it likes, Petitioner and its *amici* argue that enforcement of the Policy will expose it to hostile takeover or, stated otherwise, a "heckler's veto" permitting students who disagree with Petitioner to silence its viewpoint. *See, e.g.*, Pet. Br.

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[12] Cognizant that its blanket rejection of students of a particular sexual orientation can be decried as impermissible stereotyping about a person's beliefs, Petitioner recasts its rule as excluding only students that engage in certain acts. *See* Pet. Br. at 6-7. This begs the question of why, if this is the case, Petitioner refused to abide by a Non-Discrimination Policy—which would forbid it from discriminating blindly on the basis of sexual orientation but allow it to do so on the basis of conduct. Petitioner responds that the Non-Discrimination Policy was interpreted to prohibit discrimination based on sexual conduct as well—but offers no support in the record for this assertion. *See id.* at 10-11. More importantly, Petitioner's attempt to recast its admission criteria as not discriminating on the basis of sexual orientation is remarkably audacious given that, as Petitioner acknowledges, CLS's admission criteria bars those engaged in "acts of sexual conduct outside of God's design for marriage between one man and one woman." *Id.* at 7 (internal citation omitted). The fact that Petitioner may discriminate against only *some* gays and lesbians—"unrepentant" ones—does not diminish the fact that Petitioner discriminates against them *because of* their sexual orientation.

at 30-34, 51-53; Br. of *Amici Curiae* Foundation for Individual Rights in Education & Students for Liberty in Supp. of Pet'r at 8-27. They offer a parade of horribles in which students hostile to various organizations' viewpoints have threatened to seize or otherwise interfere with those organizations. *See id.* at 21-23. This alarmist, speculative argument should not provide the basis for constitutionally sanctioned discriminatory conduct.

Despite these scattershot examples, Petitioner offers no concrete reason to believe that it has been or would be subject to such a takeover at Hastings. Additionally, there is no reason to believe that individual preference will fail to attract like-minded members or fail to deter non-concurring ones. As previously noted, Petitioner remains free to use speech to dissuade any type of student from joining and participating in the club.

In addition, there exist many ways in which Petitioner's fear of being overrun can be assuaged. For example, Hastings could put in place policies to ensure that registered student organizations are not subjected to hostile takeovers. It is plainly within Hastings' power to prohibit attempts by hostile students to destroy or substantially interfere with educational opportunities. *See, e.g., Healy*, 408 U.S. at 188-89 (stating that universities are permitted to exclude First Amendment activities that "substantially interfere with the opportunity of other students to obtain an education").

Alternatively, if Petitioner legitimately fears itself exposed to hostile takeover, it could place conditions on voting or holding office in a manner consistent with both a Non-Discrimination and the All-Comers Policy. Petitioner could require its members to regularly attend a certain number of meetings before allowing them to vote, or limit officerships to students in their second year of law school that regularly attended its meetings and participated in Petitioner's activities during their first year. Countless conditions of this nature are possible, with the general effect of ensuring that voting members and officers of Petitioner vote and seek office because they are committed to Petitioner's cause, and not because they desire to overthrow the organization.

In addition to ignoring the endless possibilities that exist to control for hostile takeovers, Petitioner also ignores the fact that there could be a number of reasons why students who do not agree completely with Petitioner's viewpoints might nevertheless wish to fully participate. Students could wish to participate to gain knowledge about religious association from an academic perspective, or because they are intellectually and spiritually curious about the values embodied by Petitioner. In these circumstances, allowing Petitioner the exemption it seeks would thwart one of the purposes of the forum—to provide students with opportunities to pursue diverse academic and social interests outside the classroom. There is no reason to believe that the students described above

would attempt to silence Petitioner's viewpoints or otherwise censor the content of its speech, and there is no reason why these students should not be allowed to participate fully. Indeed, allowing full participation may well result in a student embracing Petitioner's views of Christianity, which result Petitioner would undoubtedly find satisfactory. *See, e.g., Matthew* 28:16-20.

Bearing these considerations in mind, the impact, if any, the Policy has on Petitioner's ability to disseminate its viewpoint and participate in the forum is minimal. Requiring Petitioner to comply with the Policy does not pose the threat, or the burden, that Petitioner claims. Petitioner's speculative hijacking scenarios notwithstanding, the policy is reasonable in light of the purposes of the forum.

In sum, it is apparent that Petitioner's attempt to pigeonhole this case into Free Speech precedent should be rejected. Simply put, none of the considerations present in those cases is at issue here—the Policy regulates conduct, not speech, and is plainly content- and viewpoint-neutral in any event. Petitioner seeks an exemption from the equal treatment principles exemplified in *Rosenberger* and related cases on the basis of its status as a religious organization. Petitioner's complaint is essentially that the Policy hampers its ability to disseminate its viewpoint, which in turn hampers its ability to practice its religion. *See* Pet. Br. at 5-7. This, however, is the classic framework that

precipitates lawsuits challenging state action under the Free Exercise Clause, *see, e.g., Locke v. Davey*, 540 U.S. 712, 720-21 (2004) (collecting cases), and it is that framework, and not *Rosenberger*, that the Court should apply.

II. THE POLICY IS CONSISTENT WITH THIS COURT'S FREE EXERCISE JURISPRUDENCE—WHICH DOES NOT REQUIRE EXEMPTIONS FROM GENERALLY APPLICABLE LAWS ON THE BASIS OF RELIGIOUS BELIEFS

Hastings' Policy does not unconstitutionally infringe on Petitioner's right to the free exercise of religion because it is neutral and generally applicable, even if it incidentally burdens particular exercises of religion, and because it does not violate the principles set forth in *Locke*. The Court has time and again rejected Petitioner's underlying position—that it is entitled to an exemption from a natural regulation on the basis of its religious beliefs—and should do so again here.

A. THE POLICY MEETS THE *SMITH* AND *LOCKE* TESTS

1. The Policy is Neutral and Generally Applicable

Under the straightforward constitutional rule announced in *Smith*, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu*

Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing *Smith*, 494 U.S. 872). This is so because, as a practical matter, the diversity of religious beliefs in a country as large and as free as the United States requires that religious exercise sometimes face limitations imposed by the requirements of civil society. *See Smith*, 494 U.S. at 888. Thus, it is constitutional for the government to require compliance with a neutral law even when it interferes with an individual's religious beliefs. *See id.* at 880.

The initial question under *Smith* is whether the Policy is facially neutral: "the minimum requirement of neutrality is that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533. The Policy does not, on its face, reference, endorse, require, or prohibit any religious practice or group and, in fact, prohibits others from discriminating on the basis of religious practice or belief.

This Court has also recognized that the neutrality principle "protects against governmental hostility which is masked, as well as overt." *Id.* at 534. In *Lukumi*, for example, the legislative and public record and the aggregate effect of regulations prohibiting cruelty to animals revealed that the government had targeted religious animal sacrifices in the practice of Santeria. *Id.* at 533-38, 540-42.[13]

[13] Similarly, the Court has upheld the exclusion of college students undertaking theological or religious studies from state-funded scholarship programs after reviewing the text and history of the laws and the operations of the program and discovering nothing "that suggests animus toward religion." *Locke*, 540 U.S. at 725.

By contrast, Petitioner here presents no evidence—either through the procedural history or the effects or implementation of the Policy—that supports the assertion that the Policy was motivated by masked hostility towards religious groups, or that it was selectively applied only to Petitioner or religious student groups. Nor could it: Hastings has never received any complaints that any other student group has violated the Policy, and no other student group has ever sought an exemption. *See* J.A. 221-22.

Although Petitioner claims that "the Policy disfavors religious groups, as such, by denying them the right that other opinion-based groups enjoy—the right to confine their leadership to students who share their viewpoint," and that this "violates the principle of *Lukumi*," Pet. Br. at 40, the Policy prohibits all recognized groups from discriminating against students on the basis of certain, clearly delineated characteristics. The focus, again, is on the prospective member's religion, not on the religious views of the student group. It is "hard to see [the Policy], then, as 'an attempt to disfavor [a] religion'—or religion generally—'because of the religious ceremonies it commands.'" Volokh, *supra* at 1937 (citing *Lukumi*, 508 U.S. at 532).[14] The law is both facially and substantively neutral.[15]

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[14] Moreover, even if the no-religious discrimination provision of the Policy is held as non-neutral towards religion, the no-sexual orientation discrimination provision would survive, because it burdens religious and non-religious groups

Much like they do in their discussion of Free Speech principles, Petitioner's *amici* attempt to argue that the Policy "singles out" religion merely because it uses that word. *See, e.g.*, Br. *Amici Curiae* of Christian Med. & Dental Ass'ns in Supp. of Pet'r at 38-39. This argument is nonsense; it is tantamount to saying that the government discriminates on the basis of race when it enumerates that trait as a basis upon which an organization may not discriminate. *See also* Volokh, *supra* at 1936-37.

2. The Policy Meets the Principles Outlined in *Locke*

In *Locke*, this Court upheld against a Free Exercise challenge a scholarship program that conditioned eligibility, *inter alia*, upon a student's

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alike. Many religious groups do not view homosexuality as sinful. Moreover, secular groups interested in issues relating to sexual orientation, like Respondent Outlaws, would have to admit students of all sexual orientations into its ranks.

[15] *Smith* also requires a determination of whether the Policy is generally applicable. *See Smith*, 494 U.S. at 879-81. Although the Court has yet to enunciate the exact standard by which general applicability is measured, it at least mandates "that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. As stated in the text, Petitioner has presented no evidence that the Policy is not generally applicable—both because it applies to all campus organizations, regardless of their religious content, and because Petitioner is the only student group to have ever sought exemption under the Policy.

certification that he or she would not pursue a degree in theology. The Court noted that because the program "impose[d] neither criminal nor civil sanctions on any type of religious service or rite," and neither "den[ied] to ministers the right to participate in the political affairs of the community" nor "require[d] students to choose between their religious beliefs and receiving a government benefit," it did not violate the Free Exercise Clause. *Locke*, 540 U.S. at 720-21 (citation omitted). Petitioners do not dispute that the Policy neither imposes sanctions nor denies them participation in the political affairs of the community.

Petitioner cannot seriously contend that the Policy requires students to choose between their religious beliefs and receiving a government benefit any more than the policy in *Locke* did. To be sure, Davey could not have benefited from the scholarship and simultaneously studied theology—but he remained free to believe whatever he wished free from government interference. Here, Petitioner may not benefit from the limited public forum and simultaneously, for example, conduct Bible classes separate from an unrepentant gay or lesbian or unmarried but sexually active student. That said, Petitioner remains free to hold any religious belief it wants. This distinction is critical as it embodies the Court's recognition that the Free Exercise Clause is about what the government may not do, not what a person can extract from the government. *Cf. Bowen v. Roy*, 476 U.S. 693, 699 (1986) ("[n]ever . . . has the Court interpreted the First Amendment

to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development" (emphasis in original)).

Nor is this case like the unemployment benefit denial cases the Court distinguished in *Locke*. *See Locke*, 540 U.S. at 721; *see, e.g., Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). In those cases, the unemployed person was, generally speaking, unwillingly forced to renounce his or her religious beliefs or risk denial of unemployment benefits. Here Petitioner is not faced with this dichotomy because, as it has sought entry to a government facility (or scholarship, as in *Locke*), Petitioner has imposed this choice upon itself. *See, e.g., Bowen*, 476 U.S. at 703 (requiring that welfare applicants provide a social security number does not "compel" applicants "to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons" because "it is [the applicant] who seek[s] benefits from the Government"). Another distinction is germane here: in the unemployment cases the individual's clash with the government was compelled by his or her religious beliefs, for example the individual was compelled to not work on a Sabbath, *see Sherbert*, 374 U.S. at 400-01, which resulted in direct conflict with the government. In *Locke*, by contrast, Davey was not compelled to pursue a degree in theology; rather,

he was inspired to do so by his beliefs. *See* Jesse R. Merriam, *Finding a Ceiling in a Circular Room: Locke v. Davey, Federalism, and Religious Neutrality*, 16 TEMP. POL. & CIV. RTS. L. REV. 103, 121 (2006). In the same way, Petitioner's members are not *compelled* by their religion to form *student* groups *in law schools* in order to exclude other religions and persons who engage in certain acts. They have simply been inspired to do so and remain free to form, and indeed have successfully formed and maintained, a group without government assistance, just as Davey remained free to pursue a religious degree.

Finally, as this Court has noted, the unemployment-benefit cases can be easily distinguished because they involved the government's case-by-case determination that a particular religious belief was not a worthy reason to become unemployed. In other words, the programs' "eligibility criteria invite[d] consideration of the particular circumstances behind an applicant's unemployment." *Smith*, 494 U.S. at 884; *see also* Merriam, *supra* at 122. In *Locke* this was not so: the government did not judge an application based on the merits of a candidate's religion—it simply refused to fund a "distinct category of instruction." 540 U.S. at 721. This case is even easier than *Locke*, as the Policy does not single out religion at all; it simply refuses to fund a distinct category of conduct—conduct that the Policy deems impermissible—without reference to any potential religious motivation.

B. Petitioner Has No Constitutional Right To An Exemption From The Policy On The Basis Of The Religious Beliefs Of Its Members

Because the Policy easily meets the neutrality principles of *Smith* and *Locke*, Petitioner's Free Exercise argument is, in essence, that it is constitutionally entitled to exemptions from neutral laws on the basis of its religious status alone. However, a religious believer has no absolute right to an exemption from "an otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 878-79. In other words, "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." *Id.* at 879 (quoting *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594-95 (1940)). The Court repeated this admonition a third time in *Smith*, explicitly refusing to hold "that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself . . . be free from governmental regulation." *Id.* at 882.

This Court has consistently declined invitations to grant religious groups exemptions from generally applicable laws even when the burden the law imposed on that group's ability to exercise their religion was much more substantial than the burden here. In *Bowen*, a couple believed that the use of their daughter's social security number in certain governmental administrative procedures

would "'rob the spirit' of [their] daughter and prevent her from attaining greater spiritual power." 476 U.S. at 696 (internal citation omitted). In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), a Native American tribe claimed that the construction of a road on their land would prevent them from effectively engaging in spiritual ceremonies necessary for their religion. *Id.* at 442. In both *Lyng* and *Bowen*, the Court denied the requests for religious-based exemptions even though it found that "the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs." *Id.* at 449. Here, as noted, the burden on Petitioner's ability to hold and exercise its religious beliefs is non-existent. *See supra* Part II.A.2.

The *Smith* respondents unsuccessfully argued that their use of peyote—necessary to their basic religious ceremonies—should not violate criminal statutes prohibiting peyote use. 494 U.S. at 878. As the tribe did in *Smith*, Petitioner here:

> contend[s] that [its] religious motivation . . . places [it] beyond the reach of a . . . law that is not specifically directed at [its] religious practice, and that is concededly constitutional as applied to those who [undertake such actions] for other reasons. [It] assert[s], in other words, that 'prohibiting the free exercise [of religion]' includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance

> of an act that his religious belief forbids (or requires).

Id. (alteration to Constitutional text in original). The Court rejected this argument in *Smith* and should do so here.

For similar reasons, *Watson v. Jones*, 80 U.S. 679 (1871) and *Serbian Eastern Orthodox Diocese for United States of America & Canada v. Milivojevich*, 426 U.S. 696 (1976) do not support an argument that Petitioner has an absolute right of religious association free from any government regulation. *See* Pet. Br. at 40-41. These cases stand for the unremarkable proposition that when "hierarchical religious organizations . . . establish their own rules and regulations for internal discipline and government, and . . . create tribunals for adjudicating disputes over these matters . . . the Constitution requires that civil courts accept their decisions as binding upon them." *Milivojevich*, 426 U.S. at 724-25. Thus, these cases are wholly inapplicable: Petitioner is neither a hierarchical religious organization nor a Church or organized religious sect that sought no benefit or funding from the government. Petitioner is a student group seeking access to a limited public forum. That Petitioner makes this argument demonstrates that its ultimate goal is to obtain an exemption from civil law nondiscrimination provisions—exemptions not available to any other group—based solely on its religious nature. *See also Locke*, 540 U.S. at 727 (Scalia, J., dissenting) (citing *Lyng* as an example of a religious group impermissibly

seeking an exemption solely on the basis of its religious beliefs).

To hold that Petitioner is entitled to the exemption it seeks would invite courts to create a presumption in favor of unconstitutionality every time a law incidentally burdened the free exercise of a religion. This would grind enforcement of our civil system of laws to a halt, transforming an individual, "by virtue of his beliefs, '[into] a law unto himself.'" *Smith*, 494 U.S. at 885 (citation omitted). Specifically, it would exempt religious organizations from:

> almost every conceivable kind [of civic duty]—ranging from compulsory military service, to the payment of taxes; to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.

Id. at 888-89 (citations omitted). As the Court succinctly wrote in *Smith*, "[t]he First Amendment's protection of religious liberty does not require this." *Id.* at 889.

Cognizant that the Court has proven unwaveringly reluctant to allow such a chaotic result, Petitioner attempts to subtly limit the reach of its request for an exemption to "well-established" religions. Pet.

Br. at 45. Under Petitioner's view of the law, "a religious group with a *well-established* set of convictions," *id.* (emphasis added), has the *constitutional* right to discriminate and receive state funding to do so. Petitioner's proposed rule, however, invites more problems than it avoids, as it puts the courts in the business of determining which beliefs are well-established and which are merely added to a creed to gain exemption from a particular law. This approach runs contrary to decades of precedent noting that it is not "appropriate for judges to determine the 'centrality' of religious beliefs before applying a . . . test in the free exercise field" because this is "akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'" *Smith*, 494 U.S. at 886-87 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982)).[16] *See also Lyng*, 485 U.S. at 449 (the Court will not "determine the truth of the underlying beliefs" that prompted the religious objections at issue in the case). *Cf. Widmar v. Vincent*, 454 U.S. 263, 270 n.6 (1981) (noting that

[16] One of Petitioner's *amici* overtly requests a broad exemption from nondiscrimination provisions for religious groups, without any apparent limit to the type of nondiscrimination provision from which it would be exempted. *See* Br. of *Amici Curiae* Ass'n of Christian Sch. Int'l in Supp. of Pet'r at 27-41. The proposed exemption is limited only by the amorphous question of whether an organization is "operated primarily for bona fide religious purposes." *Id.* at 39. For the reasons stated in the text, this approach is impermissible as it would put the courts in the business of determining which religious purposes are bona fide or "plausibl[y] connect[ed]" to an organization's mission. *Id.* at 40.

attempts by federal courts to draw distinctions between what religious speech acts constitute worship "would tend inevitably to entangle the State with religion in a manner forbidden by [the Court's] cases").

Of course, it is no answer that many states, sensible to the array of varied religious convictions in this country, have granted such exemptions. As the Court wrote in *Smith*, "to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts." *Smith*, 490 U.S. at 890; *see also supra* note 11. Petitioner's request that its newly-found exemption be limited to a certain as-of-yet unknown type of religious group provides a further reason to deny the exemption.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8,856 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 15, 2010.

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AMICUS CURIAE BRIEF

(22)

No. 08-1371

In The Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF CHRISTIAN MEDICAL AND DENTAL ASSOCIATIONS, BETA UPSILON CHI, AND OFFICERS OF VARIOUS CHRISTIAN LEGAL SOCIETY STUDENT CHAPTERS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici include Present and Former Christian Legal Society ("CLS") officers at the University of Montana, the University of Idaho, Florida State University, the University of Iowa, Ohio State University, Arizona State University, the University of Toledo, Washburn University, and Southern Illinois University; Beta Upsilon Chi ("BYX"), an all-male Christian fraternity on college campuses throughout the nation; and the Christian Medical and Dental Associations ("CMDA"), which has student chapters on college campuses throughout the nation. *Amici* are concerned that identifiably Christian student groups are increasingly facing opposition from college administrations, despite this Court's best efforts to curtail such animus. *See Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). Anti-discrimination requirements for student organizations have been used to restrict the religious activity of Christian student groups; CLS chapters have been facing this problem since

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[1] This brief was authored by *Amici* and its counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *Amici* or its counsel has made any monetary contribution to the preparation or submission of this brief. *Amici* has the consent of the parties to file this brief. Letters indicating their consent are being submitted with this brief.

1994.[2] Such requirements, when applied as Hastings applied its policies in the instant case, effectively regulate what organizations, and the students comprising them, may profess to believe. *Amici* have been struggling to maintain their beliefs while complying with the demands of their respective universities. In most cases, *Amici* have been able to maintain their doctrinal identity and continue to exist as a legitimate student group on campus, based in large part on the precedents already forged by this Court. In a few cases, resolution of the conflict has proven elusive. *Amici* file this brief to explain their struggle for recognition and legitimacy without compromising religious views that require adherence to some basic principles of professed faith for voting membership and office in a Christian organization.

(1.) In 2006, students at the University of Montana ("UM") formed a CLS chapter and sought official recognition.[3] The Student Bar Association ("SBA"), which held the authority to recognize student groups, objected to the formation of a CLS chapter and sought

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[2] Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369, 369-70 (1994); Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 669-70 (1996).

[3] The facts from the following cases are all drawn from the Record materials in each case.

an opinion from UM's General Counsel on whether it could deny the group formal recognition. The General Counsel stated in an email to the chapter advisor: "[i]n atending [sic] two national conferences on this my university colleagues and I conclude that free exercise and freedom of association considerations override any contrary anti-dfiscrimination [sic] consuiderations [sic] in this area and UM intends to follow this direction." The SBA recognized CLS and allocated funds to CLS from student fees. Per its bylaws, the SBA sent its budget, which included funds to CLS, to the student body, a step that has always been a formality. But, amid outrage by both students and faculty over the recognition of CLS, the ratification failed. The SBA then took up CLS's recognition again and decided to derecognize the organization on the basis of sexual-orientation discrimination, although it determined CLS did not engage in religious discrimination. The SBA presented a new budget to the student body, which did not include CLS, and the budget was ratified.

UM stipulated that it considers a group's "popularity" and other viewpoint-discriminatory factors in assessing funding. CLS asserted associational standing for its members, who pay student fees to challenge this system; the court, however, rejected CLS's argument, stating that since CLS was not recognized, it could not challenge the viewpoint-discriminatory funding system. *Christian Legal Soc'y v. Eck*, 625 F. Supp. 2d 1026 (D. Mont. 2009), appeal docketed, No. 09-35581 (9th Cir. June 18, 2009).

UM officials conceded that the voting members and officers of a student organization control the group's voice, that a change in the views of the leaders would change the group's expression, and that organizations they were involved in would have been different if they had been leaders. Some Defendants additionally stated that they would view a group promoting abstinence whose members were not abstinent as hypocritical.

CLS obtained official recognition from the main campus, since its nondiscrimination policy only prohibited "illegal" discrimination. During CLS's application for recognition by the main campus, a UM official applauded CLS's clear membership and officer policies, stating that at least one UM student group's lax membership and leadership policies led to its takeover by outsiders.

(2.) Southern Illinois University ("SIU") derecognized CLS after a student who neither attended a meeting nor expressed an interest in becoming a member of the organization complained to the administration. Although SIU derecognized CLS, it did not derecognize other student organizations that restricted membership to those who affirm the group's ideology. For example, the Muslim Student Association's constitution stated that membership was open to "all Muslims." CLS sought relief in federal court and won a favorable outcome. *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006). After the Seventh Circuit's decision, SIU revised its nondiscrimination policy to state that "[student organizations] founded to promote sincerely held religious

beliefs will not be denied registration solely because they limit membership or leadership positions solely to students who share and conduct themselves according to the same sincerely held religious beliefs."

(3.) Arizona State University ("ASU") denied CLS formal recognition because the CLS student officer could not sign the form, under penalty of perjury and risk of expulsion for a false statement, agreeing that "[m]embership and all privileges, including voting and officer positions, must be extended to all students without regard to," *inter alia*, "creed" and "sexual orientation." CLS explained its Statement of Faith requirements, but ASU insisted that it must sign the form. ASU, however, was replete with groups that "discriminated" on some basis, including Progression, a gay rights group, that stated a strong preference for a gay or lesbian advisor; the Baha'i Campus Association, which limited officer positions to members of the Baha'i faith; the Muslim Students' Association, which limited membership to Muslims and required one officer to be female; the Ms. Indian ASU Pageant Committee, which required participants to be at least one-quarter Native American; and numerous other Christian student groups with policies like CLS. ASU argued that the nondiscrimination policy it was applying to CLS, and seemingly no one else, furthered the University's "mission" to communicate disapproval of discrimination.

CLS filed suit, and the last business day before the trial was to begin, ASU expressed an interest in settling the case. *Christian Legal Soc'y v. Crow*, No.

04-2572 (D. Ariz. Nov. 17, 2004). The settlement agreement provided that "religious organizations will not be denied registration solely because they limit membership or leadership positions to students who share the same religious beliefs" and that "[t]he beliefs and practices of the Christian Legal Society at ASU that any sexual conduct, whether heterosexual or homosexual, outside of a traditional marriage is morally wrong, do not violate the sexual orientation provision in the non-discrimination policies of the University as they relate to registration of student organizations."

(4.) Washburn University ("WU") derecognized CLS after a Mormon student complained that he was not allowed to lead the CLS Bible studies. The student admitted that he could not sign CLS's Statement of Faith in good conscience due to theological differences. After several months of litigation, WU decided to exempt religious groups from the religion portion of the nondiscrimination policy. *Christian Legal Soc'y v. Farley,* No. 04-4120 (D. Kan. Sept. 16, 2004).

(5.) At Ohio State University ("OSU"), individuals associated with Outlaw, a student group advocating for gay and lesbian rights, approached the CLS chapter president to inquire whether non-Christians or homosexuals could be members or officers of CLS. He responded that CLS did not exclude anyone on the basis of sexual orientation, but that all voting members and leaders had to affirm the Statement of Faith, which prohibited sexual conduct outside of marriage. Outlaw challenged CLS's recognition,

claiming that CLS discriminated on the basis of sexual orientation and religion. As a result of the complaint, OSU derecognized CLS; the resulting suit was *Christian Legal Society v. Holbrook,* No. 04-197 (S.D. Ohio 2004). After several months of consideration of the constitutional issues, OSU amended its non-discrimination policy to include the following: "A student organization formed to foster or affirm the sincerely held religious beliefs of its members may adopt a nondiscrimination statement that is consistent with those beliefs."

(6.) At the University of Toledo, CLS was derecognized because its constitution contained Bible verses and allegedly violated the nondiscrimination rule. CLS had to sue before Toledo would apply its already existing exemption, previously applied to CLS, providing that "organizations whose aims are primarily sectarian" could require "religious qualifications." *Christian Legal Soc'y v. Johnson,* No. 05-7126 (N.D. Ohio Jun. 16, 2005).

(7.) At the University of Minnesota ("UMN"), CLS was told that its Statement of Faith violated the school's nondiscrimination policy. After seven months, UMN agreed to let CLS operate on campus, and its General Counsel stated in a letter to CLS that "[r]egistered student group status will not be withheld from any student group on the ground that the group's constitution contains a statement of faith or religious principles to which officers and voting

members of the group are expected or required to subscribe."[4]

(8.) At the University of Idaho, CLS was denied student activity funding by the SBA on the ground that it "discriminated" on the basis of religion. On appeal, the SBA Judiciary held in a ten-page opinion that CLS's policies were not "invidious" and therefore not "discrimination" within the commonly understood meaning of the term.

Many other CLS chapters have faced similar issues obtaining or maintaining official recognition, although each ended with the University ultimately affirming the groups' rights. The list includes, but is not limited to, the University of Michigan, Florida State University, the University of Oklahoma, the University of Illinois, the University of Wisconsin, and the University of Iowa.

Beta Upsilon Chi ("BYX"), also known as Brothers Under Christ, is a national Christian fraternity founded in 1985. It is the largest Christian fraternity in the United States, existing at twenty-four universities across twelve states.

(1.) In 2007, the University of Florida ("UF") refused to recognize BYX on the basis that the fraternity did not allow women to join and was not

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[4] Paulsen, *supra* n.2, at 672 n.41.

affiliated with the interfraternity council where it could claim an exemption. BYX wished to register as a student organization, and not as a fraternity, since it wanted to separate itself from the fraternity social scene, which often includes conduct that is counter to Christian teachings. BYX decided to formally affiliate its chapter with a Christian sorority, Theta Alpha, which satisfied the University's concern over sex discrimination. However, UF still refused to officially recognize BYX, now arguing that the group engaged in religious discrimination. BYX filed suit in October 2007; in May 2008, the Eleventh Circuit issued a preliminary injunction against UF, pending appeal. *Beta Upsilon Chi v. Machen*, No. 08-13332 (11th Cir. Jul. 30, 2008). In 2009, one month after oral argument, UF modified its non-discrimination policy by exempting student organizations "whose primary purpose is religious," mooting the case. *Beta Upsilon Chi v. Machen*, 586 F.3d 908 (11th Cir. 2009).

(2.) The University of Georgia ("UGA") claimed that BYX engaged in religious discrimination since it required its members and officers to affirm the Christian faith. After BYX filed suit, UGA amended its policies to exempt "religious student organizations." *Beta Upsilon Chi v. Adams*, No. 06-104 (M.D. Ga. 2006). UGA's decision was in compliance with a Georgia Attorney General Opinion determining that it would violate the First Amendment for Georgia Tech to deny recognition to another religious student group because it limits its voting members and

officers to those who share its religious beliefs. Ga. Op. Att'y Gen. 97-32 (1997).

BYX has had similar problems with Auburn University, Louisiana State University, and several other schools.

The Christian Medical & Dental Associations ("CMDA"), founded in 1931, provides a public voice for Christian healthcare professionals and students. With a current membership of more than 15,000, CMDA promotes positions and addresses policies on healthcare issues, conducts overseas medical evangelism projects, provides Third World missionary doctors with continuing educational resources, and sponsors student ministries in medical and dental schools.

At the University of Wisconsin ("UW"), CMDA was not allowed to lead Bible studies in campus dorms or participate in the full range of campus activities because of the group's religious identity. After six months of debate, the Board of Regents at UW voted to protect the religious liberty of students, enabling CMDA to enjoy the same rights as other campus organizations.

CMDA has also had to lobby the governing bodies at the University of Michigan, Ohio State University, Virginia Tech, and Southern Illinois University to protect its right to require the group's voting members and leaders to affirm Christian beliefs and conduct. Each university ultimately agreed to a resolution favorable to CMDA.

If the Court affirms the decision below, litigation on these important religious liberty issues will increase sharply, and many student led ministries such as *Amici*, which are safe havens for many students of faith, will disappear.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case poses the question whether a student group organized around religious beliefs will be able to ensure these beliefs are shared by its leaders and voting members, and still be able to participate in a program at a public educational institution designed to encourage speech from a wide range of student groups.

The University of California-Hastings Law School ("Hastings") denied official recognition to the school's Christian Legal Society chapter ("CLS") on the ground that CLS committed religious discrimination and sexual-orientation discrimination, respectively, by requiring that officers and voting members (a) subscribe to a statement of Christian faith and (b) refrain from engaging in or advocating sexual conduct outside of marriage between one man and one woman. The denial of official recognition excluded CLS from various access available to all other student organizations—including numerous channels for communicating with Hastings students, and funds provided from student-activity fees—and even left

CLS's right to meet on campus subject to the sufferance of Hastings administrators.

CLS claims, and we agree, that these disabilities violated its First Amendment rights: (1) the right to free speech and to freedom from viewpoint discrimination in a forum for speech activities, (2) the right to make associational decisions concerning leaders and members to preserve its ability to express its beliefs, and (3) the right under the Free Exercise Clause not to suffer a disability because its beliefs, actions, or nature are religious.

In this brief we focus on two key points in this case. On both issues we expand on petitioner's arguments and respond to errors by the district court. But in addition, this Court may be urged to uphold the exclusion of CLS on the basis of the analysis by a prominent constitutional scholar, Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919 (2006) (hereinafter "Volokh"). Professor Volokh's article also addresses the two points we discuss, and so we answer his arguments.

The first point concerns a group's right under the doctrine of expressive association to preserve its ability to maintain and express its beliefs. There can be little doubt that CLS exercised this right in requiring statements of faith, and standards of conduct directly tied to its beliefs, from prospective leaders and voting members, and that holding CLS civilly liable for its action would be unconstitutional.

The point we emphasize is that this right also applies when an expressive student group seeks access to a forum designed to encourage expression by student groups. If a group should be able to express its beliefs in such a forum, it must also be able to exercise the crucial right of ensuring that those who lead it share those beliefs.

The second point concerns the requirement of government neutrality among organizations' viewpoints. This requirement unquestionably governs a university's rules in a forum for expression among student groups. The point we emphasize is that the exclusion of CLS for religious "discrimination" singled out religious viewpoints alone among all the viewpoints that animate idea-oriented groups. Because "religion" is the only prohibited basis for action, under Hastings' policy, that is itself a belief, religious views are the only animating beliefs that a group cannot set as criteria for members and leaders—and religious groups are the only ones that cannot preserve their animating views in this way. This discrimination against religious viewpoints appears both on the face of Hastings' written policy and in its use to exclude CLS. It is not, we will show, merely the incidental impact of a neutral rule.

For essentially the same reasons that the exclusion of CLS was viewpoint discriminatory under the Free Speech Clause, it also singled out religious

beliefs, activity, and organizations for exclusion and thus violated the Free Exercise Clause.

ARGUMENT

To set the context for our constitutional arguments, we first want to emphasize two points about CLS's actions in this case.

First, CLS's actions are tightly tied to its clearly-articulated beliefs and to its ability to maintain and express those beliefs. It is undisputed that CLS opens its meetings and activities to all students, Pet. App. 12a, and applies limits only to those who can affect the organization's beliefs and actions: officers and voting members (who elect officers, vote on policies, and lead the Bible studies that are the group's "signature" expression of belief). Pet. Br. 5. That CLS's Statement of Faith is crucial to its identity as a religious organization should go without saying. But its standard concerning sexual conduct also ties closely to the belief, clearly articulated by the national CLS organization, that Scripture condemns intimate sexual conduct outside of marriage between a man and woman. CLS's standards are directed at "unrepentant" extramarital conduct and the "advocacy" of extramarital conduct, both of which involve belief.

Second, because the term "discrimination" has negative connotations, it should be emphasized that the "discrimination" in which CLS engaged is simply

the natural, ordinary means by which a bona fide religious group gathers members around shared beliefs. As Justice Brennan recognized, "[d]etermining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is . . . a means by which a religious community defines itself." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). And religious groups share this feature with other organizations that express shared beliefs and require that leaders and members share those beliefs. Thus, when a group exists to engage in religious worship and expression, as CLS unquestionably does, its use of religious criteria is not invidious. Instead, it is frequently protected by statutes that exempt religious organizations—in their religious activities, at least—from both religious-nondiscrimination and sexual-orientation-nondiscrimination laws. See Pet. Br. 46-47.

I. CLS's Expressive-Association Rights to Choose Its Leaders and Voting Members May Not Be Violated by Excluding It from Access to a Public University Forum for Student Group Speech.

CLS was told in this case that it cannot set the criteria that its officers and its voting members share its religious beliefs and abide by standards of sexual conduct derived from those beliefs. Such a restriction on CLS, if imposed as a coercive regulation, unquestionably violates the right to associate for expressive

purposes protected by the First Amendment. See Pet. Br. 26-36; *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (right to dismiss scoutmaster whose conduct and advocacy conflicted with organization's moral beliefs); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 575 (1995) (right of private parade organizers to exclude group that would express a point of view the organizers "cho[se] . . . not to propound"); see also, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together.")

Indeed, the underlying right is even more unquestionable here than in *Dale* and *Hurley*. See Pet. Br. 45-46. Those cases raised questions whether the organizations had articulated any moral stance on sexuality and whether their programs (scouting activities, a parade) operated mostly independently of such stances. Here the question is whether a bona fide religious organization with clearly-articulated faith statements concerning doctrinal beliefs and proper sexual conduct would be significantly burdened if it had to accept leaders and voting members who do not adhere to the beliefs or the standards of conduct. As the Seventh Circuit noted, "[t]o ask this question is very nearly to answer it." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 862 (7th Cir. 2006).

Nevertheless, the district court held the right of expressive association inapplicable because "Hastings is not directly ordering CLS to admit certain students" but is merely denying CLS the forms of access permitted to recognized student groups. Pet. App. 42a. In the court's view, *Dale*, *Roberts*, and *Hurley* apply only to coercive regulation, not to exclusion from facilities generally opened for student expression. *Id.*

Professor Volokh's article, on which respondents may also rely, takes the same position. He begins with the general principle that the government "need not subsidize the exercise of constitutional rights, even when it subsidizes other analogous behavior." Volokh at 1924. He then proceeds to treat access to a forum for student speech—whether access to classrooms, communication channels, or funding—as a "subsidy" equivalent to every other government subsidy from tax exemptions to public-school funding to funding of medical care or public-advocacy campaigns. *Id.* at 1924-1926. Professor Volokh acknowledges two exceptions to the general rule: the government may not discriminate by viewpoint in a program of benefits to speech, and it generally may not discriminate against religion in benefits programs. *Id.* at 1928, 1929. But he rejects any exception for the expressive-association right to choose leaders and members: government can refuse to "subsidize" it.

As a result, under this analysis there is no difference between a university excluding a Baptist student group from generally-available meeting rooms

because the group limits leadership to Baptists, and a state deciding to fund public schools but not private schools (see *id.* at 1926, 1925). Because a speech forum is just another subsidy, both decisions are equally applications of the principle that the government may generally refuse to subsidize constitutionally protected behavior even when it subsidizes alternatives. And no matter how central a religious group's selection of religious leaders is to its identity, this remains an associational choice that a university can refuse to "subsidize" even to the point of withholding meeting rooms or access to bulletin boards and e-mail lists.

These arguments are fundamentally mistaken. A group's First Amendment associational right to choose leaders and members who adhere to its beliefs should be protected not just from coercive regulation, but also from infringement through exclusion from a forum for speech. It should be protected because of the importance to the First Amendment of both (1) forums for speech by private groups and (2) associational choices by private groups concerning leaders and members.

A. Denial of Equal Access to a Forum for Speech Is a Serious Imposition.

First, one cannot dismiss as a "subsidy" a student organization's right of equal access to channels for student speech at a public university. Exclusion from such channels imposes a "prior restraint" on speech,

Widmar v. Vincent, 454 U.S. 263, 270 n.7 (1981); *Healy v. James*, 408 U.S. 169, 184 (1972); and it does so in an institution that is "peculiarly the 'marketplace of ideas.'" *Id.* at 180; *Widmar*, 454 U.S. at 267 n.5. Accordingly, when the government has opened a forum for expression, to exclude a particular expressive student organization imposes a significant burden on it. "A fundamental tenet of our Constitution is that the government is subject to constraints which private persons are not. The public forum doctrine vindicates that principle by recognizing limits on the government's control over speech activities on property suitable for free expression." *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 696 (1992) (Kennedy, J., concurring in the judgment).

Thus, this Court held in *Healy* that a university presumptively violated the First Amendment freedom of association when it refused to recognize a chapter of Students for a Democratic Society (SDS). "There can be no doubt," the Court said, "that denial of official recognition, without justification, to college organizations burdens or abridges that associational right." *Id.* at 181. *Healy* cited the same burdens on the SDS chapter that Hastings' denial of recognition has imposed on CLS. It was not just that the SDS chapter could not meet on campus; its "associational interests also were circumscribed by the denial of the use of campus bulletin boards and the school newspaper," from which CLS has also been excluded. 408 U.S. at 181 (such restrictions hamper a group's ability to "remain a viable entity in a campus community" by

"communicating with [new] students" and its "ability to participate in the intellectual give and take of campus debate"). The district court here downplayed the restrictions that CLS suffered (see Pet. App. 47a-49a); but we agree with petitioner that the burdens were severe. See Pet. Br. 23-25.

The importance of expressive rights in forums for student organizations is shown not only in *Healy*, but in the long line of this Court's decisions requiring equal access for student groups' expression of religious viewpoints. *Widmar, supra*; *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001).

This Court has many times explained the difference between government-created forums for private speech and other kinds of government benefits. When government adopts and subsidizes messages as its own, it necessarily favors some viewpoints over others. But speech principles apply far more strictly "when the University [or other government agency] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834; *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (same). In the latter category, "the University may not discriminate based on the viewpoint of private persons whose speech it facilitates." *Rosenberger*, 515 U.S. at 834.

There is no doubt that Hastings created such a forum here.

When the government opens a forum to encourage expression by student groups, freedom of expression extends to protecting associational choices that a student group makes in order to preserve and express its views. We discuss this point in the next two sections.

B. Denial of a Group's Expressive-Association Right to Ensure Its Leaders and Members Share Its Beliefs Is a Serious Imposition.

It is an especially serious imposition to deny an expressive group its ability to ensure that its leaders and voting members share its beliefs. The Court has recognized that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association" and that the intrusion may seriously hamper the group's ability to continue to express its views. *Roberts*, 468 U.S. at 623; see also *Dale, supra*. Such interference with a key aspect of expression should not serve as the basis for exclusion from the benefits of a forum for expression.

This argument stands on its own, but it finds further support in *Velazquez, supra*, where the Court held that a denial of governmental benefits violates the First Amendment when the government "seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual

religious, political, or otherwise—refuse as voting members those whose avowed viewpoints are antithetical to the organization's central tenets? Both the First Amendment and this Court's longstanding precedents make clear that the answer must be yes.

As this Court has repeatedly recognized, the First Amendment implicitly guarantees citizens the right to join together their voices and associate with those of like mind in furtherance of a wide variety of purposes. Consistent with the right to associate with others around a particular set of beliefs is an accompanying right to choose *not* to associate, and to do so without undue governmental interference. This Court has further recognized, in rulings stretching back decades, that students at our nation's public colleges and universities enjoy the full protection of the First Amendment. Accordingly, students do not lose their right to engage in expressive association on public college campuses.

In recent years, however, public colleges and universities have created a new barrier to expressive association: expansive nondiscrimination policies interpreted to prohibit not only true discrimination on the basis of status or immutable characteristics, but also "discrimination" on the basis of belief. In the instant case, Hastings College of the Law has conditioned access to its facilities on compliance with a nondiscrimination policy that prevents a religious student organization from functioning in a manner consistent with its beliefs and principles. The school has taken the remarkable position that a religious student organization is not permitted to discriminate on the basis of *religious belief.* This policy prevents Petitioner Christian Legal Society

from adhering to the very principles that are *the reason for its existence* when making decisions on leadership, voting membership, and—because the group's statements come from its leaders and members—its message. This result is plainly untenable in light of the First Amendment's guarantee of expressive association and religious freedom.

Respondent Hastings' application of its nondiscrimination policy here expands the concept of "discrimination" past its logical breaking point and trivializes the invidious, status-based animus such a policy was presumptively meant to address. Preventing what Hastings deems "discrimination" is akin to prohibiting an environmental group from asking whether prospective voting members or leaders actually have an interest in the environment, or to prohibiting the College Democrats from ensuring that its voting members are not in fact active Republicans. Hastings' nondiscrimination policy ignores the critical difference between status and belief. Expressive organizations must be permitted to make *belief-based choices* when choosing their leaders and voting members. There is a stark difference between making a determination on the basis of an immutable status and doing so on the basis of changeable personal beliefs and rules of conduct.

Because the will to censor disfavored viewpoints exists on campus, upholding the Ninth Circuit's decision will have a devastating impact on all belief-based student groups, be they religious, political, or otherwise ideological. FIRE's decade of experience defending First Amendment rights illustrates that students and administrators on campuses across the country

proactively restrict and disrupt speech with which they disagree, and have attempted on numerous occasions to undermine or even destroy controversial student groups. Worse still, administrators have proven willing to ignore binding legal precedent and exploit arguable loopholes in the law to censor unwanted speech. Given the climate on campus, denying belief-based groups their right to limit voting membership and leadership to those who agree with the organization's purpose will leave any student group formed around an unpopular viewpoint vulnerable to takeover and even dissolution by students and administrators who fundamentally disagree with the group's views and mission.

The Ninth Circuit's perfunctory one-paragraph decision in the instant case ignores this Court's precedents recognizing the right to expressive association and instead cites only its own contrary decision in *Truth v. Kent School District*, 542 F.3d 634 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2889 (2009). In *Truth*, the Ninth Circuit held that a public high school's denial of recognition to a religious student group that required members to sign a statement of faith was reasonable and viewpoint neutral because the school's extracurricular program offering benefits to a wide variety of student groups constituted a limited public forum and rendered student groups' expressive association "school-sponsored." But in both *Truth* and the present case, the expressive association in question was undoubtedly private and could not reasonably be construed as school-sponsored. Indeed, Respondent Hastings explicitly affirms that registered student organizations do *not* engage in school-sponsored speech. In both *Truth* and the instant case, the Ninth Circuit

should have applied the strict scrutiny warranted by regulations over private expressive association, as other federal courts have done when presented with similar questions. Instead, the Ninth Circuit ignored the expressive association claims at issue and allowed forum analysis to swallow whole the First Amendment right to expressive association.

If this Court holds that the First Amendment does not protect a student group's right to exclude those who disagree with its core beliefs, controversial or unpopular groups will be powerless to avoid very real threats to their existence. Depriving belief-based student organizations of equal rights of speech and association simply because those organizations choose to govern themselves according to distinct ideological principles is fundamentally incompatible with this Court's precedents and relegates groups seeking to organize around unpopular or minority viewpoints to an unconstitutional second-class status on campus. To preserve the First Amendment and the robust free expression it guarantees at our nation's public colleges and universities, this Court should reverse the Ninth Circuit's decision.

ARGUMENT

I. BECAUSE THE WILL TO CENSOR EXISTS ON CAMPUS, UPHOLDING THE NINTH CIRCUIT'S INTRUSION UPON ASSOCIATIONAL RIGHTS WILL FURTHER ERODE FIRST AMENDMENT RIGHTS ON CAMPUS

FIRE's decade of experience defending core constitutional liberties at our nation's colleges and universities demonstrates that the will to censor—on the part of both students and administrators—flourishes on our nation's campuses. Many students seek to silence fellow students expressing controversial viewpoints, and many public universities maintain unconstitutional speech codes—overbroad or vague policies restricting speech that would be protected in society at large—enabling punishment of disfavored speech. Further, universities often seize upon ambiguities in the law to silence unwanted or unpopular expressive activity. Upholding the Ninth Circuit's erroneous ruling will therefore not only jeopardize the ability of students to freely associate with others of like mind to espouse unpopular or controversial beliefs on campus, it will also embolden would-be censors at universities and further erode First Amendment protections for student speech. To preserve the right to expressive association, and freedom of expression more generally, for students at public colleges across the country, this Court should reverse the Ninth Circuit's opinion.

A. The Ninth Circuit's Decision Renders Organizations Holding Minority Viewpoints Powerless to Avoid Takeover or Dissolution by Students Who Wish to Silence Their Expression

In FIRE's experience, the challenge to a student group's membership policies often comes not from students seeking, in good faith, to join the group, but rather from students, faculty, or administrators who disagree with the group's core tenets. If the First Amendment right to free association does not give belief-based student groups the power to make belief-based membership decisions, any student groups holding unpopular viewpoints will be vulnerable to takeover and even dissolution by those students who fundamentally disagree with the group's views.

This concern is not simply hypothetical. At Central Michigan University (CMU), for example, Young Americans for Freedom (YAF), a conservative political student group, was told by the administration that because of the university's nondiscrimination policy, it could not exclude from membership students who were explicitly seeking to dissolve the group. In February 2007, CMU students started a group on the social networking site Facebook.com entitled "People Who Believe the Young Americans for Freedom is a Hate Group," where students posted messages suggesting ways to destroy YAF. One post suggested that members of the Facebook group "go to their meetings and . . . *vote eachother* [sic] *onto the board and dissolve the*

group."[2] The post further suggested that if YAF attempted to exclude these individuals from their meetings, they would likely "*slip up and break a [CMU] discrimination policy.*"[3]

When the president of CMU's YAF chapter learned of this plan, he contacted the Associate Director of Student Life to ask if his group could prevent students who disagreed with the group's purpose from joining simply to ruin the group.[4] The Associate Director of Student Life responded that "*you may not require members to be 'like-minded'* as that opens yourself up to discrimination based on political persuasion."[5] By this administrator's understanding of CMU's nondiscrimination policy—which mirrors the understanding advanced by Respondents in the instant case—YAF was powerless to control its own message. Such a result illustrates the absurdity and unconstitutionality of defining "discrimination" so broadly as to prohibit student groups from requiring that those who would lead the group actually agree with the group's purposes.

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[2] Screenshots of Facebook.com Group Entitled 'People Who Believe the Young Americans for Freedom is a Hate Group,' Feb. 12, 2007, available at http://www.thefire.org/article/7878.html (emphasis added).

[3] *Id.* (Emphasis added.)

[4] E-mail from YAF President Dennis Lennox II to Director of Student Life Thomas Idema Jr., Feb. 20, 2007, available at http://www.thefire.org/article/7885.html.

[5] E-mail from Director of Student Life Thomas Idema Jr. to YAF President Dennis Lennox II, Feb. 20, 2007, available at http://www.thefire.org/article/7886.html (emphasis added).

In countless other cases, the call for derecognition of student groups has come from students or administrations hostile to the beliefs of those groups. In 2000, the student government at Pennsylvania State University informed its university's YAF chapter that the words of the group's constitution and mission statement, identifying rights as "God-given," constituted religious "discrimination" because the words reflected a "devotion to god."[6] YAF appealed this decision to a student-faculty Appeals Board, which unanimously denied YAF the right to be recognized as a student organization if it kept its "religious" language.[7]

In 2003, the Muslim Students Association (MSA) at Louisiana State University was told by the administration that in order to re-register, it would have to revise its constitution to prohibit discrimination on the basis of, among other things, religion and sexual orientation. The MSA contacted other religious student organizations who stated that they were not asked to make this change, leading the MSA to believe it had been singled out. When the MSA refused to adopt the clause, the university immediately derecognized it and revoked all of its privileges.[8]

At Ohio State University, members of the gay and lesbian student group Outlaw (whose Hastings chapter

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[6] Lou Marano, *Penn State Reverses Policy on Club*, United Press International, Mar. 26, 2001.

[7] *Id.*

[8] Letter from Foundation for Individual Rights in Education to LSU Interim Chancellor William Jenkins, Nov. 11, 2004, available at http://www.thefire.org/article/5431.html.

is a Respondent in the instant case) wrote to the dean in 2003 asking the law school to revoke the Christian Legal Society (CLS)'s student group recognition because its Statement of Faith violated university nondiscrimination policy.[9] In 2004, at Washburn University School of Law, a student filed a discrimination complaint against the school's CLS chapter after the group refused to allow the student, a member of the Church of Jesus Christ of Latter-Day Saints, to lead Bible study sessions in a manner contrary to CLS's tenets.[10] A similar situation precipitated *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), in which the Seventh Circuit issued an injunction against a public law school's application of its non-discrimination policy to violate the expressive association rights of a CLS chapter. Although no student who had sought membership with the group had been denied entry, a discrimination complaint was nevertheless filed against the group by students presumably hostile to the group's core beliefs.[11]

In all of these cases and many others, the universities ultimately acted to preserve the

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[9] *Christian Legal Society Chapter of the Ohio State University v. Holbrook*, No. 04-197 (S.D. Ohio 2004) (Complaint at 10–11).

[10] Erin Adamson, *Regents rethink rule; Faith-based group wants members to support tenets*, TOPEKA CAPITAL–JOURNAL, Nov. 18, 2004, *available at* http://cjonline.com/stories/111804/loc_legal.shtml.

[11] Declaration of Jeremy Richey, in support of Motion for a Preliminary Injunction, *Christian Legal Society v. Walker*, CV-05-4070 (filed June 7, 2005).

associational rights of the challenged student groups. They did so, however, largely because they became convinced that the First Amendment right of expressive association prohibited them from doing otherwise. At Central Michigan University, for example, the university explicitly cited the fact that the university would not "*oppose established principles as promulgated by the highest courts*" as a reason for revising its policies to allow student organizations to make belief-based membership decisions.[12] In the instant case, Respondents ask this Court to overturn those established principles and decimate the right to engage in expressive association free of undue government interference.

It is critical to note that CLS conditions eligibility for voting membership and leadership positions *not* on a student's innate sexual orientation, but rather on the student's *viewpoint* and avowed actual *conduct*. CLS does not prohibit gay or lesbian students from holding voting membership or leadership positions if the students share CLS's understanding of morality; indeed, CLS has never expelled a gay or lesbian student. Pet'rs' Br. at 7. CLS reasonably believes that sharing their view of morality—a view shared by other major religions—requires students interested in participating in the group to abstain from certain sexual conduct, both homosexual and heterosexual, including adultery and premarital sex. *Id.*

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[12] E-mail from Central Michigan University Office of Student Life to the Presidents of all Registered Student Organizations, Mar. 28, 2007, available at http://www.thefire.org/article/7882.html (emphasis added).

If permitted to stand, the Ninth Circuit's decision will have an impact far beyond the associational rights of CLS and other religious student organizations. By requiring student groups to "accept all comers as voting members even if those individuals disagree with the mission of the group," Hastings effectively eliminates the right to expressive association on its campus. *Christian Legal Society Chapter of University of California v. Kane*, No. 06-15956 (9th Cir. Mar. 17, 2009). This impermissible result forces Christian student groups to accept avowed atheists as voting members, Muslim student groups to accept evangelical Christians, Jewish groups to accept anti-Semites, liberal groups to accept conservatives, and so forth. Indeed, under Hastings' policy, Intervenor-Respondent Outlaw would be required to accept as voting members students who not only believed that homosexual conduct was deeply immoral, but actively protested against such conduct.

Regardless of its intended result, Hastings' "accept all comers" policy actually *diminishes* the diversity of viewpoints on campus by preventing groups like CLS from voicing their worldview without interference from those who disagree. By restricting the ability of students to join in common belief, Hastings' policy seeks a manufactured "diversity" of beliefs *within* a group at the cost of a true diversity of beliefs *among* groups. Indeed, by requiring student groups to accept all comers regardless of agreement with the group's beliefs and stated mission, Hastings effectively limits what beliefs student groups may hold to only those viewpoints accepted by a majority of students. In this way, Hastings dictates what beliefs student groups may "officially" hold on campus.

In the landmark case *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court made clear that the government did not have the power to impose upon public school students any officially mandated position regarding morality, political ideology, or any other area of human knowledge and belief. There, the government could not force a student to pledge to the U.S. flag in violation of religious belief and personal conscience. As this Court wrote: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642. If Hastings chooses to embrace a diversity of viewpoints on campus, it must do so by heeding the underlying principle in *Barnette*, and not by establishing a *de facto* orthodoxy to which its students are effectively forced to adhere.

Should this Court hold that belief-based organizations may not limit their voting membership and leadership to those who agree with the organization's purpose and worldview, organizations espousing unpopular viewpoints will find themselves powerless to avoid takeover and dissolution by students and administrators wishing to silence speech with which they disagree. Those holding minority viewpoints will be powerless to take advantage of the freedom of association that the First Amendment, in theory, guarantees. FIRE's decade of experience with students and administrators seeking to use any means at their disposal to censor controversial or unpopular viewpoints leaves us sadly confident that this would become a reality on many campuses.

B. Public University Administrators and Students Frequently Seek to Silence Protected Expression on Campus

This Court has long emphasized the essentiality of the First Amendment on campus. In decision after decision spanning decades, the Court has consistently affirmed the college campus' unique role as "peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972) (citation omitted). Indeed, in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), this Court identified the fundamental link between robust freedom of expression at our public institutions of higher learning and the health of our republic, declaring that "[t]he essentiality of freedom in the community of American universities is almost self-evident . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." In *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 835 (1995), it stated that "[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses." Thus, the Court has long recognized that "the university is a traditional sphere of free expression . . . fundamental to the functioning of our society." *Rust v. Sullivan*, 500 U.S. 173, 200 (1991).

In spite of this well-established jurisprudence, public colleges consistently violate their students' First Amendment rights, frequently at the behest of other

students. FIRE's research indicates that hundreds of public universities have enacted policies prohibiting constitutionally protected expression, while hundreds more have censored protected speech on an *ad hoc* basis. This institutional hostility to free speech has proven to be a corrupting influence on students, who, in often shocking ways, have in turn demonstrated a proclivity to restrict and disrupt speech with which they disagree. The sad reality is that many administrators and students have forgotten the essentiality of liberty where it needs to be most vigilantly protected—the university campus.

1. Students Actively Censor Unpopular Viewpoints on Campus

The Ninth Circuit's decision, which would allow motivated students to take over and dissolve a student group with a less popular viewpoint, gravely threatens the First Amendment because students already initiate far too many instances of campus censorship.

For example, FIRE has received reports of multiple incidents in which students destroyed anti-abortion displays, including an incident at Missouri State University in which students smashed dozens of small crosses placed by a pro-life student group on a campus lawn.[13] When one student who participated in the act of censorship was asked why she had done so, she replied, "Because I don't believe in what you stand for," adding

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[13] Steven Ertelt, *Missouri State University Students Vandalize Campus Pro-Life Cross Display* (Oct. 10, 2008), *available at* http://www.lifenews.com/state3545.html (last visited Jan. 29, 2010).

that "I feel like I have the right to walk across campus without seeing that."[14] In another case, a student at the University of Wisconsin–Stevens Point removed the crosses of a pro-life display, one by one, in broad daylight, rationalizing his actions by declaring, "Since [abortion] is a right, you don't have the right to challenge it."[15]

The theft, mass destruction, or even burning of campus newspapers expressing unpopular viewpoints is common on our nation's campuses. At Dartmouth College, for example, students offended by a satirical cartoon in a campus newspaper brazenly burned copies of the issue.[16] The cartoon depicted a conversation between Friedrich Nietzsche and a male college student about whether the student should take advantage of a drunken female student. Angered by the cartoon, offended students staged a mass-burning of the newspaper outside the newspaper's office. At the University of North Carolina–Chapel Hill, an administrator actually aided students in stealing copies of a student newspaper which was critical of a candidate

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[14] "MSU Bears for Life: Interview with student that vandalized the 'Graveyard of the Innocents,'" available at http://www.youtube.com/watch?v=vexOiSRpdTM&feature=related (last visited Jan. 29, 2010).

[15] "Cemetery of Innocents conflict," available at http://www.youtube.com/watch?v=t5NeLyMZUYM (last visited Jan. 29, 2010).

[16] Posting of Chris Beam to *IvyGate*, http://www.ivygateblog.com/2006/11/cartoon-scandals-so-hot-right-now/#more (Nov. 8, 2006) (last visited Jan. 29, 2010).

for student body president.[17] Supporters of the candidate stole approximately 1,500 copies of the issue, which was slated to come out on the day of the election, and deposited them in the office of the student attorney general. They were aided in their efforts by an administrator who provided keys to the building and allowed them to lock the newspapers inside.

At University of Massachusetts Amherst, students prevented distribution of a campus newspaper containing articles critical of a student group.[18] Angered by the newspaper's mocking of their organization, members of the criticized group physically prevented campus members from accessing copies of the paper and stole copies of the newspaper from a student intending to distribute them. Astonishingly, the university's student government responded to the incident by demanding that the student organization responsible for publishing the newspaper publicly apologize to the student for its constitutionally protected criticism, or else face derecognition by the student government.

At Johns Hopkins University, approximately 600 copies of a campus newspaper that had been distributed to the library were stolen because the issue in question objected to a recent campus appearance by a

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[17] Mike Adams, "UNC administrator implicated in newspaper theft," *Townhall.com*, Aug. 16, 2004, available at http://www.thefire org/index.php/article/5275.html (last visited Jan. 27, 2010).

[18] Press Release, Foundation for Individual Rights in Education, UMass Amherst Stands by as Student Newspaper is Stolen and Censored (Apr. 16, 2009).

pornographic film director and contained a cover photo of the director along with members of the student group that had hosted him.[19] When the newspaper's editor attempted to report the theft, he was told by an administrator that the missing papers did not constitute theft. He was additionally informed that the paper would no longer be allowed to be distributed in residence halls—despite the fact that it, along with other campus publications, had previously been approved for distribution. In still another case, members of a sorority at Stetson University in Florida stole approximately 700 copies of a student newspaper in order to avoid negative publicity.[20] The issue in question reported on the relocation of sorority members after the university declared their sorority house to be in poor condition.

Often, students disrupt speech events on campus in order to silence speakers with whom they disagree, thereby brandishing an unconstitutional "heckler's veto." At the University of North Carolina–Chapel Hill, for instance, students disrupted a campus speech by former Virginia congressman Virgil Goode.[21] At Columbia University, student protestors physically prevented a speech by anti-illegal immigration activist

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[19] Press Release, Foundation for Individual Rights in Education, Student Newspaper Suffers Viewpoint Discrimination at Johns Hopkins University (Jun. 13, 2006).

[20] Marnette Federis, *Sorority Suspected in Student Newspaper Theft* (Oct. 25, 2006), *available at* http://www.splc.org/newsflash.asp?id=1357 (last visited Jan. 29, 2010).

[21] Posting of Robert Shibley to *The Torch*, http://www.thefire.org/article/10516.html (Apr. 24, 2009).

Jim Gilchrist.[22] At Washington State University, students repeatedly interrupted a fellow student's play, claiming they found the content of the play offensive, and even threatened the cast with violence.[23] The latter example is particularly instructive in that the students were placed in the audience by the university, which paid for their admission and later defended their actions as a "responsible" exercise of free speech. The case therefore demonstrates the powerful capacity of students and administrators working together to silence unpopular speech on campus.

These deplorable incidents demonstrate that many students stand all too ready to silence unpopular viewpoints through mob censorship. The Ninth Circuit's decision gives such students the most powerful and destructive tool yet with which to censor student groups espousing unpopular viewpoints.

2. University Administrators Actively Censor Unpopular Viewpoints on Campus

Instances of student-on-student censorship occur in addition to, and are encouraged and abetted by, public universities' own pervasive restrictions on campus speech. Such restrictions take two primary forms.

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[22] Nat Hentoff, *Mugging the Minutemen*, THE VILLAGE VOICE, Nov. 3, 2006.

[23] Press Release, Foundation for Individual Rights in Education, Washington State University Bankrolls Vigilante Censorship (Jul. 18, 2005).

First, many colleges and universities maintain unconstitutional speech codes—regulations prohibiting expression that would be protected in society at large—despite an unbroken string of successful challenges to such codes in federal and state courts dating back over two decades.[24] A 2009 report by FIRE, surveying 273 of the largest and most prestigious public institutions in the country, found that 71 percent of public colleges and universities maintain policies substantially restricting protected expression. Foundation for Individual Rights in Education, *Spotlight on Speech Codes 2010: The State of Free Speech on Our Nation's Campuses* (2009), 6. By their very existence, these restrictions impermissibly chill speech on campus and misinform students about what speech is and is not protected under the First Amendment.[25]

Second, public colleges and universities regularly enforce these speech codes to punish protected expression. For example, in 2007, Valdosta State University in Georgia expelled a student after he spoke in opposition to the university's plans to construct expensive parking garages on campus and created an online collage expressing his views.[26] The collage parodied the university president's references to the garages as his ultimate "legacy" and warned of the

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[24] *See infra* note 27.

[25] *See* Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL'Y 481 (2009).

[26] Press Release, Foundation for Individual Rights in Education, Valdosta State University Expels Student for Peacefully Protesting New Parking Garages (Oct. 24, 2007).

project's potential to cause harm to the environment. This act of protected expression led the university to label the student a "clear and present danger" to the campus. A federal civil rights lawsuit is now proceeding. *Barnes v. Zaccari*, No. 1:2008cv00077 (N.D. Ga., filed Jan. 9, 2008).

In another case, San Francisco State University's (SFSU's) College Republicans held an anti-terrorism rally at which they stepped on homemade replicas of Hamas and Hezbollah flags. Offended students filed charges of "attempts to incite violence and create a hostile environment" and "actions of incivility," prompting an SFSU "investigation" that lasted five months. In response, the College Republicans brought a constitutional challenge to SFSU's policies in federal district court. The court, siding with the College Republicans, ordered a preliminary injunction barring SFSU and other schools in the California State University system from enforcing several challenged policies, including a requirement that students "be civil to one another." The ruling also limited the California State University System's ability to enforce a policy prohibiting "intimidation" and "harassment." *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007).

During the past two years, Tarrant County College (TCC) in Texas has repeatedly prohibited members of Students for Concealed Carry (SCCC) on Campus from participating in a nationwide "empty holster" protest on TCC's campus. The empty holsters are intended to signify opposition to state laws and school policies denying concealed handgun license holders the right to

carry concealed handguns on college campuses. TCC forbade the protesters from wearing empty holsters anywhere on campus, even in the school's designated "free speech zone"—an elevated, circular concrete platform about 12 feet across. TCC informed students it would take adverse action if SCCC members wore empty holsters anywhere, strayed beyond the school's "free speech zone" during their holster-less protest, or even wore T-shirts advocating "violence" or displaying "offensive" material. Recently, after being told that this prohibition would continue, two TCC students filed suit in the United States District Court for the Northern District of Texas, Fort Worth Division, asking the court to ensure that they be allowed to fully participate in the upcoming protests and including a request for a temporary restraining order prohibiting the school from quarantining expression to its designated "free speech zone." The court has granted the students' motion and issued a temporary restraining order against TCC. *Smith v. Tarrant County College District*, Civil Action No. 4:09-CV-658-Y (N.D. Tex, Nov. 6, 2009).

Public colleges and universities, as well as their students, continue to demonstrate that the will to censor is robust on campuses. It is therefore dangerous to provide these institutions with arguable loopholes in the law that allow—indeed, invite—them to restrict expressive activity.

3. Public Colleges and Universities Will Exploit Any Arguable Loophole in the Law to Silence Unwanted or Unpopular Protected Speech

FIRE's experience demonstrates that colleges and universities will seize upon any arguable loophole in the law to restrict unwanted or unpopular expressive activity.

For example, one week after the United States Court of Appeals for the Seventh Circuit handed down its decision in *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1169 (2006) (holding that public universities may regulate the content of student newspapers in a manner similar to high schools), the general counsel for the California State University (CSU) system wrote a memorandum to CSU institution presidents in favor of campus censorship, relying on the *Hosty* decision for justification. The memorandum expressed the view that *Hosty* "appears to signal that CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers." Memorandum from Christine Helwick, General Counsel, California State University, to CSU Presidents (June 30, 2005), *available at* http://www.splc.org/csu/memo.pdf (last visited January 20, 2010). *Hosty* in fact held that the university's decision in that case to censor a student newspaper may have been unconstitutional, but that the law was not "clearly established" in this area. 412 F.3d at 731, 738–39. The inclination on the part of the CSU system's general counsel to read openings in the law in favor of censorship is sadly common on college campuses. A decision by this

Court to uphold the Ninth Circuit's flawed ruling would likely result in a rush by college administrators across the country to derecognize unpopular or unwanted student groups.

Similarly, many universities continue to defiantly maintain harassment policies that restrict protected student speech, despite the fact that federal and state courts have consistently invalidated such policies on First Amendment grounds.[27] Across the country, institutions continue to misapply peer harassment law despite the guidance supplied by this Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) (holding that peer harassment in education must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit"). In addition to *Davis*, public college administrators have received policy guidance from the Department of Education's Office for Civil Rights in a 2003 open letter sent to all colleges that accept federal funding that clarified the relationship between sexual harassment policies and the First

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[27] *See, e.g.*, *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008); *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995); *College Republicans v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *The UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Mich. 1993); *Corry v. Leland Stanford Junior University*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995). That every speech code to be litigated to a final decision has ultimately been struck down—and that not a single speech code has been upheld by a court—speaks to the well-established judicial consensus regarding the primacy of free expression on public campuses.

Amendment.[28] Nevertheless, public colleges across the country continue to maintain vague and overbroad harassment policies that restrict protected speech on campus, demonstrating a tendency to interpret the law in favor of campus censorship.

A decision by this Court to uphold the Ninth Circuit's erroneous ruling will send a message to public universities across the country that they may employ their nondiscrimination policies to deny the freedom of association of student organizations, thereby ignoring their obligations under the First Amendment. Given that universities have already demonstrated a proclivity to apply nondiscrimination policies against the associational rights of ideological student groups, a decision by this Court in favor of such practices will further embolden universities.

Universities have already proven all too willing to derecognize and punish student organizations wishing to associate around shared beliefs. In recent years, student groups have brought federal civil rights lawsuits in response to being denied recognition at public universities including Southern Illinois University–Carbondale, the University of Minnesota, Rutgers University, the Ohio State University, Pennsylvania State University, the University of North Carolina at Chapel Hill, Arizona State University, Southwest

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[28] "First Amendment: Dear Colleague" (Jul. 28, 2003), *available at* http://www.ed.gov/about/offices/list/ocr/firstamend.html (last visited Jan. 20, 2010) (stating that federal harassment regulations "do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment").

Missouri State University, the University of Oklahoma, and the University of Florida. Other instances of denial of recognition that did not result in litigation have occurred at California State University–San Bernardino, Louisiana State University, Purdue University, Castleton State College in Vermont, the University of Arizona, the University of Wisconsin at Madison, the University of Wisconsin at Eau Claire, and Wright State University.

Given this recent history, a decision by this Court to uphold the Ninth Circuit's ruling will result in public colleges across the country denying recognition to student organizations that reasonably wish to limit voting membership and leadership to only those students who actually agree with the group's core tenets. Consequently, student organizations will be forced to make the unconstitutional choice between compromising their core beliefs and organizational message in order to gain official recognition, or preserving their associational identity at the cost of being denied the same access to university resources as other groups.

II. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH SUPREME COURT PRECEDENT AND DISREGARDS THE CORE CONSTITUTIONAL RIGHT TO FREEDOM OF EXPRESSIVE ASSOCIATION

A. Freedom of Association Allows Groups to Choose Members and Leaders on the Basis of Belief

The First Amendment secures the right of freedom of association. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (holding that "a corresponding right to associate with others in pursuit of a wide variety of . . . ends" is "implicit" in the First Amendment). Freedom to associate with others of like mind is a necessary corollary to the First Amendment freedom of expression because "the right to speak is often exercised most effectively by combining one's voice with the voices of others." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006). Determining the conditions of one's associations without undue government interference is a "crucial" aspect of freedom of association because it prevents state coercion of "groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of America v. Dale*, 530 U.S. 640, 647–48 (2000). To ensure group autonomy, "freedom of association also plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623. Freedom of association therefore grants an organization the right to make belief-based membership decisions, including the decision to exclude from the organization those who do not share its core beliefs. Put another way, freedom of association at its core grants a right to "discriminate" on the basis of belief.

Distinguishing "discrimination" on the basis of *belief* from invidious discrimination based on *status* is critical. The right to exclude members based on status as opposed to belief does not follow from the right to form expressive organizations, because immutable characteristics such as one's skin color, gender, or sexual orientation do not define one's beliefs. However, the right to exclude people who do not share a common *belief* central to the group's purpose *is* fundamental to the right to expressive association.

B. Student Groups at Our Nation's Public Colleges Have a Fundamental Right to Specify Terms of Membership Based on Shared Beliefs

The First Amendment's protections fully extend to the public university campus.[29] This extension encompasses freedom of association, as this Court has previously affirmed the importance of students' associational rights in the university setting.[30] That

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[29] *See, e.g., Healy v. James*, 408 U.S. 169, 180 (1971) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.").

[30] *See id.* at 184 ("[t]here can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges [their] associational right . . . .") *See also Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (holding that by denying a religious student group the use of campus facilities for meetings, a public university violated the group's right to free exercise of religion and freedom of speech and association).

student groups at public colleges and universities have the same right as other private expressive organizations to limit membership based on shared beliefs was recognized by the Seventh Circuit in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). The facts in *Walker* are directly analogous to those in the present case. In *Walker*, Southern Illinois University School of Law, a public law school, cited a violation of a nondiscrimination policy to deny recognition to the school's chapter of the Christian Legal Society (CLS) because the group's membership requirements excluded individuals who unrepentantly affirmed or engaged in homosexual conduct.[31] The Seventh Circuit held that forced inclusion would violate the group's expressive associational rights: "It would be difficult for CLS to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct." *Id.* at 863. To the Seventh Circuit, the expressive association analysis was straightforward; the court observed that to ask the question of "whether application of SIU's antidiscrimination policy to force inclusion of those who engage in or affirm homosexual conduct would significantly affect CLS's ability to express its disapproval of homosexual activity" was "very nearly to answer it." *Id.* at 862. Finding that the law school did not demonstrate a compelling state interest sufficient to justify its interference with the

[31] While expecting members to refrain from engaging in homosexual conduct—as well as premarital or extramarital sexual conduct—the Christian Legal Society accepted officers and members who had engaged in homosexual conduct in the past or who had homosexual inclinations but did not engage in or affirm homosexual conduct. *Walker*, 453 F.3d at 858.

group's associational rights, the Seventh Circuit issued a preliminary injunction ordering the group's official status to be restored. *Id.* at 867. The Ninth Circuit's ruling in the instant case contravenes the well-established Court jurisprudence that *Walker* upholds.

C. By Affirming *Truth v. Kent School District*'s Flawed Analysis, the Ninth Circuit's Decision Below Impermissibly Restricts the Right to Expressive Association at Public Colleges and Universities

Like *Truth v. Kent School District*, 542 F.3d 634 (9th Cir. 2008), the sole precedent upon which it relies, the Ninth Circuit's perfunctory, one-paragraph opinion below misconstrues or simply ignores well-established First Amendment doctrine. *See Christian Legal Society Chapter of University of California v. Kane*, No. 06-15956 (9th Cir. Mar. 17, 2009), *citing Truth*, 542 F.3d at 649–50.

In *Truth*, the Ninth Circuit held that a public high school did not violate the First Amendment rights of a Christian student group by denying the group's application for official recognition because the group required all voting members and officers to sign a "statement of faith" that the school claimed was in violation of its nondiscrimination policies. In upholding Kentridge High's denial of official recognition to Truth, the Ninth Circuit construed the school's extracurricular program offering funding, access to facilities, and other benefits to a wide variety of student groups as a limited public forum because the benefits granted to recognized groups rendered their expressive association "school-

sponsored." *Truth*, 542 F.3d at 648–49. It further held that the school's exclusion of Truth from that forum for refusing to abide by the school's nondiscrimination policy was permissible because such an exclusion need only be reasonable and viewpoint neutral. *Id.* at 649–50; *see also Truth v. Kent School District*, 551 F.3d 850 at 850–51 (9th Cir. 2008) (concurring in denial of rehearing *en banc*).

In the instant case, the Ninth Circuit relied exclusively on *Truth* in ruling that because Hastings' policy requires that "all groups must accept all comers as voting members even if those individuals disagree with the mission of the group," the school's conditions for group recognition are "therefore viewpoint neutral and reasonable." *Christian Legal Society Chapter of University of California v. Kane*, No. 06-15956 (9th Cir. Mar. 17, 2009). The Ninth Circuit's decision directly contradicts this Court's precedents and impermissibly restricts students' right to expressive association. If it is allowed to stand, student groups at public colleges and universities will find their right to assemble with others of like mind on campus in grave jeopardy or eliminated altogether.

1. *Truth* Applied the Wrong Standard of Review

In *Truth*, the Ninth Circuit erroneously applied a reasonableness standard in evaluating the student group's denial of recognition. The court applied a reasonableness standard after ruling that the student group's expressive association was sponsored by the school, and thus constituted participation in a limited

public forum as opposed to a public forum.[32] Because it deemed the group's speech to be "school-sponsored," the Ninth Circuit found limited public forum analysis to be controlling, without any reference to Truth's expressive association claim. In denying CLS's claim in the instant case, the Ninth Circuit again applied the limited public forum analysis employed in *Truth*.

But classifying the speech at issue in either *Truth* or the instant case as "school-sponsored"—a classification which the Ninth Circuit cited as justifying its limited public forum analysis—is unreasonable. Hastings recognized approximately 60 registered student organizations during the 2004–2005 academic year advocating on behalf of a wide range of ideological interests, including Intervenor-Respondent Hastings Outlaw, the Clara Foltz Feminist Society, Hastings Republicans, the Hastings Democratic Caucus, the Hastings Association of Muslim Law Students, and many more. Pet'rs' Br. at 3–4. Further, Hastings itself clearly disclaimed all sponsorship of registered student organizations, and required each organization to inform members and outside parties that it is not school-sponsored. Pet'rs' Br. at 4.

As if this explicit acknowledgment of non-sponsorship was not sufficient to render *Truth*'s justification for limited public forum analysis inapplicable to the instant case, this Court has repeatedly held that a public school providing funds and other resources, such as empty classrooms, to a variety

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[32] *Truth*, 542 F.3d at 648–49 (emphasis added) (internal citations omitted).

of student groups is not sufficient to transform student speech into school-sponsored speech. *See Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 229 (2000) (student groups in a similarly structured program did not speak for the government); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 834 (1995) (with regard to a similarly structured program, the school is funding students' private speech); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (a similarly structured program "does not confer any imprimatur of state approval" on the messages expressed by student groups).

Because the speech at issue both in *Truth* and in the instant case was *not* school-sponsored and thus private, the Ninth Circuit should have applied the strict scrutiny standard of review that governs regulation of private expressive association. *Roberts*, 468 U.S. at 623 ("Infringements on [the right to expressive association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.").

2. The Ninth Circuit Ignored the Expressive Association Claims at Issue, Allowing Forum Analysis to Swallow Expressive Association Whole

By failing to analyze the expressive association claims brought by Petitioner, the Ninth Circuit reduces freedom of association to a merely theoretical right, without the possibility of practical application or vindication.

This Court provided specific guidance in *Dale* for evaluating claims of undue government interference with expressive association: The government must prove its regulation furthers "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623). But despite the obvious expressive association claims at issue in both *Truth* and the instant case, the Ninth Circuit's decision in each failed to impose *Dale*'s strict scrutiny requirement. Instead, as the dissent notes in *Truth*, the Ninth Circuit mistakenly applied "a *Rosenberger* 'free speech' analysis (when the content of the speech is known and is outside a reasonably set topic area) to what is a *Dale* 'freedom of association' case (which deals with the formulation of the content of such speech)." *Truth*, 551 F.3d at 853 (Bea, J., dissenting).

Dale indeed is controlling and compels a different result. As in *Dale*, the government action at issue here forces CLS to fundamentally alter its expressive message and allows Hastings to "impos[e] its views on groups that would rather express other, perhaps unpopular, ideas." *Dale*, 530 U.S. at 647–48. As in *Dale*, the government action here would "force the organization to send a message"—namely, that behaviors or beliefs patently inconsistent with CLS's mission are nevertheless unobjectionable positions for voting members and group leaders to hold and espouse. *Id.* at 653. This Court has held that a government actor cannot compel *indirectly* a result that it is constitutionally prohibited from achieving *directly*. *Healy*, 408 U.S. at 183. By permitting Hastings to

require CLS to change its organizational message before being allowed to broadcast it effectively, the Ninth Circuit has sanctioned precisely such unconstitutional government compulsion.

The Seventh Circuit correctly recognized the facts in *Walker* as presenting a "'forced inclusion' case," as in *Dale* and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).[33] Accordingly, the Seventh Circuit applied the *Dale* standard, holding that "[i]nfringements on expressive association are subject to strict scrutiny." *Walker*, 453 F.3d at 861. Finding that "CLS's beliefs about sexual morality are among its defining values," the Seventh Circuit concluded that "forcing [CLS] to accept as members those who engage in or approve of homosexual conduct would cause the group as it currently identifies itself to cease to exist." *Id.* Critically, the Seventh Circuit distinguished the student group's expressive association claim from a concordant free speech claim, addressing each in separate sections of the opinion. This approach allowed each distinct First Amendment claim to be considered discretely, with the proper scrutiny, and in the correct analytical framework.

In sharp contrast, rather than accord expressive association a distinct analysis befitting its importance (and demanded by precedent), the Ninth Circuit in *Truth*—and, by extension, in the instant case—reduces expressive association to "simply another way of

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[33] *Walker*, 453 F.3d at 864. Indeed, the Seventh Circuit characterized the question presented by *Walker* as "legally indistinguishable from *Healy*." *Id.*

speaking," indistinct from other speech claims. *Truth*, 542 F.3d at 652 (Fisher, J. concurring). In doing so, it robs expressive association of its unique value as "a correlative freedom" to other First Amendment protections, "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts*, 468 U.S. at 622.

3. In Contravention of This Court's Precedent, *Truth* Holds That Expressive Association May Be Violated to Further Government-Approved Viewpoints

In *Truth*, the Ninth Circuit held that the school's exclusion policy was justified because it would "instill[ ] the value of non-discrimination" in students. *Truth*, 542 F.3d at 649. Properly analyzed under strict scrutiny, however, this justification is clearly insufficient. The school could not have prevented the students in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969), for example, from wearing their anti-Vietnam armbands on school property in order to instill the value of patriotism. *Tinker*, 393 U.S. at 512–14 (schools may regulate students' on-campus speech only when it causes "disruption of or material interference with school activities"). In violation of this Court's precedent, the Ninth Circuit's holding in *Truth* means that schools may violate students' fundamental associational rights in order to teach "correct" values. But this Court has repeatedly held that the state cannot interfere with expressive organizations' ability to form and to express their

messages "for no better reason than promoting an approved message." *Dale*, 530 U.S. at 661 (quoting *Hurley*, 515 U.S. at 579).

This Court has made clear that the state's interest in preventing discrimination does not outweigh an organization's right to reject members who do not support its message. *See Dale*, 530 U.S. at 656–59. Like Kentridge High in *Truth*, Hastings has chosen to fund a wide variety of private student speech. Having done so, it is precluded from requiring students to forgo their right of expressive association as a condition of accessing those funds. Laws that "[make] group membership less attractive" by "withhold[ing] benefits . . . [raise] the same First Amendment concerns about affecting the group's ability to express its message" as the state engaging in direct regulation of group membership. *Rumsfeld*, 547 U.S. at 69.

Addressing a program similar to the one at issue here, this Court held in *Healy* that a public university cannot require a student group to forego its expressive association rights in order to receive school recognition. *Healy*, 408 U.S. at 181–82. The Court stated in *Healy* that the fact that a student group maintains a "possible ability to exist outside the campus community" nevertheless "does not ameliorate" the unconstitutional burden placed on the student group by a denial of recognition. *Id.* at 183.

CONCLUSION

As this Court has long recognized, public colleges and universities serve as our nation's premier marketplaces of ideas, and students are entitled to the full enjoyment of their First Amendment rights on campus. Denying belief-based student groups the fundamental First Amendment right to associate around shared beliefs would thus be anathema to this Court's understanding of the role of public universities in our modern liberal democracy. Public universities may not exclude minority viewpoints and the organizations—religious and secular—that promote them. In *Barnette*, this Court protected "individual freedom of mind" rather than an "officially disciplined uniformity for which history indicates a disappointing and disastrous end." 319 U.S. at 637. Consistent with that principled decision, the Court should overturn the Ninth Circuit's ruling and uphold the freedom of association of public university students.

For all of the reasons stated above, this Court should rule in favor of Petitioner and reverse the Ninth Circuit's opinion.

Respectfully submitted,

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CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF GAYS & LESBIANS FOR INDIVIDUAL LIBERTY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Gays and Lesbians for Individual Liberty (GLIL) is a nonpartisan organization founded in 1991 to advance the principles of the free market, individual responsibility, and noninterference by government in the private lives of all citizens. GLIL seeks to educate members of the gay and lesbian community about these principles, while promoting tolerance and acceptance of homosexuals among members of the wider society. GLIL is based in Washington, D.C., with members across the United States and in several foreign countries. To achieve its goals, GLIL sponsors lectures, debates, panel discussions, fundraisers for charitable organizations, and social events. GLIL also publishes a newsletter and uses a website to express its views, while its members contribute articles to various publications. GLIL filed a brief as *amicus curiae* in *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) ("*Dale* Amicus Br.").[1]

SUMMARY OF ARGUMENT

The Constitution protects the "right of individuals to associate to further their personal beliefs." *Healy v. James*, 408 U.S. 169, 181 (1972). That right

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[1] Pursuant to this Court's Rule 37, GLIL has obtained the consent of the parties to the filing of this brief, and letters of consent have been filed with the Clerk. GLIL states that counsel for a party did not author this brief in whole or in part and that no persons or entities other than amicus, its members, and its counsel made a monetary contribution to the preparation and submission of the brief.

encompasses the freedom of a purely expressive association to limit its membership to those who share its guiding beliefs. Groups whose views reflect prevailing majority orthodoxies seldom need to invoke this freedom, but it has proven indispensable to disfavored and disenfranchised minority groups throughout our Nation's history.

Hastings College of Law (Hastings) has adopted a system of compulsory association. An expressive student group must either relinquish the right to exclude those who do not share its beliefs, or forfeit the right to participate on an equal footing with approved student organizations.

The oppressive and irrational impact of this policy is especially evident when applied to a pure expressive association like the Hastings Chapter of the Christian Legal Society (CLS), whose *raison d'etre* is to communicate its distinctive beliefs in a speech forum created for diverse student expression. By barring CLS from applying its belief-centered membership qualification, Hastings' policy threatens to turn a collective voice into a cacophony. However noble its educational or nondiscrimination goals, Hastings' policy is both self-defeating and unconstitutional.

I. Rigorous protection of minorities—including gays and lesbians—from invidious discrimination does not require sacrificing expressive associational freedom. To the contrary, these values should complement and reinforce each other. Throughout American history, gays and lesbians, like other disfavored minorities, have struggled to speak collectively without fear of government sanction, and the formation of expressive associations has often represented the first step toward equality. Wooden and inflexible application of nondiscrimination provisions

to expressive associations like CLS will erode the right to choose one's associates, thereby threatening the ability of disfavored minorities to associate to express their views free from majoritarian interference.

II. Hastings' forced-membership policy needlessly pits associational freedom against equality. Loss of associational freedom is the price of admission to Hastings' speech forum.

Hastings' policy significantly impairs CLS's ability to express its core beliefs, because the policy would require CLS to cede control over its message to those who reject its core beliefs as encapsulated in its Statement of Faith. That burden triggers the compelling-interest test. Hastings' policy strikes at the heart of CLS's protected expression by targeting its belief-based membership qualification. It does so using the same coercive means—a condition on access to an expressive forum—that this Court has strictly scrutinized as a significant burden on associational freedom. Hastings, however, has failed to establish any compelling interest advanced by the application of its policy to CLS. The balance—and the Constitution—decisively favors freedom of association.

Hastings' policy also infringes CLS's freedom of speech. The policy is viewpoint discriminatory because it systematically privileges majority viewpoints over minority viewpoints by allowing the former to overwhelm the latter. The policy is also unreasonable because its effect is to drown out minority viewpoints, thereby impeding rather than advancing the stated purpose of the forum, which is to encourage diverse expression.

ARGUMENT

I. FREEDOM OF ASSOCIATION PROVIDES VITAL PROTECTION FOR ALL MINORITY VOICES, INCLUDING GAY AND LESBIAN AMERICANS

A. Freedom of Association Has Long Been Instrumental In the Pursuit of Equal Rights and Genuine Pluralism

This Court has recognized that freedom of association is "an indispensable means of preserving other individual liberties." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). First Amendment liberties, in particular, depend on the freedom to "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id.* at 622. The Constitution's guarantee of "the freedom to speak, to worship, and to petition the government for the redress of grievances" would be hollow if individuals were forced to exercise these rights alone. *Id.* Without the benefit of association, the lone dissenter or the advocate for minority rights is easily drowned out in the din of the public square. Association with like-minded citizens is often the sole means of challenging mass opinion or majoritarian injustices.

The history of disenfranchised and disadvantaged groups in the United States bears this out. The journey toward legal equality and social acceptance has often begun with the rise of private associations of individuals united in pursuit of a common cause. *See* Dale Carpenter, *Expressive Association and Anti-Discrimination Law After* Dale: *A Tripartite Approach*, 85 MINN. L. REV. 1515, 1524–1534 (2001). Before there was a Nineteenth Amendment,

there was the National Woman's Party and the National American Woman Suffrage Association. INEZ H. IRWIN, THE STORY OF THE WOMAN'S PARTY 13, 26–27 (1921). Before there was a Civil Rights Act of 1964, there was the NAACP. *See NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958). And long before many states adopted protections against sexual orientation discrimination, there was an army of gay and lesbian advocacy groups in America. *See* WILLIAM N. ESKRIDGE, JR., GAYLAW 93–95, 112–116 (1999). Freedom of association remains, in many respects, the first freedom for minority groups.

The relationship between associational freedom and equality in the American experiment is as old as the Republic itself. The "necessary relation between associations and equality" in the United States left a deep impression on Alexis de Tocqueville. ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 490 (Harvey C. Mansfield & Delba Winthrop, trans. & ed., 2000) (1840). He marveled at the singular American genius for the art of association, which he traced to the condition of American equality. *See id.* at 490–93. "Everywhere that, at the head of a new undertaking, you see the government in France and a great lord in England, count on it that you will perceive an association in the United States." *Id.* at 489. Instead of statism or aristocracy, Americans turned to private associations to advance great causes and win over fellow citizens. *Id.* The freedom to join with like-minded neighbors, what Tocqueville called "the mother science" of American democracy, *id.* at 492, has long been the essential *democratic* means by which Americans have pursued political, moral, cultural, and intellectual goals.

Freedom of association protects the interests and advances the rights of minority groups in two fundamental ways, both recognized repeatedly by this Court. First, it enables disfavored groups to pursue their *distinctive ends*—including the goal of civil rights—by giving them a collective voice and equipping them for "[e]ffective advocacy of both public and private points of view." *NAACP v. Alabama*, 357 U.S. at 460; *see also Roberts*, 468 U.S. at 622 (noting that associational freedom "shield[s] dissident expression from suppression by the majority"). Second, associational freedom enables minority voices to cultivate and maintain their *distinctive identity*, thereby "preserving political and cultural diversity." *Roberts*, 468 U.S. at 622; *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000) (noting that freedom of association is "crucial in preventing the majority from imposing its view on groups that would rather express other, perhaps unpopular, ideas"). The Constitution's sturdy protections for freedom of association thus advance the pursuit of equality and the development of a genuinely pluralistic society.

For individuals relegated to a position of political powerlessness, the ability to pursue distinctive ends, including the goals of legal equality and social acceptance, requires the ability to associate freely with others committed to those ends. Such associations make possible the expression of a collective voice and allow—perhaps for the first time—the concerns of politically powerless individuals to be heard.

This has certainly been true for gay Americans, who have "have benefited politically and personally when they organize, and . . . suffered terribly when

the state impeded their ability to do so." Carpenter, *supra* at 1519. The earliest known gay-rights advocacy group, the Chicago Society for Human Rights, was a small group of gay men who organized in 1924. "One of our greatest handicaps was the knowledge that homosexuals don't organize," a leader of the group later wrote. *Id.* at 1528 (citation omitted). As one commentator has observed, "[t]he key to overcoming inequality, in the eyes of the earliest organizers of the gay civil rights movement, was to form groups devoted to that goal. It was, in short, to form expressive associations." *Id.* The Society for Human Rights selected its leaders, published a newsletter, and devised a plan to win new members. Importantly, the group found it necessary to limit its membership on the basis of sexual orientation: Only gay men could join. But the Society soon fell victim to state suppression. Within months, its leaders were prosecuted and financially ruined, and the group dissolved. It would be a quarter-century before another gay-rights association was formed. *Id.*

When gay-rights groups reappeared, they again met with state disapproval and hostility. The FBI and state authorities investigated and conducted surveillance of gay organizations. ESKRIDGE, *supra* at 75; Carpenter, *supra* at 1530. Congress attempted to revoke a fledging gay-rights group's license as an educational organization in Washington, D.C. Carpenter, *supra* at 1531. The IRS withheld tax-exempt status from non-profit organizations that promoted homosexuality. *Id.* And multiple states refused on public policy grounds to recognize articles of incorporation of gay-rights groups. ESKRIDGE, *supra* at 75.

Gay Americans first found some "breathing room" in the strengthened associational freedom protections born of the Civil Rights Era. ESKRIDGE, *supra* at 93. In *NAACP v. Alabama*, this Court held that freedom of association is an "indispensable libert[y]" that the Constitution guards against not only "direct action" but also subtler interference, 357 U.S. at 461, including state attempts to turn "community pressures" against minority associations. *Id.* at 463. And in *NAACP v. Button*, 371 U.S. 415 (1963), the Court recognized the protected "expressive" character of the NAACP's associational activities. *Id.* at 428–29. In the decades that followed, courts gradually began applying this and related First Amendment protections to gay organizations, overturning state denials of corporate status to gay groups, *see, e.g., Aztec Motel, Inc. v. Faircloth*, 251 So. 2d 849, 854 (Fla. 1971); *Gay Activists Alliance v. Lomenzo*, 293 N.E.2d 255 (N.Y. 1973) (per curiam); barring the IRS from discriminating against gay nonprofit organizations, *see Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980); ESKRIDGE, *supra* at 115; and shielding gay organizations' membership lists from disclosure, *see Adolph Coors Co. v. Wallace*, 570 F. Supp. 202, 207–10 (N.D. Cal. 1983).

But the importance of freedom of association to gay Americans is perhaps nowhere more visible than on this Nation's university campuses, where the First Amendment became a lifeline to gay student organizations. Carpenter, *supra* at 1531–33. After this Court's landmark student-expression decision in *Healy*, 408 U.S. 169, and the associational freedom cases from the Civil Rights Era, courts repeatedly used these precedents in the 1970s and 1980s to bar public universities from denying school recognition and funding to gay student groups. *See Gay Stu-*

dents Org. v. Bonner, 509 F.2d 652 (1st Cir. 1974); *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 164–67 (4th Cir. 1976); *Gay Lib v. Univ. of Missouri*, 558 F.2d 848 (8th Cir. 1977); *Gay Student Servs. v. Tex. A&M Univ.*, 737 F.2d 1317, 1319 (5th Cir. 1984); *see also Wood v. Davison*, 351 F. Supp. 543 (N.D. Ga. 1972); *Student Coal. for Gay Rights v. Austin Peay State Univ.*, 477 F. Supp. 1267 (M.D. Tenn. 1979); *Gay Activists Alliance v. Bd. of Regents of the Univ. of Okla.*, 638 P.2d 1116 (Okla. 1981); *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988). And, more recently, speech protections applied in one case to protect the expressive freedom of a conservative Christian student group, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995), were later used to shelter a gay-student advocacy group. *See Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997).[2] The genius of the First Amendment is that it knows no bias. Protections for one minority voice extend to all. When the state tramples expressive associational freedom—whether through "'heavy-handed frontal attack'" or "'more subtle governmental interference,'"

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[2] The expressive freedom claims of religious and gay student groups have long been mutually reinforcing. The plaintiffs in *Rosenberger* "rel[ied] heavily on *Gay & Lesbian Students Assn. v. Gohn* . . . ." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 795 F.Supp. 175, 178 (W.D. Va. 1992), *aff'd*, 18 F.3d 269 (4th Cir. 1994), *rev'd*, 515 U.S. 819 (1995). And many high school gay-rights groups have found refuge in the Equal Access Act, 20 U.S.C. § 4071 (1994), which was enacted in part at the behest of religious-liberty advocates. Carpenter, *supra* at 1532; *see, e.g., Straights & Gays for Equality v. Osseo Area Schs.-Dist. No. 279*, 540 F.3d 911 (8th Cir. 2008).

Healy, 408 U.S. at 183 (citation omitted)—all minority groups and disfavored causes are threatened.

B. An Association's Control of Its Membership Is Necessary to Preserve Its Distinctive Voice

The pursuit of distinctive ends through expressive association as reflected in these historical examples is impossible, however, if associations are unable to maintain their distinctive identity and voice. And maintaining that distinctiveness requires the freedom to exercise control over membership and leadership. *See Roberts*, 468 U.S. at 633 (O'Connor, J., concurring) ("Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."). An expressive association's *input*—its members and their opinions—is often inextricably related to the association's *output*—its message and ideas. For that reason, "[f]orcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express." *Dale*, 530 U.S. at 648. Thus, restricting the ability of a pure expressive group to control its membership "ineluctably controls the group's viewpoint." *Truth v. Kent Sch. Dist.*, 551 F.3d 850, 857 (9th Cir. 2008) (Bea, J., dissenting from denial of rehearing en banc) (citation omitted).

The link between membership and viewpoint is demonstrated by the fact that expressive associations, especially those advocating a particular belief, routinely limit their membership to those who share a common bond or commitment. This is certainly true of many gay associations. "From the beginnings

of the gay civil rights movement, gay organizations have relied on exclusively gay environments in which to feel safe, to build relationships, and to develop political strategy." Carpenter, *supra* at 1550. As GLIL has observed as *amicus curiae* in the past, there are many exclusively gay social and activity clubs, retreats, vacations, and professional organizations. *Dale* Amicus Br. 25; *see also* Carpenter, *supra* at 1550. Even gay groups that open membership to straight people almost invariably limit access to those who are committed to advancing the interests of gays and lesbians.[3] Gay organizations limit their membership for the same reason that countless expressive associations do so: a belief-centered group cannot maintain its distinctive voice and identity if its members reject its core beliefs.

This interdependence between message and membership also explains why associational freedom

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[3] *See, e.g.*, Harvard Gay and Lesbian Caucus Website, http://www.hglc.org/about/about.html) ("Any Harvard/Radcliffe affiliates who support our mission are welcome to join . . . ."); University of California, Santa Barbara, Center for Sexual & Gender Diversity Website, http://www.sa.ucsb.edu/sgd/Resources/OnCampus.aspx (describing a dormitory for "lesbian, gay, bisexual, transgender students and their allies"); Pet. App. 138a (noting that Hastings Outlaw reserves the right to remove any officer who "work[s] against the spirit of the organization's goals and objectives."); *see also* National Gay & Lesbian Chamber of Commerce Website, http://www.nglcc.org/membership/benefits ("Membership is open to LGBT-owned and LGBT-friendly small businesses, individuals and students."); Lesbian & Gay Lawyers Association of Los Angeles Website, http://www.lgla.net (members must "support the mission").

is essential to "preserving . . . diversity." *Roberts*, 468 U.S. at 622. The free exchange of diverse ideas is uniquely important "in one of the vital centers for the Nation's intellectual life, its college and university campuses." *Rosenberger*, 515 U.S. at 836 (citations omitted). Indeed, the Court has held that state universities have an interest of the highest order in exposing students to "widely diverse people, cultures, ideas, and viewpoints." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003); *see also id.* at 308 (noting that diversity is particularly needed in America's law schools, "the training ground for a large number of the Nation's leaders"). To be more than a slogan, however, diversity must mean *distinctive* voices engaged in the "robust exchange of ideas." *Id.* at 324 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.)). The alternative is homogenized student speech, defined by majority orthodoxies. An expressive group's right to choose its members promotes genuine diversity, in the academic setting and elsewhere, because it is often the only way minority associations can preserve their *distinctive* viewpoints and identity. Freedom of association thus serves as a bulwark against not only overt suppression of ideas, but also against the soft tyranny of mass opinion.

II. HASTINGS' FORCED MEMBERSHIP POLICY VIOLATES THE FIRST AMENDMENT

This Court's freedom-of-association and free-speech precedents compel the conclusion that Hastings' policy of requiring all student groups to be open to all members is not merely ill-advised, but

also unconstitutional.[4] Where a government regulation significantly burdens an expressive association's ability to convey its desired message, that burden must be outweighed by a compelling interest that is advanced in a narrowly tailored fashion by that specific application of the regulation. Mere recitation of a generalized interest will not do. As this Court has made clear, the compelling-interest test applies regardless of whether the burden imposed by the government on associational freedom is direct or indirect, absolute or merely significant. Here, Hastings' forced membership policy significantly burdens the ability of CLS and all Hastings student groups to associate with like-minded individuals to spread their desired message; they must admit nonadherents or lose all the substantial benefits of recognition. The most striking aspect of this case, however, is the total absence of any permissible, much less compelling,

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[4] While Hastings' written policy on its face prohibits only discrimination on the basis of certain protected classes including sexual orientation, Hastings now takes the position that its policy actually requires all registered groups to allow "any interest student to participate, become a member or seek leadership positions in the group, regardless of the student's status or beliefs." *Compare* Br. of Appellees, *CLS v. Kane*, No. 06-15956 at 3 (9th Cir. Jan. 12, 2009) *with* J.A. 93, 220 ¶15. GLIL's analysis of the policy assumes the interpretation urged by Hastings. The policy *as written*, however, would also adversely affect gay organizations because it would clearly ban gay-only groups. And if the religious non-discrimination rule prohibits discrimination on the basis of particular religious tenets, it would bar gay groups from excluding students with faith-based opposition to homosexual conduct.

interest to be weighed against that substantial burden on associational freedom. Hastings has not identified, and cannot identify, any valid justification for its broad requirement that an expressive student group must admit those students who affirmatively disagree with its core message. In this case, the outcome of the expressive-association balancing analysis is clear, because there is no weight on the government's side of the scale.

Hastings' policy is likewise unlawful when considered under this Court's designated-forum framework, which permits incidental restrictions on speech only when reasonable and viewpoint neutral. Hastings' policy is neither. It is not reasonable for Hastings to create a forum for the express purpose of "promot[ing] a diversity of viewpoints among registered student organizations," J.A. 216 ¶8, and then undermine viewpoint diversity by compelling those organizations to admit students who affirmatively disavow the organizers' viewpoints. Nor is Hastings' policy viewpoint neutral, because it systematically privileges majority viewpoints over minority viewpoints.

A. Hastings' Policy Significantly Impairs CLS's Ability To Express Its Core Values

The fundamentally expressive character of both CLS and the registered student organizations forum at Hastings has never been seriously contested in this case. The CLS chapter at Hastings exists for the principal purpose of communicating its beliefs. Pet. App. 99a–100a. Those beliefs are summarized in the CLS Statement of Faith, which CLS requires all members to affirm. *Id.* Moreover, CLS seeks to

promulgate those beliefs in a forum created for the express purpose of promoting "a diversity of viewpoints . . . including viewpoints on religion and human sexuality." J.A. 216 ¶8. In short, "[i]t would be hard to argue—and no one does—that CLS is not an expressive association." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 862 (7th Cir. 2006).

But while the district court in this case recognized the fundamentally expressive nature of both CLS and the Hastings forum, it never acknowledged the obvious corollary mandated by this Court's precedents—that forced inclusion of students who refuse to affirm CLS's Statement of Faith would severely impair CLS's ability to express its chosen message in that forum. To the contrary, the district court erroneously divorced membership from message, stating that "[a]s long as the organization admitted all students who wanted to join, it was free to express any ideas or viewpoints." Pet. App. 23a. That reasoning has no more basis in reality than it does in the law. As this Court has recognized time and again, an expressive association is a collection of individuals, each of whom "affects the message conveyed" by the whole. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572–73 (1995). For that reason, "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together." *Roberts*, 468 U.S. at 623. The question is not whether a group forced to absorb unwanted associates remains nominally "free to express

any ideas," Pet. App. 23a, but rather whether such forced inclusion of unwanted members will "significantly affect" the association's ability to "express those views, and only those views, that it intends to express." *Dale*, 530 U.S. at 648, 650.

In past cases, this Court has approached that question by considering the relationship between an association's expressive purpose and the membership practices at issue. In *Roberts*, for example, the Court found that the forced inclusion of women would not impair the Jaycees' protected expression, because the organization's men-only rule was unrelated to its "preferred views" on civic and business issues. 468 U.S. at 627. By contrast, in *Dale*, the Court found that application of a New Jersey nondiscrimination law to require the Boy Scouts to retain an openly gay man as an assistant scoutmaster would "interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs." 530 U.S. at 654. And in *Hurley*, the Court concluded that the "peculiar" application of a similar nondiscrimination law to force inclusion of a pro-gay float in Boston's St. Patrick's Day Parade would have interfered with the parade organizers' choice "not to propound a particular point of view." 515 U.S. at 575. In both *Dale* and *Hurley*, the message that each association preserved through its decision to exclude was seldom expressed and seemingly incidental to its core expressive purpose, yet the burden on those messages was sufficient to warrant First Amendment protection.

Here, the link between membership practices and expressive purpose is far more direct, and the burden on associational rights is correspondingly substantial. CLS's membership qualification—

affirmation of and adherence to its Statement of Faith—is *synonymous* with its core message. J.A. 226–27 ¶¶33–35; Pet. App. 100a–101a (CLS Chapter Constitution). Indeed, Hastings concedes that CLS has no method for assuring its members' fidelity to its message "[a]side from requiring that members or officers sign the Statement of Faith." Hastings Br. in Opp. 10. CLS seeks to exclude only those students who have affirmatively demonstrated, by refusing to affirm and abide by the Statement of Faith, that they disagree with the message CLS exists to promote. Through this modest requirement, CLS members preserve the integrity of the "views that brought them together." *Roberts*, 468 U.S. at 623. It is a membership practice entirely in service of protected expression.[5]

As applied to CLS, therefore, Hastings' policy does exactly what this Court has said a membership regulation may not do. In *Roberts*, the Court ex-

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[5] The close nexus between CLS's membership practices and preservation of its expressive purpose is further evidenced by the fact that only the four activities most closely linked to message definition—voting, serving as officers, amending the group's constitution, and *leading* religious study groups—are reserved for members. Pet. App. 101a–102a (CLS Chapter Constitution). Much as in *Dale*, the only appreciable effect of Hastings' forced membership policy would be to place nonadherents in control and leadership roles in CLS. *See Dale*, 530 U.S. at 654. For a student organization that in 2004-2005 had only four members, J.A. 230 ¶ 48, a single new member who does not share CLS's core beliefs could easily impair its message.

plained that application of Minnesota's nondiscrimination law to an expressive association was lawful because it "require[d] no change in the Jaycees' creed" and "impose[d] no restrictions on the organization's ability to exclude" members who reject the Jaycees' "ideologies or philosophies." *Id.* at 627; *see also New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988) (concluding that New York City's nondiscrimination law did not burden a private club's freedom of association because it "erects no obstacle" to the club's ability "to exclude individuals who do not share the views that the club's members wish to promote"). In sharp contrast, Hastings' policy requires CLS to admit members who refuse to affirm its guiding philosophy and creed—its Statement of Faith.

Nonetheless, the district court concluded that CLS must "take[] the risk" that the forced admission of those who decline to affirm and adhere to its Statement of Faith will "impair CLS's ability to convey its beliefs." Pet. App. 59a. The Constitution tolerates no such gamble with First Amendment liberties. As this Court has recognized, "we must . . . give deference to an association's view of what would impair its expression." *Dale*, 530 U.S. at 653. Thus, an association need only show that its protected activity "*could* be impaired in order to be entitled to protection." *Id.* at 655 (emphasis added). Much like the open primary law invalidated by this Court in *California Democratic Party v. Jones*, Hastings' policy would compel CLS to grant membership and voting privileges to those who, "at best, have refused to affiliate with" CLS's message, and, at worst, espouse a contradictory message. 530 U.S. 567, 577 (2000). In

Jones, this Court had no trouble concluding that the "likely outcome" of such a policy would be to change the association's message. *Id.* at 581. CLS's predicament is no different.

B. The Burden On Associational Freedom Far Outweighs Any Permissible Interest Hastings May Have In Applying Its Policy To CLS

When, as here, a nondiscrimination rule significantly burdens expressive association, the First Amendment interests at stake can be overridden only "'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623). As the *Dale* Court explained, "in these cases, the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other." *Id.* at 658–59. Constitutional scrutiny of a membership regulation requires balancing the burden on the group's expression against the weight of any compelling governmental interests that are served in a narrowly tailored fashion by the specific application of the regulation at issue. Here, the balance decisively favors expressive association. The burden on CLS's associational freedom is plainly significant, and Hastings has no permissible, much less compelling, interest in forcing a purely expressive group to admit members who affirmatively reject its message.

1. The Significant Burden On CLS's Associational Freedom Triggers The Compelling-Interest Test

Hastings' policy puts CLS to a painful choice: jettison its commitment to its core message, or lose the status and benefits of a registered student organization. Even so, the district court in this case concluded that the compelling-interest test is "inapplicable" because "Hastings is not directly ordering CLS to admit certain students" by means of outright compulsion. Pet. App. 40a, 42a. This Court has never required, however, that a burden on expressive association be absolute or direct to trigger the compelling-interest test. To the contrary, the "Constitution's protection is not limited to direct interference with fundamental rights .... Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'" *Healy*, 408 U.S. at 183 (citations omitted); *see also NAACP v. Alabama*, 357 U.S. at 461 (finding freedom-of-association violation even though the state had taken "no direct action . . . to restrict the rights of [petitioners] to associate freely"). State actions that impermissibly burden expressive association "can take a number of forms," including "impos[ing] penalties or withhold[ing] benefits." *Roberts*, 468 U.S. at 622. This Court has consistently applied the compelling-interest test to *all* "significant[]" burdens on associational interests. *Dale*, 530 U.S. at 659. That has been true whether the coercion involves the threat of immediate compulsion, *id.* at 646, or the denial of government benefits, *Healy*, 408 U.S. at 183, and whether the effect would directly hinder the

association's basic expressive function, *Jones*, 530 U.S. at 581, or incidentally detract from its message, *Hurley*, 515 U.S. at 574.

This Court's decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006), confirms that *Dale*'s compelling-interest test applies to significant but indirect burdens on expressive association. In *FAIR*, a coalition of law schools brought, *inter alia*, a freedom-of-association challenge to the Solomon Amendment, a law that requires institutions of higher education to grant military recruiters access to on-campus recruiting or forfeit federal funding. Even though the alleged burden was only a condition on funding rather than an absolute mandate, the unanimous Court analyzed the schools' expressive association claim under the *Dale* framework, without suggesting that the indirect nature of the burden provided a basis for applying a less rigorous test instead. *Id.* at 68–69. While the Court concluded that the Solomon Amendment did not burden associational freedom and therefore did not trigger strict scrutiny, it did so because, in sharp contrast to Hastings' forced *membership* policy, the military recruiters in *FAIR* were deemed "outsiders who come onto campus for the limited purpose of trying to hire students—*not to become members* of the school's expressive association." *Id.* at 69 (emphasis added). The means of coercion—a funding condition—did not affect the Court's

method of analyzing the law schools' forced-association claim.[6]

The burden on CLS's associational freedom is unquestionably on par with those the Court has considered sufficient to warrant strict scrutiny. As a penalty for refusing to admit nonadherents, Hastings derecognized CLS, stripping it of the benefits enjoyed by registered student organizations. The disabilities imposed on CLS parallel those involved in *Healy*, where this Court had "no doubt that the denial of official recognition, without justification, to college organizations burdens or abridges that associational right." 408 U.S. at 181. By denying recognition, the college in *Healy* denied access to the "customary media for communicating with the administration, faculty members, and other students," and to campus meeting spaces. *Id.* at 181–82. The Court concluded that "the effect of the College's denial of recognition was *a form of prior restraint*," which attracts the strictest scrutiny under the First Amendment. *Id.* at 184 (noting that the College had a "heavy burden" of justification) (citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713–16 (1931)) (emphasis added); *see Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 102 (1979) ("Prior restraints have been accorded the most exacting scrutiny.").

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[6] The majority concurrence in *Truth v. Kent School Dist.*, 542 F.3d 634, 651 (9th Cir. 2008) (Fisher, J., concurring) (joined by Wardlaw, J.) therefore erred in concluding that the level of scrutiny applicable to a significant burden on expressive association varies with the type of speech forum.

CLS, too, has been shut out from channels of communication open to all registered student organizations. Pet. App. 7a. It can no longer reach the student body through student government mass emails or announcements in the school's weekly newsletter. *Id.* The chapter has been removed from the Student Guidebook and Hastings' website, and it is barred from the Student Information Center. *Id.* Even Hastings' annual student organizations fair is closed to CLS. *Id.* Hastings also cut off CLS's access to student activity funds available to registered organizations—a burden that goes beyond those at issue in *Healy*. 408 U.S. at 182 n.8; Pet. App. 7a–8a. Each of these disabilities significantly impedes CLS's ability to participate on an equal footing "in the intellectual give and take of campus debate." *Healy*, 408 U.S. at 181. As in *Healy*, the fact that Hastings allows CLS to exist as a derecognized student group "does not ameliorate significantly the disabilities imposed." *Id.* at 183. The "practical realit[y]" in this case, no less than *Healy*, is that a student expressive association has been cast out of a university speech forum. *Id.*

To be sure, the coercive method used by Hastings differs from the state public accommodations laws at issue in *Dale* and *Hurley*. But while Hastings' chosen instrument for regulating membership is perhaps a less blunt tool than the coercion in those cases, the threatened effect on CLS's message is more severe and direct. The protected viewpoints at stake in *Dale* and *Hurley* were peripheral to the associations' respective messages. The *Dale* majority acknowledged that it was not entirely clear whether all Boy Scout leaders are expected to share the

Scouts' seldom-expressed views on sexual morality, 530 U.S. at 655–56 & n.1, and four dissenting Justices found it "difficult to discern any shared goals or common moral stance on homosexuality" within the Boy Scouts, *id.* at 670 (Stevens, J., dissenting). In *Hurley*, the parade organizers wished simply to "remain[] silent" on the issue of homosexuality. 515 U.S. at 574. In stark contrast, the forced association in this case imperils CLS's cardinal beliefs and message. Indeed, a closer analogue to Hastings' policy in the *Dale* and *Hurley* contexts would be barring the Boy Scouts from excluding a scoutmaster who declined to affirm the Scout's Oath, or barring Boston's Irish St. Patrick's Day Parade organizers from asking a contingent of modern-day Orangemen to find their own parade.

In short, the burden in this case strikes at the heart of CLS's protected expression to a degree not approximated by the government burdens in *Hurley* or *Dale*. The mere fact that the burden comes not as a command but rather as a condition on access to an expressive forum does not excuse the intrusion. The substantial burden must be justified by a compelling and particularized governmental interest.

2. *Hastings Has No Compelling Interest In Requiring an Expressive Student Group To Admit Members Who Reject The Group's Message*

The significant burden that Hastings' policy imposes on CLS's associational interests can be justified only if outweighed by a "compelling state interest[], unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S.

at 648 (quoting *Roberts*, 468 U.S. at 623). In this as in other areas of constitutional scrutiny, "'context matters' in applying the compelling-interest test." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (citation omitted); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995) ("[S]trict scrutiny *does* take 'relevant differences' into account—indeed that is its fundamental purpose.") (emphasis in original). To justify burdening expressive associational freedom, the government cannot resort to airy generalities, but rather must show that the regulation *as applied* "'responds precisely to the substantive problem which legitimately concerns' the State and abridges no more speech or associational freedom than is necessary to accomplish that purpose." *Roberts*, 468 U.S. at 629 (citation omitted); *accord Jones*, 530 U.S. at 568.

Following that approach in *Hurley*, this Court, after acknowledging the important interests supporting Massachusetts' nondiscrimination law generally, focused on the particular way that law had been "applied" in that case. 515 U.S. at 572–73. It was not enough that laws prohibiting discrimination in public accommodations "are well within the State's usual power to enact." *Id.* at 572. The appropriate question was whether a compelling interest is served "[w]hen the law is applied to expressive activity *in the way it was done here*"—that is, to force parade organizers to embrace participants who would alter their message. *Id.* at 578 (emphasis added). The Court answered that, as applied to those particular circumstances, the rule's "apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law

choose to alter it with messages of their own." *Id.* Because application of the statute in that context "had the *effect* of declaring the sponsors' speech itself to be [a] public accommodation," it violated "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573 (emphasis added). Simply put, Massachusetts had no "legitimate" interest in that particular application of its nondiscrimination law. *Id.* at 578.

So too here. The relevant question in this case is whether Hastings has demonstrated a compelling interest in requiring a purely expressive group, as a condition of access to an expressive forum, to admit members who have refused to identify with the group's message. To ask that question is to answer it. Hastings has no valid—much less compelling—interest in forcing CLS (or any other expressive student group on campus) to leave the integrity of its message in the hands of nonadherents.

To justify the application of its policy to CLS, Hastings cannot appeal to an abstract interest in eliminating invidious discrimination generally. It must instead show how its policy "precisely" serves that interest in this particular context. *Roberts*, 468 U.S. at 628–29. Hastings falls far short of that target. The *sine qua non* of invidious discrimination is differential treatment on the basis of *irrelevant* characteristics. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion) ("In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."). The Court has

recognized that nondiscrimination laws legitimately target discrimination by private associations on the basis of characteristics *irrelevant* to the association's protected expressive activities—as in the private club cases. *See Roberts*, 468 U.S. at 625; *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *New York State Club Ass'n*, 487 U.S. at 13. In *Roberts*, for example, this Court explained that Minnesota's public accommodations law reflected the state's longstanding interest in combating discrimination based on characteristics that "often bear no relationship" to the "actual abilities" of the excluded persons. 468 U.S. at 625. Importantly, the Court then confirmed that this important goal would be advanced by the law's specific application to an association like the Jaycees. *Id.* at 625–27. The government's interest was "strongly implicated with respect to gender discrimination in the allocation of publicly available goods and services," like the "leadership skills," "business contacts," and "employment promotions" provided by the Jaycees. *Id.* at 625 (alteration marks omitted). The Court emphasized that gender was in no way relevant to the ability to participate in the Jaycees' "commercial programs and benefits," *id.* at 626, nor was it relevant to the Jaycees' expressive purpose, *id.* at 627.

The private club cases support the proposition that antidiscrimination provisions "do their legitimate work only when applied to organizations whose exclusion of individuals is based on protected characteristics irrelevant to the organizations' core expressive purposes." Note, *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations*, 118

HARV. L. REV. 2882, 2894 (2005); *see also* Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. DAVIS L. REV. 889, 923–25 (2009). That principle explains why Congress, the Court, and California (like every state in the Union) have recognized the rational distinction between invidious discrimination and a religious association's use of religious criteria to stay true to its mission. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987); 42 U.S.C. §§ 2000e-1 & 2000e-2(e)(1) (exempting religious organizations from the religious nondiscrimination provisions of Title VII); CAL. GOV. CODE § 12926(d) (exempting religious organizations from law prohibiting religious discrimination in employment); 22 CAL. ADMIN. CODE tit. 22, §§ 98100, 98222 (exempting religious organizations from prohibition on religious discrimination by state contractors and recipients of state funds).

To rely on its interest in preventing *invidious* discrimination, Hastings must show how that interest is directly advanced by applying its forced membership policy to CLS. It cannot do so. Obviously, beliefs and conduct that are inconsistent with an expressive student organization's core views are *centrally relevant* to the organization's expressive activity. When a belief-centered group excludes those who reject its beliefs, it is not using harmful or stereotypical "shorthand measures" of personal worth. *New York State Club Ass'n*, 487 U.S. at 13. Rather, it is preserving its identity and message. CLS's ability to advocate its message depends on the shared values of its membership.

In any event, the Court has made clear that the state cannot pursue generalized nondiscrimination goals by severely impairing an expressive association's ability to communicate its message. As applied to CLS, the only purpose of Hastings' policy is to give nonadherents the opportunity to participate in CLS's protected expression, which is to say the opportunity to "change, dilute or silence" that expression. *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring). That goal is "merely to allow exactly what the general rule of speaker's autonomy forbids," *Hurley*, 515 U.S. at 578, and thus is unrelated to *any* legitimate purpose that concerns the school. *Id.*; *see Jones*, 530 U.S. at 582 ("We have recognized the inadmissibility of this sort of 'interest' before."). Forcing an expressive organization to accept members who reject its core beliefs in no way responds to any "substantive problem which legitimately concerns the State." *Roberts*, 468 U.S. at 629. Nor is it "an appropriately related and narrow response" to the genuine problem of invidious discrimination that legitimately concerns Hastings. *Healy*, 408 U.S. at 189 n.20. Hastings' interest in combating *invidious* discrimination therefore cannot justify its serious intrusion on CLS's membership integrity.

Hastings points also to a broader interest behind its forced membership policy: "encourag[ing] tolerance, cooperation, and learning among students . . . ." Hastings Br. in Opp. 3–4; *see also* J.A. 349 ¶5. To the extent Hastings is wielding its policy to conform students' *attitudes* to government-approved values like "tolerance" or "cooperation," however, that is "a decidedly fatal objective." *Hurley*, 515 U.S. at 579. This Court has unanimously condemned

such attempts to use antidiscrimination rules "to produce a society free of . . . biases" through forced association. *Id.* at 578. "The very idea that a non-commercial speech restriction be used to produce thoughts and statements acceptable to some groups"—for example, school administrators or the majority of students—"grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis." *Id.* at 579. Such a policy is all the more odious in the public university setting, "where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger*, 515 U.S. at 835.

* * *

When a private expressive organization "truly aims to foster a belief at odds with the purposes of a State's antidiscrimination laws," the "First Amendment . . . precludes forced compliance with those laws." *Dale*, 530 U.S. at 687 (Stevens, J., dissenting); *accord id.* at 659 (majority opinion). That is precisely the case here. The sincerity and centrality of CLS's belief-centered message are undisputed, and the threat to that message from Hastings' forced membership policy is manifest. GLIL of course regards Hastings' interest in ending invidious discrimination on the basis of religion and sexual orientation as important and bona fide, but that aim can doubtless "be achieved through means significantly less restrictive of associational freedoms" than Hastings has chosen. *Id.* at 648. On one side of the scale is the significant burden on CLS's freedom to define

its collective voice. On the other is a failure to identify any valid state interest in forcing an expressive association, as a condition of access to an expressive forum, to admit members who would impair its message. The balance—and the Constitution—favors freedom of association.

C. Hastings' Policy Violates CLS Members' Freedom Of Speech Because It Is Viewpoint Discriminatory And Unreasonable

While Hastings' forced membership policy is best evaluated under this Court's expressive-association doctrine, it also fails under a pure speech analysis. Even assuming that the registered student organizations at Hastings operate in a designated public forum, Hastings' restrictions on that forum must be both viewpoint neutral and "reasonable in light of the purpose served by the forum." *Rosenberger*, 515 U.S. at 829. Hastings' policy is neither.

Hastings' policy is viewpoint discriminatory because it systematically privileges majority viewpoints over minority viewpoints, leaving the latter at the mercy of the former. "The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views." *Bd. of Regents of Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). By requiring all groups to admit all students, Hastings' policy empowers the majority of students to weaken disfavored expressive associations, simply by forcibly "participat[ing]" in, and thereby changing, those associations' speech. *Hurley*, 515 U.S. at 573. The continued viability and integrity of minority expressive associations in Hast-

ings' forum is thus made dependent on the goodwill of the majority.

In effect, Hastings has "substitute[d] majority determinations for viewpoint neutrality," an approach that this Court has already repudiated in *Southworth*, 529 U.S. at 235. There, the university's entire student body could vote by "student referendum" to fund or defund any student organization. *Id.* at 224. The Court found it "unclear . . . what protection, if any, there is for viewpoint neutrality" when student groups were subjected to the whims of a majority that might disagree with their message. *Id.* at 235. In this case, it is clear that if a majority of students took issue with CLS's message—or Outlaw's, for that matter—nothing would prevent them from becoming members of the organization and silencing that message.[7] No less than in *Southworth*, Hastings' policy surrenders the viewpoint of expressive groups to the tyranny of the majority, and eliminates any protection for viewpoint neutrality.

Hastings' policy is also unreasonable, because it actually impedes, rather than advances, the stated purpose of the forum. "The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of

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[7] It would not be the first time such a result has been seen in the university setting. *See, e.g.*, Note, *Leaving Religious Students Speechless*, 118 HARV. L. REV. at 2885 n.20 (recounting incident at the University of Nebraska where the College Republicans voted in its members as officers of the Young Democrats because of an open election).

the forum and all the surrounding circumstances." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985). One explicit purpose of Hastings' student organizations forum is to "promote a diversity of viewpoints . . . including viewpoints on religion and human sexuality." J.A. 216 ¶8. As this Court has explained, genuine diversity on campus requires not only a diverse student body, but also "expansive freedoms of speech and thought associated with the university environment." *Grutter*, 539 U.S. at 329 (citations omitted). That "open dialogue" is not limited to isolated student speech or instructor-led classroom discussion; it is fueled by extracurricular speech of diverse student associations, under the shelter of the First Amendment. *See Southworth*, 529 U.S. at 233.

University policies that manipulate the "marketplace of ideas," *Healy*, 408 U.S. at 180, or empower a majority of students to do so, *see Southworth*, 529 U.S. at 236, are the enemy of diverse expression. *See Rosenberger*, 515 U.S. at 834. Yet under Hastings' forced membership policy, only majority viewpoints (or those viewpoints too banal to interest the majority) are actually assured a voice in Hastings' forum. That is a patently unreasonable way to "promote a *diversity* of viewpoints." J.A. 216 ¶8 (emphasis added). Indeed, Hastings has acknowledged that under its policy, "the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization." J.A. 221 ¶18. *But cf. Jones*, 530 U.S. at 581–82 ("Such forced association has the likely outcome . . . of changing the parties'

message."). That is not only unreasonable—it is unconstitutional.

CONCLUSION

It should come as no surprise that GLIL does not agree with CLS's views regarding homosexuality. But the constitutional remedy for speech with which one disagrees is "more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). CLS's views—like those of GLIL and other expressive associations—are entitled to First Amendment protection, including protection of CLS's right to preserve the integrity of its message by excluding nonadherents. The wooden application of a forced membership policy like that enforced by Hastings puts minority and dissenting viewpoints in an especially precarious position. If the shared values of every expressive group are put up for a vote in the "committee of the whole," disfavored messages will be uniquely vulnerable. Speech that cannot be stifled from without can be undermined from within.

Our fears in this regard are not imagined. Today it is Hastings. Tomorrow it will be another university, with a different student body majority. Recall, for example, the Alabama state law ban on gay student organizations at state universities, which the Eleventh Circuit invalidated under *Rosenberger*. *See Gay Lesbian Bisexual Alliance*, 110 F.3d 1543. That ban did not originate with the state legislature or university administration. It was inspired by the student body of a state university. *See Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1548, 1550 (M.D. Ala. 1996) (describing vote by Auburn

University student government to deny recognition to gay student group on the basis that the "group does not meet the idea[l]s entrusted to the Student Senate on behalf of the students at Auburn"). Student majorities are not immune from the temptation to silence views they dislike. Weakening associational freedom on our Nation's university campuses in the name of protecting disfavored minorities would be a self-defeating proposition.

This Court should not place freedom of association on a collision course with the interests of gay and lesbian Americans and other minority voices in this Nation. To do so would only sharpen the edges of distrust and factionalism in what some have called "the culture wars." Howarth, *supra* at 896; *cf.* JOHN LOCKE, A LETTER CONCERNING TOLERATION 52 (James H. Tully ed. 1983) (1689). It is not the role of the government of a free people to cleanse speech and thought of all actual or perceived biases by forcing expressive groups to relinquish control of their messages. *See Hurley*, 515 U.S. at 579. The First Amendment envisions a better way: A confident pluralism that conduces to civil peace and advances democratic consensus-building. The proper—and constitutionally compelled—solution in this case is to permit the marketplace of ideas to work, not pretermit debate through misapplication of nondiscrimination rules in an expressive forum.

Respectfully submitted.

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CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, PETITIONER,

v.

LEO P. MARTINEZ, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND THE UNITED STATES CONFERENCE OF MAYORS AS AMICI CURIAE SUPPORTING RESPONDENTS

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BRIEF FOR INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND THE UNITED STATES CONFERENCE OF MAYORS AS AMICI CURIAE SUPPORTING RESPONDENTS

The International Municipal Lawyers Association, the National League of Cities, and the United States Conference of Mayors respectfully submit this brief as amici curiae in support of respondents.[1]

INTEREST OF AMICI CURIAE

Amici curiae represent local governments and their attorneys from across the nation. Their members have adopted varied approaches to the policy questions pressed by petitioner regarding whether the government should condition receipt of government subsidies to private entities on those entities agreeing not to discriminate, what types of discrimination should be addressed in their jurisdictions, and under what circumstances exceptions should be made.

---

[1] Pursuant to Rule 37.3(a), letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The *International Municipal Lawyers Association* (IMLA) is a non-profit, professional organization of over 3,500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the federal and state courts.

The *National League of Cities* (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Founded in 1924, its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The United States Conference of Mayors (Conference), founded in 1932, is the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,204 such cities in the country today. Each city is represented in the Conference by its chief elected official, the mayor. The Conference

has had strong policy supporting civil rights and opposing discrimination dating back to the early 1960's. In 1984, the organization adopted policy calling for the legal protection of gay and lesbian rights at all levels of government.

SUMMARY OF ARGUMENT

This case has nothing to do with whether petitioner can exist and thrive. This is a question about public subsidies, which include not only funds but also special access to public facilities and fora. Petitioner and other groups are free to continue to exist without the subsidies if they do not wish to accede to the conditions that come with the subsidies.

Petitioner asks this Court to impose a one-size-fits-all rule that all governments, if they provide any subsidies to private entities, may not refuse to subsidize a private entity that discriminates on the basis of any characteristic (other than race or possibly sex) so long as the private entity is a "noncommercial expressive association[ ]." Pet. Br. 2.

That categorical rule would stifle the innovation and flexibility that local governments have demonstrated in striking the difficult balance between promoting a diversity of private associations through subsidies while assuring that government dollars, drawn from all of the citizenry through taxes and fees, are not funneled to groups not open to all.

A. Governments have special obligations to ensure that those who receive public subsidies, drawn or created from funds provided involuntarily by all taxpayers, are not using those subsidies in an exclusionary manner.

As early as 1935, governments concerned about discrimination in employment on the basis of race

prohibited employment discrimination by those private contractors hired by the government, well before enacting prohibitions on private employment discrimination generally. The same pattern existed in the housing and public accommodation areas, where those who received government subsidies were the first entities (and sometimes the only entities) to become subject to non-discrimination conditions. The current Model Human Rights Ordinance issued by amicus IMLA recognizes the importance of government subsidies in determining which entities are subject to regulation.

Perhaps the ultimate recognition of the special obligations that should flow to recipients of government subsidies is Title VI of the Civil Rights Act of 1964, which relies on that principle to extend a non-discrimination requirement to any recipient who accepts any "Federal financial assistance." 42 U.S.C. § 2000d. Although it is unknown how many localities have formally adopted rules similar to Title VI, a survey of the members of amicus IMLA done for this brief revealed that a significant percentage of local governments that responded had an ordinance, policy, regulation, or other document providing that, in order for an organization to be eligible for municipal benefits, the organization must not discriminate in its membership policies.

The reasons for conditioning receipt of government subsidies on a promise of non-discrimination are two-fold, and neither is viewpoint discriminatory. The first reason may have been best articulated by

President Kennedy in urging adoption of Title VI: "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." *Lau v. Nichols*, 414 U.S. 563, 569 (1974) (quoting 110 Cong. Rec. 6543 (1964) (Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963)).

The second reason, albeit less tangible, is equally important. Refusing to subsidize groups that discriminate avoids the appearance of government endorsement or entanglement. Even if not true in fact, providing benefits to discriminatory groups may give the impression to a reasonable observer that the government is supportive of, or at least indifferent to, discrimination. That appearance alone may encourage private-sector discrimination, contrary to substantial government interests.

While amici do not seek to force truly private, noncommercial expressive associations to include persons they do not want, by the same token, amici should not be required to subsidize such exclusionary associations with public funds and special access to public facilities and fora.

B. Governments at every level have extended the non-discrimination conditions on government subsidies beyond race. Those efforts of federal and state governments have been sustained by this Court from First Amendment challenges. *See Grove City College*

v. Bell, 465 U.S. 555 (1984); *Jonathan Club v. California Coastal Comm'n*, 488 U.S. 881 (1988).

Local governments have been at the forefront of eliminating discrimination and government support thereof, often acting well in advance of federal or state governments in identifying additional forms of invidious discrimination that warrant action. These democratic institutions have determined that, in their communities, discrimination on the basis of other personal characteristics results in burdens similar to that of race discrimination. Those burdens result in a group of people not being treated equally as citizens and members of that group being excluded from jobs, housing, public accommodations, and other aspects of civic life.

Municipalities have, in particular, taken the lead in prohibitions against sexual orientation discrimination, with the first law prohibiting sexual orientation discrimination enacted 38 years ago. In 1984, amicus The United States Conference of Mayors urged all local governments to adopt legal protections so that all Americans can fully participate in American society, regardless of sexual orientation. Today, over 181 municipalities have passed ordinances prohibiting sexual orientation discrimination. Amicus IMLA in its current Model Human Rights Ordinance offers its members language to include sexual orientation in a non-discrimination ordinance.

In response to amicus IMLA's survey, of those municipalities with an ordinance, policy, regulation,

or other document, providing that, in order for an organization to be eligible for municipal benefits, the organization must not discriminate in its membership policies, 80% prohibited discrimination on the basis of religion and 50% prohibited discrimination on the basis of sexual orientation. The vast majority of them do not offer exemptions, yet they report virtually no controversies in applying their rules. The constitutional rule urged by petitioner would stifle experimentation and nuanced approaches.

C. The adoption of petitioner's rule to exclude certain organizations from certain types of anti-discrimination conditions will lead to two possible consequences, neither of which is preferable to the status quo followed by the Ninth Circuit and urged by respondents.

First, municipalities may choose to simply eliminate subsidies. If local governments were to ultimately choose to deny all subsidies, everyone would suffer.

Alternatively, if municipalities are forced to subsidize groups that can discriminate on certain bases (such as religion or sexual orientation) but not others (race or sex), it may become effectively impossible for municipalities to police, and for courts to enforce, even unlawful discrimination.

ARGUMENT

THE CONSTITUTION DOES NOT REQUIRE LOCAL GOVERNMENTS TO PROVIDE PUBLIC SUBSIDIES FOR PRIVATE ASSOCIATIONS THAT WISH TO DISCRIMINATE ON THE BASIS OF RELIGION OR SEXUAL ORIENTATION, EVEN IF THAT PRIVATE DISCRIMINATION IS CONSTITUTIONALLY PROTECTED FROM DIRECT GOVERNMENT REGULATION

Petitioner asks this Court to impose a categorical rule: that all governments, if they provide any subsidies to private entities, may not refuse to subsidize a private entity that discriminates on the basis of any characteristic (other than race or possibly sex) so long as the private entity is a "noncommercial expressive association[]." Pet. Br. 2. That rule, if adopted, would stifle the innovation and flexibility that local governments have demonstrated in striking the difficult balance between promoting a diversity of private associations through subsidies while assuring that government dollars, drawn from all of the citizenry, are not funneled to groups not open to all.

A. Governments At Every Level Have Distinct Interests In Prohibiting Discrimination By Entities Receiving Public Subsidies That Would Be Undermined By Any Constitutionally Mandated Exception

Local governments understand that they have special obligations to ensure that those who receive public subsidies, including funds and special access to

public facilities and fora, are not using those subsidies in an exclusionary manner because those subsidies are drawn (or were themselves created and maintained) from funds provided involuntarily by all taxpayers.

1. Historically, non-discrimination conditions tied to the receipt of government subsidies have been viewed as less problematic than unilateral government regulation of private discrimination, such as that addressed by the Court in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). And non-discrimination conditions have never been viewed as anything other than viewpoint-neutral requirements.

For example, governments concerned about discrimination in employment on the basis of race started by prohibiting employment discrimination by those receiving government subsidies, such as private contractors hired by the government. New York did so in 1935, and the federal government, other States, and municipalities followed suit. *See* J. Edward Conway, *State and Local Contracts and Subcontracts*, 14 BUFF. L. REV. 130, 132 & n.7, 134 & n.13 (1964-1965); National Conference of Comm'rs on Uniform State Law, *Model Anti-Discrimination Act* § 706(d) cmt. (1966), *reprinted in* 4 HARV. J. ON LEGIS. 224 (1966-1967); Paul H. Norgren, *Government Contracts and Fair Employment Practices*, 29 LAW & CONTEMP. PROBS. 225, 225-226 (1964).

Even when governments at every level later enacted legislation generally prohibiting private employment discrimination by large- and medium-sized employers, many excluded the smallest employers. Those laws nevertheless often contained special provisions to cover private entities receiving subsidies, no matter how many people they employed, because of their "special obligation to avoid discrimination." Commissioners on Uniform State Law, *supra*, at § 301(1) cmt.

Similarly, governments began to address housing discrimination by prohibiting discrimination in "publicly assisted housing," *e.g.*, housing built with tax exemptions or on land sold to the builder below cost by States or political subdivisions. *See* J. Harold Saks & Sol Rabkin, *Racial and Religious Discrimination in Housing: A Report of Legal Progress*, 45 IOWA L. REV. 488, 513-516 (1959-1960); Charles S. Rhyne & Brice W. Rhyne, National Institute of Municipal Law Officers, Report No. 148, *Civil Rights Ordinances: A Preliminary Report* 90-107 (1963) (reprinting ordinances). It was only later that governments moved to also prohibit private housing discrimination. *See* Saks & Rabkin, *supra*, at 521-523. Even then, it was still understood that entities receiving government subsidies were under special obligations to avoid discrimination. *See, e.g.*, Harvard Student Legislative Research Bureau, *A Proposed Model State Civil Rights Act*, 3 HARV. J. ON LEGIS. 63, 73-74, 95 (1965-1966).

In the area of public accommodations, likewise, some governments have elected to avoid regulating private clubs directly but still seek to influence clubs by conditioning government subsidies on non-discrimination. For example, for more than 20 years, States and municipalities have precluded the use of government funds to pay for membership at discriminatory clubs and have refused to issue liquor licenses to such clubs. *See* Anti-Defamation League of B'nai B'rith, ADL Law Report, *Private Clubs: Legislative Responses to Discriminatory Practices* 13-14, B13-B21 (Winter 1989). Indeed, over a quarter of a century ago, New York City prohibited city funds being expended at private clubs that did not afford full membership rights to any person because of race, creed, sex, or sexual orientation. *Id.* at B6.

The current Model Human Rights Ordinance issued by amicus IMLA recognizes the importance of government subsidies in determining which entities are subject to regulation. That model ordinance urges municipalities to define public accommodations subject to regulation as "any place that offers services, facilities, privileges, or advantages to the general public *or* that *receives financial support* through the general public or *through governmental subsidy of any kind.*" International Mun. Lawyers Ass'n, *IMLA Model Ordinance Service*, at 12-1.2 (1998) (emphasis added); *see also id.* at 12-1.1 to 12-1.2 (defining "distinctly private" organization as one that does not "regularly receive payment * * * directly or indirectly from or on behalf of nonmembers").

Perhaps the ultimate recognition of the special obligations that should flow to recipients of government subsidies is Title VI of the Civil Rights Act of 1964, which relies on that principle to extend a nondiscrimination requirement to any recipient who accepts any "Federal financial assistance." 42 U.S.C. § 2000d. Although it is unknown how many localities have formally adopted rules similar to Title VI, a survey of the members of amicus IMLA done for this brief revealed that a significant percentage of local governments had "an ordinance, policy, regulation, or other document, providing that, in order for an organization to be eligible for municipal benefits, the organization must not discriminate in its membership policies." And some of those reporting no such policy might not offer any subsidies to private organizations.

2. The reasons for conditioning receipt of government subsidies, such as funds and access to government facilities and fora, on a promise of nondiscrimination are two-fold, and neither is viewpoint discriminatory.

The first reason may have been best articulated by President Kennedy in urging adoption of Title VI: "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." *Lau v. Nichols*, 414 U.S. 563, 569 (1974) (quoting 110 Cong. Rec. 6543 (1964) (Sen. Humphrey, quoting from

President Kennedy's message to Congress, June 19, 1963)).

For this reason, the government has a powerful interest in avoiding subsidizing private entities that discriminate against individuals on the basis of irrelevant personal characteristics. "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality opinion); *see Bob Jones Univ. v. United States*, 461 U.S. 574, 591, 604 (1983) ("[g]overnment has a fundamental, overriding interest in eradicating racial discrimination in education," which warrants denial of tax exemptions to discriminatory private schools, because "[w]hen the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors' ").

The second reason is equally important, albeit less tangible. Refusing to subsidize groups that discriminate avoids the appearance of government endorsement or entanglement. *Cf. Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725, (1961) (noting that by its inaction, the State had "elected to place its power, property and prestige behind the admitted discrimination," although the State did not actually order the discrimination). Funding

discriminatory groups may give the impression to a reasonable observer (even if not true in fact) that the government is supportive of, or at least indifferent to, discrimination. That appearance alone may encourage private-sector discrimination, contrary to substantial government interests. In addition, it may make people feel like their government views them as outsiders. *See Romer v. Evans*, 517 U.S. 620, 635 (1996).[2] This is especially true if the organization at issue is using the government's name in its title.

Although amici do not seek to force truly private, noncommercial expressive associations to include persons they do not want, by the same token, amici's members should not be required to abandon their viewpoint-neutral conditions and subsidize such exclusionary associations with public funds. "That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination." *Norwood v. Harrison*, 413 U.S. 455, 463 (1973); *see Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 97-98 (2d Cir. 2003), cert. denied, 541 U.S. 903 (2004).

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[2] Of course, some government activities that benefit private entities (such as police and fire protection or access to sidewalks and parks) do not pose any appearance of endorsement because they are equally available to all members of the public. It is likely for that reason that this Court has never viewed those activities as constituting subsidies. *Cf Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972) (distinguishing subsidies from "state-furnished services includ[ing] such necessities of life as electricity, water, and police and fire protection").

B. Municipalities Must Be Given The Same Latitude To Prohibit Religious And Sexual Orientation Discrimination By Entities Receiving Public Subsidies That Petitioner Agrees Is Available To Prohibit Race And (To Some Extent) Sex Discrimination

1. Modern civil rights legislation in America cannot be understood apart from the legacy of slavery, the Civil War, and Jim Crow. And, indeed, race discrimination was the initial focus of much of the legislative action and case law discussed above.

But race discrimination is not the only way in which America has deviated from the ideals of the Declaration of Independence and the Fourteenth Amendment. Religious discrimination against Catholics and Jews, for example, has often influenced governments and private entities. *See Mitchell v. Helms*, 530 U.S. 793, 828-829 (2000) (plurality opinion); *County of Allegheny v. ACLU*, 492 U.S. 573, 604-605 (1989). Likewise, as this Court has recognized, discrimination on the basis of gender by governmental and private entities has long disadvantaged women. *See J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994) (noting that women, like racial minorities, have "suffered * * * at the hands of discriminatory state actors during the decades of our Nation's history"); *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

As they have believed necessary and proper, therefore, governments at every level have extended non-discrimination conditions on government

subsidies beyond race and, in fact, beyond characteristics that this Court has determined warrant heightened judicial scrutiny under the Equal Protection Clause. *See Romer*, 517 U.S. at 628-629.

At the federal level, in single across-the-board statutes, Congress has conditioned all federal financial assistance on recipients not discriminating on the basis of sex, disability, and age. *See* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (sex); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (disability); Age Discrimination Act of 1975, 42 U.S.C. § 6101 (age). Those efforts to prohibit recipients of federal subsidies from discriminating have been sustained by this Court. *See Grove City College v. Bell*, 465 U.S. 555, 575-576 (1984) (rejecting First Amendment challenge to Title IX).

In numerous statutes, Congress also has conditioned particular federal funds on non-discrimination on the basis of religion and creed,[3] as well as sexual orientation.[4] Federal agencies also have exercised their discretion to prohibit certain recipients from discriminating on the basis of sexual orientation.[5]

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[3] *See, e.g.*, 42 U.S.C. § 708; 42 U.S.C. § 300w-7; 42 U.S.C. § 300x-57; 42 U.S.C. § 3789d(c)(1); 42 U.S.C. § 10406; 47 U.S.C. § 398.

[4] *See, e.g.*, Energy Supplemental Appropriations Act of 1994, Pub. L. No. 103-211, § 403(5), 108 Stat. 3, 40 (1994).

[5] *See, e.g.*, 42 C.F.R. § 460.98(b)(3).

State efforts likewise to prohibit recipients of state subsidies from discriminating have been sustained by this Court. Thus in *Jonathan Club v. California Coastal Commission*, 488 U.S. 881 (1988), this Court dismissed for want of a substantial federal question a private club's appeal that raised a First Amendment associational claim. In that case, the State refused to allow the club a favorable long-term lease to state-owned beachfront property unless the club agreed not to discriminate on the basis of race, religion, and sex. *See Jonathan Club v. California Coastal Comm'n*, 243 Cal. Rptr. 168 (Cal. Ct. App. 1988), rev. denied and ordered not to be officially published (Cal. 1988). In this Court, the club urged that the condition was unconstitutional because the State "infringe[d] upon [the club's] freedom of association" without establishing "the factors which must be present before an organization's association rights constitutionally may be regulated." Appellant's Juris. Statement at i-ii (Question 3), *Jonathan Club v. California Coastal Comm'n*, No. 88-179 (U.S. Aug. 1, 1988); *see also id.* at 18, 21-22 (arguing that "the condition attempts to force [the club] to allow the State to control [the club's] membership policy" and the club's associational right "protects [the club] from microscopic scrutiny of its membership and government intrusion into personal associational rights"). This Court's dismissal of the club's appeal for want of a substantial federal question constituted a decision on the merits in favor of the State. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

2. Local governments have been at the forefront of eliminating discrimination and government support thereof, often acting well in advance of federal or state governments in identifying additional forms of invidious discrimination that warrant action. *See* James B. Flickinger, Note, *Municipal Fair Employment Practices Ordinances and Commissions: A Legal Survey and Model Ordinance*, 45 NOTRE DAME LAW 258, 258-259 n.3, 264 n.25 (1970) (noting that cities prohibited age discrimination in employment as early as 1960).

These democratic institutions have determined that, in their communities, discrimination on the basis of other personal characteristics results in burdens similar to that of race discrimination. Those burdens result in a group of people not being treated equally as citizens and members of that group being excluded from jobs, housing, public accommodations, and other aspects of civic life. Such exclusions, local governments have found, "are a menace to the public peace and welfare, inimical to democracy, and harmful to the health and welfare of our citizens." IMLA Model Human Rights Ordinance, *supra*, at 12-1.1.

Municipalities have, in particular, taken the lead in prohibiting sexual orientation discrimination, well in advance of States. Indeed, the absence of protection at the state or federal level is one of the reasons local governments adopt anti-discrimination laws. *See id.* at 12-1.9 (explaining that one of the "advantages of a local human rights ordinance" is to

"prohibit discrimination against persons because of characteristics not covered in federal law").

In 1972, East Lansing, Michigan became the first municipality to ban discrimination based on sexual orientation, followed later that year by Ann Arbor, Michigan. *See* Note, *Constitutional Limits on Anti-Gay Rights Initiatives*, 106 HARV. L. REV. 1905, 1923-1924 (1993). In the following decade, dozens of other localities did the same. In 1984, amicus The United States Conference of Mayors adopted a policy resolution calling for local governments to "adopt legal protections for the rights of gay and lesbian Americans" in order to acknowledge "the right of all citizens, regardless of sexual orientation, to full participation in American society." U.S. Conference of Mayors, *Resolutions Adopted: Fifty-Second Annual Conference* 22 (1984). Today, over 181 municipalities have passed ordinances prohibiting sexual orientation discrimination. *See* Human Rights Campaign Found., *The State of the Workplace for Lesbian, Gay, Bisexual and Transgender Americans 2007-2008* 4 (2009).

Amicus IMLA in its current Model Human Rights Ordinance offers its members language to include sexual orientation in a non-discrimination ordinance. It explains that, "[a]lthough some local governments may not include these categories [(marital status and sexual orientation) in their laws], many do. * * * Even as this commentary is being drafted, local governments are facing this issue. This Model includes language on sexual orientation and provides this

commentary for those local governments that wish to adopt such prohibitions." IMLA Model Human Rights Ordinance, *supra*, at 12-1.9 (footnotes and citations omitted).

Of those municipalities that responded affirmatively to IMLA's question regarding whether they had an ordinance, policy, regulation, or other document providing that, in order for an organization to be eligible for municipal benefits, the organization must not discriminate in its membership policies, 80% prohibited discrimination on the basis of religion or creed and 50% prohibited discrimination on the basis of sexual orientation. *See also, e.g.*, *Evans v. City of Berkeley,* 129 P.3d 394, 400 (Cal.) (rejecting First Amendment claim to city applying such a policy), cert. denied, 549 U.S. 987 (2006).

A few municipalities have elected to exempt some religious or private clubs from those rules; most have not. *Cf.* Flickinger, *supra*, at 267-268 & n.38 (noting that some, but not all, cities surveyed excluded "[r]eligious organizations and social, fraternal, charitable and sectarian groups *that do not receive government support*" from employment discrimination laws) (emphasis added). Those that have not offered exemptions report virtually no controversies in applying their rules. A constitutional rule would stifle experimentation and nuanced approaches.

C. Adopting Petitioner's Rule May Have Unintended Consequences Of Either Reducing Subsidies Or Substantially Undermining Prohibitions Against Race And Sex Discrimination

This case has nothing to do with whether petitioner can exist and thrive. This is a question about public subsidies. Petitioner and other groups are free to continue to exist without the subsidies if they do not wish to accede to the conditions that come with the subsidies.

1. Petitioner speculates (Pet. Br. 31-33) that the non-discrimination condition adopted by respondents will permit individuals to take over groups with which they have ideological disagreements, and that the result will be a set of homogenous groups run by the same people espousing the same views.

If that were a real problem, government could address it by amending the non-discrimination rules or by applying general rules against disruptive behavior. But, contrary to petitioner's hypothesis, amici have not seen that type of behavior at the local level. Likewise, on this record, despite having an "all comers" policy, homophobes have not invaded respondent Outlaw, and non-Christians did not take over petitioner's predecessor during the *decade* that it complied with respondent's non-discrimination policy. Pet. App. 58a.

2. In contrast, the adoption of petitioner's rule to exclude certain organizations from certain types of

anti-discrimination conditions will lead to two possible consequences, neither of which is preferable to the ruled adopted by the court of appeals and urged by respondents.

First, municipalities may choose to simply eliminate subsidies. If local governments ultimately were to choose to deny all subsidies, everyone would suffer.

Alternatively, if municipalities are forced to subsidize groups that can discriminate on certain bases (such as religion or sexual orientation) but not others (race or sex), it may become effectively impossible for municipalities to police, and for courts to enforce, even unlawful discrimination.

The "ministerial exception" courts have created for Title VII of the Civil Rights Act of 1964 demonstrates the difficulties that may occur when certain types of discrimination are constitutionally protected. Some courts have held that some employment decisions by religious organizations that were purportedly made for religious reasons are immune from regulation. *See, e.g., Rweyemamu v. Cote*, 520 F.3d 198, 206 (2d Cir. 2008) (surveying cases). Those courts reason that it is impossible to enforce the substantive provisions on race or sex discrimination without questioning the religious rationale as pretext. As Judge Posner explained:

> It might seem that unless a church had a doctrine placing limitations of age, race, ethnic origin, disability, or sex on [employees],

> the application of laws forbidding employment discrimination would not involve the court in theological controversy. But this is not correct, because the church would be likely to defend its employment action on grounds related to church needs rooted in church doctrine.

Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1040 (7th Cir.), cert. denied, 549 U.S. 881 (2006); *see also Rweyemamu*, 520 F.3d at 209 (a priest's claim of race discrimination in employment was not justiciable because "in order to prevail on his Title VII claim, he must argue that the decision of the Congregatio Pro Clericis was not only erroneous, but also pretextual. Such an argument cannot be heard by us without impermissible entanglement with religious doctrine.").

Similarly, petitioner's rule requiring subsidization of certain kinds of private discrimination, while permitting the government to refuse to subsidize others types of discrimination, would require judges to intrude into what each noncommercial, expressive association "really" believes and why in fact it refused or expelled a particular person as a member. The association might argue that a court cannot constitutionally make that inquiry because of the risk of substituting its own judgment as to what for that of the association makes an appropriate member. Petitioner's rule might thus have the effect of immunizing the association from any form of anti-discrimination requirement, including even the requirements with

regard to race and sex that petitioner acknowledges can constitutionally be applied.

CONCLUSION

For the reasons set forth above and in respondents' briefs, the judgment of the court of appeals should be affirmed.

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AMICUS CURIAE BRIEF

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CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, AKA HASTINGS CHRISTIAN FELLOWSHIP,
Petitioner,

v.

LEO P. MARTINEZ, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF AMICI[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Ninth Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. FFE's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

A victory for CLS will be a victory for all Hastings law students. The school's nondiscrimination policy serves honorable purposes in assuring a wide range of educational and social opportunities to all of its students. But its particular application to CLS grates on the First Amendment by requiring this one association to sacrifice its core identity in order to participate in a forum the school has opened to a broad range of student groups. This oppressive application

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

will ultimately defeat the purpose of the school policy. There will be neither liberty nor equality if Hastings squelches protected speech, association, and free exercise rights under the illusion that a more just university environment will result if no one is ever excluded from anything. Exclusion is an inevitable fact of life. The narrowly crafted CLS criteria, creating its unique "voice," is not the arbitrary, unreasonable discrimination the school policy rightly prohibits.

I. AS AN EXPRESSIVE ASSOCIATION, CLS MUST CREATE A "VOICE" THAT WILL FAITHFULLY COMMUNICATE ITS MESSAGE.

An association is a composite of individual persons that can only speak through its authorized representatives. "[T]he formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 643 (1984) (O'Connor, J., concurring) ("*Jaycees*"). Speech is often most effective when many voices are combined. Government restrictions on expressive association can have a chilling effect on protected speech. *Rumsfeld v. Forum for Academic & Inst. Rights*, 547 U.S. 47, 68 (2006) ("*Rumsfeld*"); *Jaycees, supra*, 468 U.S. at 622. Leaders speak for an organization through their conduct and spoken words. If they are not committed to the association's purposes, they are likely to be disloyal or misrepresent the group.

Regulating the identity of a political party's leaders may interfere with the content and promotion of its message. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 579 (2000). Similarly, associational autonomy is

critical to preserving the expressive freedom of religious organizations. Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. Det. Mercy L. Rev. 189, 283 (1999); Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. Rev. 391, 436 (1987). A religious institution may not be forced to say "anything in conflict with [its] religious tenets." *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961). Government cannot constitutionally regulate the membership of a religious organization, "because changes in membership would be highly likely to alter both content and the mode of expression of its shared commitments over time." Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination, supra*, 67 B.U. L. Rev. at 434.

It is inadequate to argue that CLS can still speak freely--even if it could. This Court has consistently held that the unconstitutional restriction of some First Amendment activity (association) is not acceptable merely because some other protected activity (speech) is left intact. There is no substitute for an expressive association's right to select its members and leaders. *Cal. Democratic Party v. Jones, supra*, 530 U.S. at 581. The ability of an organization to speak is severely curtailed if the group is denied the right to identify the members who comprise it. The freedom to associate presupposes the freedom to *not* associate. *Id.* at 574. This limited right to *discriminate* enables an expressive association to create its unique voice.

A. The CLS Policy Itself Is Speech--Not Conduct That Can Be Detached From Its Core Message And Subjected To Government Regulation.

The relationship between conduct and speech can be complicated. Some protected categories, such as race and national origin, are unrelated to conduct and morally neutral. Religion is a category that intersects belief and behavior, as religious faiths typically advocate a code of moral conduct.

The First Amendment protects expressive conduct along with "pure" speech. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969) (students wearing black armbands to protest the Vietnam War were protected by the Free Speech Clause). Moreover, speech that has concrete effects is not automatically converted into nonexpressive conduct. It can be regulated when it is "directed to inciting or producing imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). In the public school context, student expression is regulable when it "materially and substantially disrupt[s] the work and discipline of the school." *Tinker v. Des Moines Indep. Cmty. Sch. Dist., supra*, 393 U.S. at 513. No such dangers are present in this case, where CLS merely preserves its identity by requiring its leaders, and the members who will elect them, to affirm the association's core religious tenets.

Hastings might argue there is no "speech" involved in the "act" of excluding non-believers from certain CLS positions. Alternatively, if the "conduct" and "speech" elements could be segregated, incidental limitations on CLS's free speech rights might be

justified if the burden promoted a substantial government interest that Hastings could not achieve in a less restrictive manner. *United States v. O'Brien*, 391 U.S. 367, 376 (1968); *Rumsfeld, supra*, 547 U.S. at 67. But the possibility of separating "speech" and "conduct" is questionable. In *Hsu*, the term "speech" included a high school Bible club's leadership policy provisions to the extent these were created to protect the club's religious message. *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 856 (2d Cir. 1996) ("*Hsu*"). Under this analysis, the CLS policy itself constitutes speech. Moreover, the burden on CLS is hardly incidental, since its restrictive policy is essential to preserve its identity and distinctive "voice." CLS is not like the individual in *O'Brien* who burned his draft card as a means of communication--symbolic conduct--but could still disseminate his message through ordinary speech. *United States v. O'Brien, supra*, 391 U.S. 367. CLS has no comparable alternative channels if Hastings cuts off its ability to mold and preserve the message it was formed to express.

B. CLS Is Entitled To Participate In The Intellectual Life Of The College.

By applying its nondiscrimination policy to CLS, Hastings threatens to chill expression in "one of the vital centers for the Nation's intellectual life, its college and university campuses." *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 836 (1995) ("*Rosenberger*"). The First Amendment must thrive on campus, allowing young adults to discuss and consider many ideas. "[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479,

487 (1960). This Nation is dedicated to safeguarding academic freedom. *Keyishian v. Bd. of Regents,* 385 U.S. 589, 603 (1967); *Healy v. James*, 408 U.S. 169, 180-181 (1972). The academic environment is hardly the place to invoke censorship. *Gay Lib. v. Univ. of Missouri*, 558 F.2d 848, 857 (8th Cir. 1977).

This Court has acknowledged that a public college campus is much like a public forum, at least for its own students. *Widmar v. Vincent*, 454 U.S. 263, 268 n. 5 (1981). Persons entitled to be there enjoy First Amendment rights of speech and association. *Shelton v. Tucker, supra,* 364 U.S. at 487; *Healy v. James, supra,* 408 U.S. at 180; *Widmar v. Vincent, supra*, 454 U.S. at 268-269. The university chills campus debate when it denies access to the customary means of communicating with other students, faculty, and administration. Denial of access to particular student groups should be analyzed according to the same level of scrutiny applicable to any other prior restraint. *Id.* at 268 n. 5.

Even if the student groups at Hastings do not have all the benefits of a traditional public forum, the law school has surely opened a limited forum and "must respect the lawful boundaries it has itself set." *Rosenberger, supra*, 515 U.S. at 829. Limitations on access must be reasonable in light of the forum's purpose and viewpoint neutral. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 806 (1985); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-393 (1993) (public school cannot deny a church access to limited public forum, based on Free Speech Clause).

As applied to CLS, Hastings nondiscrimination policy is neither reasonable nor viewpoint neutral. On the contrary, it has the perverse effect of excluding religious voices from campus dialogue rather than granting them the protection the policy itself claims to offer.

1. CLS Serves The Reasonable Purposes Of Both The Forum And The Policy By Opening Its Meetings And Events To All Students.

The reasonableness of restricting access to a limited forum is evaluated by considering the purpose of the forum and surrounding circumstances. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., supra,* 473 U.S. at 809.

This Court has recognized that public universities should be "accessible to all individuals regardless of race or ethnicity." *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003). Campus groups offer students important educational and social opportunities, including discussion and debate on many topics. The Hastings nondiscrimination policy ensures that all students can participate. Opp. to Pet., 3, 12. CLS does not detract from that goal merely by establishing criteria to select its voting members and officers. Its meetings and events are open to all students, thus serving the reasonable educational and social purposes of the forum.

In *Evans v. Berkeley*, 38 Cal. 4th 1 (2006), the city required the Boy Scouts to allow all persons to participate in its programs at the city marina facilities. Participation in those programs did not impact the

Scouts' choice of leaders or expression of the organization's message. By opening its events to all students, CLS does exactly what the Scouts in *Evans* would not promise to do. It is unreasonable for Hastings to demand that CLS also risk sacrificing its core identity.

2. The Nondiscrimination Policy Is Not Viewpoint Neutral Because It Suppresses The Religious Convictions Of CLS.

Even if there were reasonable to apply the nondiscrimination policy as a condition of access to Hastings' student groups, the application to CLS is improper if it is "in reality a facade for viewpoint-based discrimination." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., supra,* 473 U.S. at 811. The university may not "favor some viewpoints or ideas at the expense of others." *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 804 (1984); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., supra,* 508 U.S. at 394. Hastings may not exclude CLS from the forum it has created merely to suppress its religious viewpoint, because CLS is within the class of speakers for whom the limited forum was created--Hastings law students--and addresses topics encompassed by the forum--including religion. Pet., 3; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., supra,* 508 U.S. at 394. Hastings must allow discussion of those topics from all perspectives, even where there is controversy among students.

Nondiscrimination laws have long protected morally neutral traits such as race and national origin. Religious organizations are typically exempt from

religious nondiscrimination laws that would prevent them from pursuing their mission. An antidiscrimination policy may pursue the goal of producing a society that is free of bias. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 578 (1995) ("*Hurley*"). But that objective is fatally flawed when applied to expressive associations and used to limit speech to "orthodox expression." *Id.* at 579. This is a frontal attack on the First Amendment free speech guarantee:

> While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.
>
> *Id.* at 578-579

While Hastings does not exclude religious speech per se, applying its nondiscrimination policy to CLS effectively discriminates against religious speech generally. This is an unconstitutional content-based exclusion of religious speech in the context of a forum generally open to all law student groups. *Widmar v. Vincent, supra*, 454 U.S. at 277.

Finally, Hastings can facilitate the private speech of its students without compromising its own nondiscrimination policy or appearing to endorse any particular view. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 248 (1990). Accommodation of

CLS's rights to speech, religion, and association in no way suggests that the school endorses its particular theology.

C. It Is Unconstitutional To Require CLS To Forego *Three* Core First Amendment Rights--Association, Speech, And Religion--As A Condition Of Its Participation In A Program Open To Student Groups With Diverse Viewpoints.

Speech, association, and religion would qualify as fundamental rights even if the First Amendment did not expressly guarantee them. All of these rights are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," so that "neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997). Hastings will only recognize CLS if these students agree to forfeit all three of these fundamental rights.

The government rarely has any duty to subsidize even the most fundamental of rights. *Rust v. Sullivan*, 500 U.S. 173, 201 (1991). But when government undertakes a program offering public funds, it must be administered evenhandedly. Examples include the federal tax exemptions and state property tax exemptions offered to charitable organizations covering a wide diversity of viewpoints. In the arena of speech, government can finance its own speech using private entities and ensure that the message is not distorted. *Rosenberger, supra*, 515 U.S. at 833. But when a state actor dispenses funds to encourage the expression of private speakers, the program must be viewpoint neutral. *Id.* at 834.

Parties on both sides of a controversial issue are entitled to speak and associate. At Hastings College of Law, student groups may assert antithetical positions about religion, politics, and other topics. All of them are entitled to contribute to the debate and to preserve their core identity. In order to continue as a viable campus entity and participate in the intellectual discussions, CLS must have access to the study body through customary means of communication. *Healy v. James, supra*, 408 U.S. at 181. Hastings' denial of recognition is a substantial impediment. *Id.* at 182. The speech, association, and free exercise liberties of CLS "are protected not only against heavy-handed frontal attack, but also from being stifled by *more subtle governmental interference*." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960); *Healy v. James*, 408 U.S. 169, 183 (1972) (emphasis added). Denial of recognition is a prior restraint on these rights. *Healy v. James, supra*, 408 U.S. at 184.

Finally, this Court has held that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *United States v. Am. Library Ass'n*, 539 U.S. 194, 210 (2003), quoting *Bd. of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 674 (1996). In *Rumsfeld*, the Court applied this unconstitutional conditions doctrine to hold that "the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students." *Rumsfeld, supra*, 547 U.S. at 59. Since Congress could have directly required the law school to allow access to the military even without the funding incentive, requiring access as a condition to receiving federal funds passed constitutional muster.

Here, Hastings could *not* directly require CLS to comply with its nondiscrimination policy by opening its voting memberships and leadership positions to all students. The university admits as much in its argument that CLS can simply continue to meet on campus without the benefits of official recognition. *Christian Legal Soc'y v. Kane*, No. CV-04-04484-JSW, 2006 U.S. Dist. LEXIS 27347, 31 (N.D. Cal. Apr. 17, 2006); Opp. to Pet. 9, 29-30.

II. PRESERVATION OF CLS'S CORE IDENTITY IS NOT THE ARBITRARY DISCRIMINATION THE SCHOOL POLICY RIGHTLY PROHIBITS.

An organization committed to the transmission of a system of values is engaged in constitutionally protected expression. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650 (2000) ("*Dale*"). That expression is threatened when the group is compelled to accept a person whose presence may significantly affect its ability to promote a particular viewpoint. *Id.* at 648; *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 13, (1988). This is nowhere more evident than in a religious association that transmits the values of that religion. The presence of a non-adherent, particularly in a leadership position, encroaches on the group's ability to advocate its religious values.

In contrast to the "large and basically unselective" Jaycees [*Jaycees, supra*, 468 U.S. at 621], CLS is a selective religious association. Its very existence as a Christian group is jeopardized by the inclusion of non-believers in positions where they are able to mold the group's message. As in *Hsu*, Christian leadership is imperative to preserve the group's purpose and

identity. *Hsu, supra*, 85 F.3d at 857. Group leaders shape the content and quality of the group's speech. If they are not committed to the association's values, the group voice will be garbled. *Id.* at 857.

The government has no business interfering in the internal affairs of any religious association--whether a church or other group defined by a particular faith. Religious beliefs merit First Amendment protection, whether or not they are "acceptable, logical, consistent, or comprehensible." *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 714 (1981). CLS is not a church, but like the high school Bible club in *Hsu*, it is a religious community entitled to define and express itself, "notwithstanding its reliance on a public [law] school to sanction its existence and to give it a roof." *Hsu, supra*, 85 F.3d at 869.

The law school is rightly concerned to offer equal educational opportunities to all of its students. But Hastings subjects the student CLS members to *unequal* treatment by conditioning recognition on their abandonment of First Amendment rights. *Hsu, supra*, 85 F.3d at 862. The school's nondiscrimination policy need not coincide with the private speech of every student group on campus. Indeed, it could not, because the groups express diverse and even conflicting viewpoints. CLS asks Hastings only for the benefits available to all other student organizations, not endorsement of its religious tenets. On the contrary, this public law school must remain neutral in matters of religious doctrine.

A. Nondiscrimination Provisions Have Expanded To Cover More Places And Protect More Groups--Complicating The Legal Analysis And Triggering Collisions With The First Amendment.

Antidiscrimination policies have ancient roots. In America, this Court rightly upheld civil rights legislation enacted to eradicate America's long history of racial discrimination. *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964). The Massachusetts public accommodations law at issue in *Hurley* grew out of the common law principle that innkeepers and others in public service could not refuse service to a customer without good reason. *Hurley, supra*, 515 U.S. at 571. But like many similar statutes across the country, the Massachusetts legislation broadened the scope, adding more protected categories of persons and more places subject to the law. *Id.* at 571-572. This Court noted the same trend in *Dale*. The traditional "places" moved beyond inns and trains to commercial entities and even membership associations--increasing the potential for collisions with First Amendment association rights. *Dale, supra*, 530 U.S. at 656. Protection also expanded, adding criteria such as prior criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, and political ideology. *Id.* at 656, n. 2.

But as protection expands to more places and people, so does the potential to employ nondiscrimination provisions to suppress traditional viewpoints and impose social change on unwilling participants. Religious liberty is particularly susceptible to infringement. When antidiscrimination policies are applied to religious entities, there is

enormous potential for collision with First Amendment rights--free exercise of religion, speech, and association. Political power can be used to squeeze religious views out of public debate about controversial social issues. Michael W. McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 188 (1993). Hastings' application of its nondiscrimination policy to CLS effectively ejects this religious group from the university's "marketplace of ideas." *Healy v. James, supra*, 408 U.S. at 180.

B. The CLS Mission Necessitates Selection Criteria.

Everyone experiences discrimination. Student groups at Hastings are open only to Hastings law students--not the general public or even law students from other schools. The university is not required to grant unlimited access to its campus. *Souders v. Lucero*, 196 F.3d 1040, 1044 (9th Cir. 1999) (former student excluded for stalking). Hastings, like the high school in *Hsu*, might argue that "its nondiscrimination policy is the only way it can achieve an important educational objective: that students be free of any type of 'discrimination.'" *Hsu, supra*, 85 F.3d at 871. But students are subjected to discrimination all the time--honor rolls, sports teams, or activities requiring a certain grade point average. *Id.* Although it is a worthy goal to eliminate certain forms of invidious discrimination--where the selection criteria are truly irrelevant--it is impossible to eradicate all discrimination.

C. The Narrowly Crafted CLS Policy Is Not The Arbitrary, Unreasonable Discrimination The School Policy Rightly Prohibits.

CLS freely opens its meetings and events to all Hastings law students. But it cannot follow the nondiscrimination policy without sacrificing allegiance to its core convictions. Nondiscrimination policies serve admirable purposes but must sometimes yield in order to avoid directly burdening the First Amendment rights of others.

Under the First Amendment, a speaker has autonomy over the content of his own message. *Hurley, supra*, 515 U.S. at 573. Where an expressive association is lumped in with places of public accommodation and subjected to a nondiscrimination policy, this principle is compromised. In *Hurley*, the application of the state's antidiscrimination statute effectively converted the parade organizers' *speech* into a place of public accommodation and forcibly transformed the message. *Hurley, supra*, 515 U.S. at 573. The same is true here. If CLS must follow Hastings' nondiscrimination policy, its message will be shaped by all those students protected by the policy--including those who reject the core religious convictions the group was formed to promote. This extends far beyond the "meal at the inn" promised by the old common law and encroaches on the right of an expressive association to preserve the integrity of its message. *Id.* at 578. This Court, when it rejected a 400-member dining club's facial challenge to a state antidiscrimination law, recognized that the state could not prohibit the exclusion of members whose views conflicted with positions advocated by an expressive

association. What the club could not do is use characteristics like race and sex as "shorthand measures" in place of legitimate membership criteria. *New York State Club Assn., Inc. v. City of New York, supra,* 487 U.S. at 13. Similarly, *Hsu* acknowledged the impropriety of a student club excluding members "solely for reasons of hostility or cliquishness" rather than "to foster the group's shared interest in particular speech." *Hsu, supra*, 85 F.3d at 859; *see* William P. Marshall, *Discrimination and the Right of Association*, 81 Nw. U. L. Rev. 68, 78-80, 90-91 (1986).

Not all discrimination is created equal. Discrimination may or may not be invidious--and thus rightly circumscribed--depending on the context and the identity of the person or group who discriminates. *Hsu, supra*, 85 F.3d at 869. Some antidiscrimination regulations, like Hastings' policy, impair an association's ability to express only the shared views that brought them together. *Jaycees, supra*, 468 U.S. at 623. It is hardly "individious" discrimination for an association to exclude voting members and leaders who threaten to dilute its message. This principle cuts across all viewpoints and protects all groups from infiltration. Here, CLS has opened its doors as widely as possible, crafting restrictions narrowly to preserve its core identity and message as a Christian organization.

D. The First Amendment Bars Courts From Becoming Entangled In The Relationship Between A Religious Association And Its Leaders.

Although this case does not expressly implicate the Establishment Clause, First Amendment principles

foreclose state involvement in the selection of members or leaders of a religious association. This Court has long recognized that a religious organization can require conformity to its moral standards as a condition of membership. *Watson v. Jones,* 80 U.S. (13 Wall.) 679 (1872). The government cannot dictate either membership criteria or religious doctrine. Hastings enters forbidden constitutional territory by imposing its nondiscrimination policy on CLS and becoming improperly entangled in the selection of those who will disseminate its religious message.

First Amendment exemptions are appropriate to preserve the "identity, expression, and intimacy" of "both those who seek protection under anti-discrimination laws, as well as those who seek exemption." Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws, supra,* 76 U. Det. Mercy L. Rev. at 191. This is particularly true for the actions of a religious group within the context of its own religious community--no matter how much the government might disagree with their beliefs. Shelley K. Wessels, *The Collision of Religious Exercise and Governmental Nondiscrimination Policies,* 41 Stan. L. Rev. 1201, 1219 (1989). Religious organizations must establish religious criteria to select their members and leaders. Otherwise, the association could be hijacked by non-adherents who would distort its identity and message. It could even cease to *be* religious.

The legal protections for a religious organization's employment policies are analogous to the issues in this case. A religious organization can exclude non-adherents from key employment positions where they could distort the organization's message. Ira C. Lupu,

Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination, supra, 67 B.U. L. Rev. 391. Because of the unique constitutional protection for religion, the Civil Rights Act of 1964 accommodates religious employers by exempting them from the prohibition of religious discrimination. 42 U.S.C. § 2000e-1; Julie Manning Magid and Jamie Darin Prenkert, *The Religious and Associational Freedoms of Business Owners*, 7 U. Pa. J. Lab. & Emp. L. 191, 195 (2005). This Court rejected Establishment and Equal Protection Clause challenges to that exemption, recognizing that government should not interfere with "the ability of religious organizations to define and carry out their religious missions." *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 335-336 (1987).

"A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose." *Hsu, supra*, 85 F.3d at 864 (emphasis added). Similarly, it is not preferential treatment to exempt CLS it from a policy that prevents it from preserving its identity. Hastings Law School would simply be allowing CLS to advance religion--its very purpose--just as Congress did when it enacted a religious exemption to the Civil Rights Act of 1964. 42 U.S.C. § 2000e-1.

Finally, it is inadequate to argue that the risks of non-Christian leadership are mere speculation. Unlike *Hurley*, a broad cross-section of students is excluded from certain positions because they do not affirm the religious beliefs of CLS. The exclusion is not a specific group that intends to communicate a contrary message. *Hsu, supra*, 85 F.3d at 856. But as in *Hsu*, no one really knows. It is equally speculative to

presume that non-believers would not infiltrate the group and muffle its message. *Id.* at 861. CLS should not be required to assume the risk.

III. THE LAW SCHOOL'S REFUSAL TO RECOGNIZE CLS VIOLATES ITS OWN POLICY AND THREATENS THE RIGHTS OF ALL STUDENTS.

Hastings College of the Law is standing on legal quicksand. The application of its nondiscrimination policy to CLS is tantamount to the very religious discrimination the policy prohibits. It is ironic and paradoxical to promote diversity, tolerance, and inclusiveness by excluding opposing voices. Tolerance morphs into tyranny. Diversity is replaced by a phony "unity" when opposing viewpoints are muzzled.

A. Ironically, The Policy Weakens Constitutional Protection For Everyone--Including The Students The Policy Claims To Protect.

The First Amendment protects a broad spectrum of expression, popular or not. In fact, the increasing popularity of an idea makes it all the more essential to protect dissenting voices. *Dale, supra*, 530 U.S. at 660. Censorship spells death for a free society. "Once used to stifle the thoughts that we hate...it can stifle the ideas we love." *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167-168 (4th Cir. 1976); *Gay Lib. v. Univ. of Missouri, supra*, 558 F.2d at 856. Justice Black said it well in connection with the Communist Party, which advocated some of the most dangerous ideas of the twentieth century:

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the *First Amendment* must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Communist Party v. SACB,* 367 U.S. 1, 137 (dissenting opinion) (1961).

Healy v. James, supra, 408 U.S. at 187-188

A ruling against CLS will not advance the cause of any group seeking enhanced constitutional protection. The status of various minority groups--including racial and religious minorities--has improved dramatically only because the Constitution guarantees free expression for all Americans and facilitates the advocacy of new ideas. David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223, 232 (2003). No group can demand for itself what it would deny to others. Otherwise, the constitutional foundation will crumble and all Americans will suffer.

More specifically, expressive association is critical to preserving freedom for all Americans. Association is an important corollary to free speech. *Jaycees, supra,* 468 U.S. at 622. It preserves political diversity and shields minority views from majority suppression. *Dale, supra*, 530 U.S. at 647-648. Moreover, public disapproval of an expressive association's tenets does not justify intrusion into its internal affairs, such as compelled acceptance of a member who would compromise the organization's message. *Id.* at 648, 661.

This principle applies on campus and cuts across a wide range of viewpoints. A public university may not squelch student speech or association based on the views a group expresses. *Healy v. James, supra*, 408 U.S. at 187-188. Restriction is appropriate only where advocacy is likely to incite or produce imminent lawless action. *Brandenburg v. Ohio, supra,* 395 U.S. at 447; *Gay Lib. v. Univ. of Missouri, supra*, 558 F.2d at 855 n. 13.

Here, Hastings is applying its nondiscrimination policy in a discriminatory, unequal manner. "[E]xemptions from neutrally applicable rules that impede one or another club from expressing the beliefs that it was formed to express, may be required if a school is to provide 'equal access.'" *Hsu, supra*, 85 F.3d at 859. The Hastings policy impedes the ability of CLS to communicate the beliefs it was formed to express, because it can only obtain official recognition by jeopardizing its ability to exist as a distinctly Christian group.

B. Hastings' Application Of The Nondiscrimination Policy Defeats Its Own Purpose.

Antidiscrimination laws and policies attempt to build a fairer society. But the means used to achieve that worthy goal may threaten civil liberties. David E. Bernstein, *Defending the First Amendment From Antidiscrimination, supra,* 82 N.C. L. Rev. at 228. Punishing expression because it offends certain designated groups can lead to serious injustice, as demonstrated by the theft and destruction of college campus newspapers to squelch offensive stories or ads. Such practices provide "a scary glimpse at the

potential future of antidiscrimination policies that will be pursued at all levels of American government if civil liberties protections are not maintained." *Id.* at 241. If Americans want to preserve their constitutional liberties, they need to "develop thicker skin" and tolerate a variety of expression. *Id.* at 245. Instead, there is a growing trend to provide legal remedies under the rubric of discrimination, "perversely encouraging more people to be hypersensitive and easily outraged." *Id.* at 245. If Americans pursue equality by sacrificing civil liberties, they will eventually have neither liberty nor equality. *Id.* at 246.

CLS exercises a trilogy of rights--free speech, association, and religion--in limiting its voting members and leaders to students who support the group's religious tenets. By opening its meetings and events to all students, CLS affirms equality to the fullest extent possible without compromising its identity. If Hastings requires more, CLS risks the loss of its core identity as a Christian organization. That is a perverse, discriminatory result for a policy designed to eradicate discrimination.

C. Student Fees May Fund A Wide Variety Of Private Student Speech Without Violating The First Amendment.

Registered student groups at Hastings are funded by mandatory student fees. There are bound to be ideological conflicts among student organizations. Republican students might not want to finance a student group of Democrats. Jewish students could object to funding a Hindu group. Everyone will be

offended at some point, but offense is inevitable in order to guard the First Amendment.

This Court has held that a public university may charge students an activity fee to finance a broad range of extracurricular expression if the program is viewpoint neutral in the allocation of its funding. *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233 (2000). If Hastings funds all students groups *except* CLS--which can only preserve its religious identity by limiting voting members and leaders--that is exactly the type of impermissible viewpoint discrimination this Court rejected in *Rosenberger, supra*, 515 U.S. 819 (university could not refuse to fund a student newspaper espousing a religious viewpoint).

D. Hastings Should Grant Equal Access To All Student Organizations, Just As The Law Schools In *Rumsfeld* Had To Grant Equal Access to Military Recruiters.

This Court has held that law schools can be required to grant military recruiters access to their campuses as a condition of receiving federal funds, even though the schools disagree with certain military policies. *Rumsfeld, supra*, 547 U.S. at 58. Hastings argues that CLS, similarly, can be required to follow the school's nondiscrimination policy as a condition of receiving benefits as a registered student group. But mere access to a law school campus is not analogous to holding a voting membership or leadership position in an expressive association. The presence of military recruiters on campus does not threaten the composition of the law school or any message it proclaims. The recruiters are not seeking to become

part of the law school. They are outsiders who enter the campus for a limited time and purpose. *Id.* at 69. Their mere presence does not violate the school's rights regardless of the school's disagreement with their message. *Id.* at 70.

The situation at Hastings is quite different. As the Second Circuit observed in *Hsu*, merely allowing non-Christians to attend the meetings of a high school Bible Club would not alter the Club's speech. *Hsu, supra*, 85 F.3d at 858 n. 17. But when the Club sets criteria for the students who will lead Christian prayers and devotions, these leadership provisions safeguard the spiritual content of the Club's message. *Id.* at 858. CLS meetings and events are open to all Hastings students. Like the military recruiters, the mere presence of non-believers does not alter the CLS message. But their exclusion as voting members or leaders is necessary to preserve the integrity of the CLS religious message.

CONCLUSION

CLS engages in a highly limited form of "discrimination" for the sole purpose of preserving its core religious identity. Restricting its leaders and voting members to students committed to the group's religious tenets is the only way this association can create and maintain a "voice" that will faithfully represent the shared beliefs for which it was formed. By denying CLS access to the forum available to all other student groups, Hastings engages in the very religious discrimination its nondiscrimination policy was enacted to prevent. Applying that policy to CLS will ultimately harm all of the university's students by suppressing protected speech and eliminating CLS's

unique contribution to the school's "marketplace of ideas."

Respectfully Submitted,

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AMICUS CURIAE BRIEF

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CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,
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BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AND GAY & LESBIAN ADVOCATES & DEFENDERS IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AND GAY & LESBIAN ADVOCATES & DEFENDERS IN SUPPORT OF RESPONDENTS

Lambda Legal Defense and Education Fund, Inc. and Gay & Lesbian Advocates & Defenders respectfully submit this brief as *amici curiae* in support of Respondents Leo P. Martinez, *et al.*[1]

[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Pursuant to the letters filed with the Clerk, *amici curiae* have permission of all parties to file.

STATEMENT OF INTEREST

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender people and those with HIV through impact litigation, education, and public policy work. Lambda Legal is the largest and oldest such organization in the country and has appeared as counsel in hundreds of cases involving sexual orientation discrimination issues, including *Lawrence v. Texas*, 539 U.S. 558 (2003), *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Romer v. Evans*, 517 U.S. 620 (1996), which figure prominently in the briefing of this case.

Gay & Lesbian Advocates & Defenders ("GLAD") is a public interest organization dedicated to ending discrimination based upon sexual orientation, HIV status, and gender identity and expression. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. GLAD appeared as counsel in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), also discussed in the briefing to this Court.

Amici respectfully submit this brief because they are deeply concerned about the ongoing problem of discrimination against lesbians and gay men. Unfortunately, as the present litigation illustrates, gay students continue to be subject to exclusion and prejudice in many areas of campus life, and this discrimination can have a devastating mental and emotional impact on the gay members of a university community. In addition, the positions taken by

Petitioner Christian Legal Society Chapter of University of California, Hastings College of the Law ("Petitioner" or "CLS") threaten to effect a fundamental shift in this Court's jurisprudence on private organizations' entitlement to government subsidies, and potentially call into question government nondiscrimination policies of all stripes.

INTRODUCTION AND SUMMARY

Amici agree with the arguments of Respondents and Respondent-Intervenor that the policy of the University of California, Hastings College of the Law ("Hastings") regarding registered student organizations ("RSO") is permissible, and that Petitioner's claims must fail. As Respondents explain, Petitioner's claims are unavailing whether the Court considers the Hastings RSO policy as stipulated to by the parties and relied upon by the courts below (what has been termed an "all comers" or "open membership" policy) or the more limited nondiscrimination policy that Petitioner would have this Court address, contrary to its earlier stipulation. This *amicus* brief focuses primarily on the contention advanced in Petitioner's brief that CLS "has no policy excluding anyone on the basis of the person's sexual 'orientation,'" but rather "excludes . . . on the basis of a conjunction of conduct and the *belief* that the conduct is not wrong." Brief for Petitioner ("Pet. Br.") 35-36, 39 (emphasis in original). As will be discussed, this contention need not be addressed by the Court in resolving this case, but if it is addressed, it should be rejected. CLS's membership policy unequivocally discriminates on the basis of sexual orientation.

The question whether CLS discriminates on the basis of sexual orientation is not properly before this Court. The parties have stipulated that Hastings applied an "all comers" or "open membership" policy to RSOs, which requires RSOs to allow any student to participate, become a member, or seek leadership positions in the organization, regardless of the student's status or beliefs. Because Petitioner admits that it violates this policy, the Court need not address whether CLS's membership policy discriminates on the basis of sexual orientation specifically.

However, if the Court addresses the issue, it should recognize that Petitioner's membership policy does discriminate on the basis of sexual orientation. The constitution CLS submitted to Hastings omitted any prohibition against sexual orientation discrimination even though it included other prohibitions against discrimination, Pet. App. 101a, and CLS sought "an exemption from the religion *and sexual orientation* portions of the [Hastings] Nondiscrimination Compliance Code." J.A. 281 (emphasis added). Moreover, in its pleadings before the district court, CLS alleged that when it submitted its constitution to Hastings it "maintained that it would still consider religion *and sexual orientation* in the selection of officers and members." J.A. 72 (emphasis added). The district court found these to be "binding . . . judicial admissions." J.A. 460. Petitioner's present contention that its membership policy does not discriminate based on sexual orientation but only on same-sex sexual conduct—or on a nebulous "conjunction of conduct and [ ] *belief*," Pet. Br. 36 (emphasis in original)—is thus untenable. This Court and others have recognized that discrimination based on same-sex sexual conduct *is* discrimination based on sexual

orientation. Petitioner's argument to the contrary offends common sense no less than judicial precedent.

Given this reality, Hastings acted well within its authority in denying Petitioner's application for RSO status. *Amici* are not challenging Petitioner's right to express its beliefs or establish its own membership policies. Hastings has not forced Petitioner to accept members it does not want or to express views contrary to its core beliefs. Nor does this case involve disfavored treatment of religious viewpoints or limitations on what religious groups can say in the "public square." Pet. Br. 58. The question presented by this litigation is whether a state school is *required* to provide funding and other benefits to a student group that violates the school's generally applicable policy. Under this Court's jurisprudence, the answer to that question is clear. A public school may permissibly decide not to subsidize groups that discriminate.

ARGUMENT

I. THE ISSUE WHETHER CLS DISCRIMINATES BASED ON SEXUAL ORIENTATION IS NOT BEFORE THE COURT.

As will be discussed, there can be little doubt that CLS's membership policy, as codified in a CLS national board resolution prohibiting membership by those who engage in unrepentant "homosexual conduct," J.A. 146, discriminates against gay students. However, in resolving the pending case, the Court need not address CLS's argument that this policy does not constitute discrimination against gay students based on their sexual orientation.

It is undisputed that Hastings maintains what has been referred to as an "all comers" policy with respect to RSOs. The parties have stipulated that "Hastings requires that registered student organizations allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs." J.A. 221 (Joint Stip. ¶ 18). While Petitioner now seeks to cast doubt upon this description of the Hastings policy, *see* Pet. Br. 14-15, 41-42, 47-49, the courts below relied upon the parties' stipulation on this fact issue.[2] Petitioner may not now change its position on the Hastings policy in this Court. *See, e.g., Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 226 (2000) (declining to consider argument that university funding policy is not viewpoint-neutral because the parties had previously stipulated to the contrary); *Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1880) ("The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced.").

It follows that CLS's arguments about the precise bases on which it seeks to discriminate are immaterial. CLS does not dispute that it refuses to accept "all comers." *See* Pet. Br. 5 (members must "affirm their commitment to the group's core beliefs").

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[2] *See Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane*, 319 F. App'x 645, 645-46 (9th Cir. 2009) (Pet. App. 2a-3a) ("The parties stipulate that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group. The conditions on recognition are therefore viewpoint neutral and reasonable."); *Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane*, No. C 04-04484 JSW, 2006 WL 997217, at *2 (N.D. Cal. May 19, 2006) (Pet. App. 9a) (recognizing Hastings' open membership policy).

Instead, CLS argues that it and similarly situated groups have "a constitutionally protected right to . . . exclud[e] those who do not share their essential purposes and beliefs." Pet. Br. 2, 27-29. CLS's membership criteria manifestly violate the requirement that, to become an RSO, an organization may not exclude any student based on the student's beliefs. It is thus irrelevant whether CLS discriminates based on sexual orientation as well.

Accordingly, whether CLS's policy discriminates against gay students based on sexual orientation is not before the Court. For the reasons set forth below, to the extent the Court nevertheless is inclined to address the issue, it should recognize that CLS's membership policy unequivocally does discriminate on the basis of sexual orientation.

II. CLS'S MEMBERSHIP POLICY DISCRIMINATES ON THE BASIS OF SEXUAL ORIENTATION.

CLS's membership criteria are governed by a national resolution prohibiting, among other things, "unrepentant participation in or advocacy of a sexually immoral lifestyle," including "homosexual conduct." J.A. 146. Rather than acknowledge that this policy discriminates on the basis of sexual orientation and attempt to defend that discrimination, CLS contends that it "has no policy excluding anyone on the basis of the person's sexual 'orientation,'" but rather "excludes them on the basis of a conjunction of [sexual] conduct and the *belief* that the conduct is not wrong." Pet. Br. 35-36, 39 (emphasis in original). CLS relies on a false distinction. Its policy does discriminate on the basis of sexual orientation.

CLS's condemnation of "unrepentant" "homosexual conduct" is stated in a policy that also includes references to religious faith.[3] While CLS certainly is entitled to its private religious beliefs, here it seeks to mandate an entitlement to a *government benefit* based in part on the untenable claim that it does not engage in sexual orientation discrimination. Whatever the other issues in this case, that claim cannot, and should not, be credited.

A. Petitioner's Attempt To Distinguish Between Same-Sex Sexual Conduct And Sexual Orientation Is Untenable.

This Court already has rejected Petitioner's attempted distinction between sexual conduct and sexual orientation. In invalidating a Texas law that

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[3] *See* J.A. 146:

> 5. The Holy Scripture declares that the "acts of the sinful nature" of which the repentant believer is forgiven and from which he or she is to be cleansed include all acts of sexual conduct outside of God's design for marriage between one man and one woman, which acts include fornication, adultery, and homosexual conduct. Exodus 20:14; Matthew 15:19; Romans 1:27; I Corinthians 6:9-10.
>
> 6. In view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership.

See also, e.g., J.A. 67-68 (CLS "interprets its Statement of Faith to require that officers adhere to orthodox Christian beliefs, including the Bible's prohibition of sexual conduct between persons of the same sex. A person who engages in homosexual conduct or adheres to the viewpoint that homosexual conduct is not sinful would not be permitted to become a member or serve as a[ ] [CLS] officer.").

criminalized certain same-sex sexual conduct in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court left no doubt that such laws impermissibly discriminate against gay people as a class:

> The laws involved . . . here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences . . . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.

Id. at 567. The Court recognized that "[w]hen homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination, both in the public and in the private spheres." *Id.* at 575 (emphasis added). Upholding such laws, the Court concluded, "demeans the lives of homosexual persons." *Id.*

Justice O'Connor elaborated on this point in her concurring opinion:

> While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. "After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."

Id. at 583 (O'Connor, J., concurring in the judgment) (quoting *Romer v. Evans*, 517 U.S. 620, 641 (1996)

(Scalia, J., dissenting) (internal quotation marks omitted)).[4]

The Court reached a similar conclusion in *Romer v. Evans*, where it struck down an amendment to Colorado's Constitution that deprived "homosexual, lesbian or bisexual orientation, conduct, practices or relationships" of protection under state nondiscrimination laws. 517 U.S. at 624. The Court found the amendment to be "a status-based enactment," "born of animosity toward the class of persons affected," with not even a rational relation to a legitimate government purpose. *Id.* at 634, 635. The lower Court in Romer reached the same conclusion:

> Amendment 2 targets this class of persons based on four characteristics: sexual orientation; conduct; practices; and relationships. Each characteristic provides a potentially different way of

---

[4] *See also Romer*, 517 U.S. at 642 (Scalia, J., dissenting) ("where criminal sanctions are not involved, homosexual 'orientation' is an acceptable stand-in for homosexual conduct"); Nicole R. Hart, Note, *The Progress and Pitfalls of Lawrence v. Texas*, 52 Buff. L. Rev. 1417, 1441 (2004) ("[A] coherent definition of homosexuality must recognize that conduct and status are inextricably intertwined because the choice to perform certain sexual acts is a fundamental criterion for determining who might be regarded as homosexual.") (citation, quotation marks and brackets omitted); Brief *Amici Curiae* of the American Psychological Association, et al. at 6, *In re Marriage Cases*, No. S147999 (Cal. Sept. 26, 2007) ("Sexual orientation refers to an enduring pattern of or disposition to experience sexual, affectional, or romantic attractions primarily to men, to women, or to both sexes. It also refers to an individual's sense of personal and social identity based on those attractions, behaviors expressing them, and membership in a community of others who share them."), *available at* http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/Amer_Psychological_Assn_Amicus_Curiae_Brief.pdf.

> identifying that class of persons who are gay, lesbian, or bisexual. These four characteristics are not truly severable from one another because each provides nothing more than a different way of identifying the same class of persons.

Evans v. Romer, 882 P.2d 1335, 1349-50 (Colo. 1994); *see also Christian Legal Soc'y v. Walker*, 453 F.3d 853, 873 (7th Cir. 2006) (Wood, J., dissenting) (rejecting proposed "distinction between discrimination on the basis of sexual *orientation* and discrimination on the basis of sexual *conduct*") (emphasis in original).

Courts have recognized the inseparability of sexual conduct and sexual orientation in other contexts as well. For example, for purposes of seeking political asylum in the United States, persecution of same-sex sexual *conduct* is recognized as tantamount to persecution on the basis of sexual *orientation*. *See, e.g., Karouni v. Gonzales*, 399 F.3d 1163, 1172-73 (9th Cir. 2005) (collecting authorities and rejecting argument that "the future persecution Karouni fears would not be on account of his status as a homosexual, but rather on account of him committing future homosexual acts," because there is "no appreciable difference between an individual . . . being persecuted for being a homosexual and being persecuted for engaging in homosexual acts"); *Maldonado v. Att'y Gen.*, 188 F. App'x 101, 104 (3d Cir. 2006) (rejecting argument that persecution of gay individual was on account of same-sex conduct rather than sexual orientation and stating that "[t]his is a distinction without a difference").

These precedents comport with prevailing law in other contexts where conduct also is closely correlated with status. For example, this Court has

determined that "discrimination on the basis of racial affiliation and association is a form of racial discrimination" even though it may be couched in terms of prohibitions of specific conduct that "appl[y] to all races." *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (holding that university prohibition of interracial relationships—*i.e.*, conduct—constitutes racial discrimination); *accord Loving v. Virginia*, 388 U.S. 1 (1967) (striking down law prohibiting interracial marriage); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (striking down law prohibiting interracial cohabitation).

Federal employment law also makes clear that, as a statutory matter, such status-conduct distinctions are untenable where conduct is inherently linked to status. If a woman is judged adversely because of a view that she does not act, talk, or dress in a stereotypically feminine way, that is evidence of sex discrimination, not just discrimination based on conduct. *PriceWaterhouse v. Hopkins*, 490 U.S. 228, 234-36, 251 (1989) (plurality opinion); *see also id.* at 258-61 (White, J., concurring in the judgment); *id.* at 261, 272-73 (O'Connor, J., concurring in the judgment). Federal statutes likewise define sex discrimination to include not only discrimination based simply on a person's gender, but also discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10; *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) ("The Pregnancy Discrimination Act has now made clear, that for all Title VII purposes, discrimination based on a woman's preg-

nancy is, on its face, discrimination because of her sex.").[5]

Federal regulations similarly define national origin discrimination broadly to include not only denial of equal employment opportunities based on place of origin, but also discrimination "because an individual has the physical, cultural or linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1. The EEOC has expressed "particular concern" over denials of equal employment opportunities based on conduct

> grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group . . . .

Id.

Federal law likewise prohibits not only discrimination based on religious affiliation, but also discrimination based on "all aspects of religious observance and practice." 42 U.S.C. § 2000e(j). Indeed, religious

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[5] The Court has held, of course, that the statutory provisions discussed above are not necessarily coterminous with constitutional limitations on government conduct. *See, e.g., Geduldig v. Aiello*, 417 U.S. 484, 494-97 (1974) (ruling that pregnancy discrimination did not constitute sex discrimination for purposes of the Equal Protection Clause). These statutory provisions nevertheless demonstrate that, where certain conduct is closely correlated with status, the law often treats discrimination based on conduct as tantamount to discrimination based on status.

affiliations are inextricably linked to faith-specific conduct in the form of rituals, ceremonial dress, and other observances. A group obviously would not succeed in arguing that it does not discriminate against Muslims, but merely excludes those who pray toward Mecca five times a day; that it does not discriminate against Jews, but merely excludes individuals who wear yarmulkes; or that it does not discriminate against Christians, but only excludes those who partake in communion. Yet this is precisely the kind of Orwellian distinction Petitioner would have the Court draw. *See generally Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").[6]

Petitioner's own explanation of its membership policy confirms the point. One would be hard pressed to find a better definition of sexual orientation—or for that matter religious affiliation—than Petitioner's proffered "conjunction of conduct and . . . *belief*." Pet. Br. 36 (emphasis in original). Both religion and sexual orientation are defined in part by specific forms of conduct which simultaneously express and define the practitioner's identity and beliefs. *See, e.g.*, Michael W. McConnell, *What Would It Mean to Have a "First Amendment" for Sexual Orientation?*, *in* Sexual Orientation and Human Rights in American Religious Discourse 234 (Saul M. Olyan & Martha C. Nussbaum eds., 1998) ("Both religion and sexuality

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[6] *See also Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986) (upholding military ban on wearing yarmulkes while on duty only because "the military is, by necessity, a specialized society separate from civilian society" and "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment") (internal quotations omitted).

are central aspects of personal identity; opinions and practices with regard to sexuality and religion are not easily changed; both sexuality and religion involve opinion as well as conduct; both involve choice and something deeper than choice; both have public and private dimensions.").

Petitioner's argument that discrimination based on a particular status does not encompass discrimination based on conduct central to that status could lead to easy evasion of nondiscrimination laws. Those intent on discriminating based on a particular religion could simply exclude individuals who engage in religious practices core to that religion. National origin discrimination could be accomplished by simply barring those who engage in customs common to a particular country. And disability discrimination could be engaged in by those who claim they are opposed only to the "conduct" of using wheelchairs or guide dogs. This Court and others have rejected such illogical and invidious distinctions.

Petitioner's own actions belie its contention in this Court that it does not discriminate based on sexual orientation. The constitution CLS submitted to Hastings included provisions barring discrimination on several bases, but not sexual orientation. Pet. App. 101a. CLS moreover asked Hastings for "an exemption from the . . . *sexual orientation* portions of the [Hastings] Nondiscrimination Compliance Code." J.A. 281 (emphasis added). Most tellingly, in its verified pleadings below, CLS alleged that, in submitting its constitution to Hastings, it "maintained that it would still consider religion *and sexual orientation* in the selection of officers and members," that it objected to Hastings requiring it to "open its membership and officer positions to all students

regardless of . . . *sexual orientation*," and that it objected to the policy "forbidding [CLS] to discriminate on the basis of . . . *sexual orientation*." J.A. 72-74 (emphasis added). The district court found these to be "binding . . . judicial admissions." J.A. 460.

In short, Petitioner did not even attempt to convince Hastings that its membership policy does not discriminate based on sexual orientation, and it has *admitted* that it does consider sexual orientation in selecting its members. Because CLS excludes lesbian and gay students on the basis of conduct that reflects their sexual orientation, it rightfully recognized, as should this Court, that CLS was not in compliance with the nondiscrimination obligations of RSOs.

B. CLS's Exclusion Of "Unrepentant" Individuals Confirms That Its Policy Targets Sexual Orientation.

Any doubt about the scope of Petitioner's membership policy is removed by its exclusion of only "unrepentant" students, J.A. 146, *i.e.*, those who "*belie[ve]* that the[ir] conduct is not wrong." Pet. Br. 35-36 (emphasis in original). According to Petitioner, the CLS policy is intended to exclude "those who do not regard the conduct as wrong or sinful and resolve to cease acting in that manner." Pet. Br. 35. The implication is that, in order to become members of CLS, gay students would have to view expression of their own sexual identities as inherently "wrong or sinful."

It is as much a form of discrimination to require as a condition of membership that students condemn an aspect of themselves central to their identity as it is to exclude them altogether because of that identity.

Excluding gay students from membership unless they reject their own same-sex sexual orientations falls squarely within the types of harms that nondiscrimination policies are intended to prevent.

If a law student group at Hastings had a requirement that members agree that women are unintelligent and should not work outside the home, that would readily be seen as discriminating against female students based on their sex: It requires women, and not men, to reject their own equal worth in order to join. Likewise, a white supremacist group could not seriously say it does not discriminate based on race because it allows non-white members to join if they will simply admit their own inferiority.

The requirement that lesbian and gay students who might wish to join CLS must internalize such self-condemnation likewise discriminates based on sexual orientation. Indeed, the discriminatory nature of such a requirement is borne out by social science research describing the harm suffered by lesbian and gay individuals from societal prejudices against them. The U.S. Surgeon General has stated that "our culture often stigmatizes homosexual behavior, identity and relationships . . . . These anti-homosexual attitudes are associated with psychological distress for homosexual persons and may have a negative impact on mental health, including a greater incidence of depression and suicide, lower self-acceptance and a greater likelihood of hiding sexual orientation . . . ." David Satcher, Surgeon General, U.S. Dep't of Health & Human Servs., *The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior* 4 (July 9, 2001) (internal citations omitted), *available at*

http://www.surgeongeneral.gov/library/sexualhealth/call.pdf.

The American Psychological Association similarly has recognized that "sexual stigma, manifested as prejudice and discrimination directed at non-heterosexual sexual orientations and identities, is a major source of stress for sexual minorities" and "a factor in mental health disparities found in some sexual minorities." Am. Psychol. Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (hereinafter "APA Report") 1 (2009), *available at* http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf.

Gay people who feel compelled to conceal their sexual orientation tend to report more frequent mental health concerns than those who are openly gay, and are also at greater risk for physical health problems. *See* Steve W. Cole, *Social Threat, Personal Identity, and Physical Health in Closeted Gay Men*, *in* Sexual Orientation and Mental Health: Examining Identity and Development in Lesbian, Gay, and Bisexual People 245, 245-251 (Allen M. Omoto & Howard S. Kurtzman eds., 2006); Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 Psychol. Bull. 674, 676-85 (2003) (hereinafter "Meyer"). Attempts to alter gay peoples' sexual orientation have been associated with "loss of sexual feeling, depression, suicidality, and anxiety." APA Report at 3. As with other historically stigmatized groups, the impact of social prejudice is especially pronounced among the young, who experience self-hatred when they internalize societal

prejudice against same-sex relationships. *See* Meyer at 680-85.

In contrast, gay people have been found to manifest better mental health when they hold positive feelings about their own sexual orientation, have developed a positive sense of personal identity based on it, and have integrated it into their lives by disclosing it to others. *See* Gregory M. Herek & Linda D. Garnets, *Sexual Orientation and Mental Health*, 3 Ann. Rev. Clin. Psychol. 353, 362 (2007); John E. Pachankis, *The Psychological Implications of Concealing a Stigma: A Cognitive-Affective-Behavioral Model*, 133 Psychol. Bull. 328, 334, 339 (2007). Indeed, a scientific consensus has emerged that there is nothing abnormal or unhealthy about same-sex sexual orientations. The APA has recognized that "[s]ame-sex sexual attractions, behavior, and orientations per se are normal and positive variants of human sexuality." APA Report at 2. The American Psychiatric Association and the American Psychological Association accordingly have removed "homosexuality" from their lists of mental disorders. *See Dale*, 530 U.S. at 699 (Stevens, J., dissenting).

Yet it remains a sad fact that discrimination, harassment, and violence directed against lesbians and gay men continue to be extraordinarily prevalent, even within institutions of higher education. *See, e.g.*, Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. Davis L. Rev. 195, 221 (2008) (between 55 and 72% of lesbian and gay college students have reported being victims of violence); Susan R. Rankin, *Campus Climate for Gay, Lesbian, Bisexual and Transgender People: A National Perspective*, The National Gay

and Lesbian Task Force Policy Institute 24, 27 (2003), *available at* http://www.thetaskforce.org/downloads/reports/reports/CampusClimate.pdf (more than one third of college students and nearly one fifth of graduate and professional school students surveyed experienced sexual orientation or gender identity harassment in the previous year, and more than 50% concealed their sexual orientation or gender identity in order to avoid intimidation); Amelia Cramer, *Homophobia in the Halls of Justice: Sexual Orientation Bias and Its Implications Within the Legal System: Discovering and Addressing Sexual Orientation Bias in Arizona's Justice System*, 11 Am. U. J. Gender Soc. Pol'y & L. 25, 31-32 (2002) (nearly 90% of law students surveyed had heard disparaging remarks about lesbians and gay men and 10% had seen lesbian or gay students discriminated against by professors, staff, or students).

The CLS membership policy must be recognized for what it is. By excluding those who engage in same-sex sexual conduct unrepentantly, it rejects gay people based on their sexual orientation. Such a policy reinforces historical patterns of discrimination against gay people, patterns that have a destructive social and psychological impact on students who internalize the notion that their sexual identities are "wrong or sinful." CLS is entitled to its own private beliefs about sexual orientation, same-sex sexual conduct, and morality, but it is not entitled to government funding for its discrimination against gay and lesbian students who do not repent their sexuality.

C. CLS's Membership Policy Is Discriminatory Even If It Does Not Necessarily Apply To All Gay People Or May Apply To Some Non-Gay People.

The claim that CLS's membership policy facially "applies to heterosexual as well as homosexual conduct," Pet. Br. 7, and that it might theoretically admit some ("repentant") lesbians and gay men, does not alter its discriminatory nature.

This Court has repeatedly held that a generally-applicable policy may effectively discriminate against a certain group even if it does not exclude every member of that group. *See, e.g., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198-200 (1991) (employer's policy prohibiting non-sterile women from performing certain jobs exposing them to high amounts of lead was facially discriminatory even though it did not necessarily apply to all women); *Newport News*, 462 U.S. at 683-84 (employer's health insurance plan that provided fewer benefits to married male employees than to married female employees was discriminatory even though it did not apply to all male employees); *Frontiero v. Richardson*, 411 U.S. 677, 686-88 (1973) (plurality opinion) (military benefits program that enabled only those women who provided 50% or more of their household income to receive housing and medical benefits for their husbands, while imposing no such reciprocal limitation on men, was discriminatory even though it did not apply to all women); *id.* at 691 (Stewart, J., concurring in the judgment).

Similarly, the Court has held that a policy or practice may discriminate against a targeted group even if it applies to members of other groups as well. *See, e.g., Bob Jones Univ.*, 461 U.S. at 605 (university

policy prohibiting interracial relationships among students was "a form of racial discrimination" even though it did not exclude all members of a particular race, subjected all students to the same conduct restrictions, and excluded some white students as well as some non-white students); *Nashville Gas Co. v. Satty*, 434 U.S. 136, 139-40 (1977) (employer's policy depriving employees of seniority when they take leaves of absence discriminated against women even though the policy applied to educational leave as well as pregnancy leave); *Dothard v. Rawlinson*, 433 U.S. 321, 324-331 (1977) (facially neutral statute that excluded from employment as corrections officers all persons shorter than five foot two inches and weighing less than 120 pounds resulted in "a significantly discriminatory pattern" of hiring under Title VII because it excluded a large percentage of the female population, even though it also excluded some men).

It has long been recognized that the exclusion of more than a single group does not make a policy permissible. "Discriminations that operate to the disadvantage of two groups are not the less to be condemned because their impact is broader than if only one were affected." *Henderson v. United States*, 339 U.S. 816, 825-26 (1950). *See also Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."); *Sweatt v. Painter*, 339 U.S. 629, 635 (1950) (same); *Romer*, 517 U.S. at 633 (same).

* * *

CLS has chosen to exclude unrepentant gay students from its ranks based solely on "a conjunction" of those students' same-sex sexual conduct and

their "*belief* that the conduct is not wrong." Pet. Br. 36 (emphasis in original). There can be no doubt that this policy expressly discriminates against gay students. CLS omitted from its constitution any prohibition of sexual orientation discrimination even though it prohibited discrimination on other bases, Pet. App. 101a, requested "an exemption from the . . . sexual orientation portions of the [Hastings] Nondiscrimination Compliance Code," J.A. 281, and admitted in verified pleadings that it considered sexual orientation in admitting members, J.A. 72. CLS's defense that its policy does not exclude based on sexual orientation is logically and legally untenable.

III. A PUBLIC LAW SCHOOL IS NOT REQUIRED TO PROVIDE FUNDING OR OTHER BENEFITS TO A DISCRIMINATORY GROUP SUCH AS CLS.

Given that Petitioner's policy must be viewed as involving discrimination on the basis of sexual orientation (if that issue is even reached, *see* section I, *supra*), there can be little doubt that Hastings acted well within its discretion in refusing RSO status to CLS. As set forth in Respondents' and Respondent-Intervenor's briefs, states have no obligation to subsidize discriminatory conduct, even if that conduct is otherwise protected by the Constitution.[7] And

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[7] *See generally* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919, 1922 (2006) ("Groups have the constitutional right to put on events open only to . . . religious believers; they may also put on programs open to all listeners but designed by group officers chosen in discriminatory ways. Yet the government need not subsidize this right, just as the government need not subsidize the rights to abortion, private schooling, or political expression.").

while *amici* do not present a comprehensive treatment of this issue, they respectfully submit a few additional points for the Court's consideration regarding the broader implications of Petitioner's arguments.

In considering these issues, it is first important to recognize what the present case is not. Contrary to Petitioner's protestations, this case is not *Boy Scouts of America v. Dale*, 530 U.S. 640, or *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557. CLS is not being forced to accept members of whom it disapproves, or "to renounce [its] views that homosexual or other disputed sexual conduct is wrong." Pet. Br. 44. Hastings is simply conditioning access to modest public funding and other benefits on compliance with a general nondiscrimination policy applicable to all student groups.

The Court has expressly held that such conditions on public funding do not impermissibly impinge on expressive rights. In *Rumsfeld v. Forum for Academic & Institutional Rights ("FAIR")*, 547 U.S. 47 (2006), the Court upheld a federal law that conditioned federal funding to institutions of higher learning on the institutions' granting military recruiters the same access to their students as recruiters from other organizations. The Court rejected the argument that the law violated schools' First Amendment rights by effectively forcing them to endorse the military's policy toward lesbians and gay men. In doing so, the Court distinguished the case from *Hurley* and *Dale*, ruling that the funding law "neither limits what law schools may say nor requires them to say anything." *Id.* at 60. The Court noted that the law "gives universities a choice: Either allow military recruiters the same access to students

afforded any other recruiter or forego federal funds." *Id.* at 58; *see also Grove City Coll. v. Bell*, 465 U.S. 555, 557-61 (1984) (the government may condition federal education funding on agreement not to discriminate on the basis of sex); *Bob Jones Univ.*, 461 U.S. at 605 (the government may deny tax exemption to college that prohibits interracial relationships).

Similarly here, CLS is not being required to accept any particular members or express any particular message. Like every other student group on Hastings' campus, it too has a choice: It can adhere to Hastings' general nondiscrimination policy or forego school funding.

Nor is the present case like *Rosenberger v. Rectors & Visitors of the University of Virginia*, 515 U.S. 819 (1995), where a university refused to fund the production of a student publication solely because the publication expressed a religious viewpoint. *Id.* at 822, 827. Contrary to Petitioner's contention, Hastings' nondiscrimination policy does not "target[] solely those groups whose beliefs are based on 'religion' or that disapprove of a particular kind of sexual behavior." Pet. Br. 19. Quite the opposite. As Petitioner has stipulated, the Hastings policy applies equally to all student groups, not simply those whose views are religiously motivated, and it prohibits discrimination based on any "status or belief[ ]," not simply sexual orientation. J.A. 221 (Joint Stip. ¶ 18). In short, nothing in the record suggests that the policy was applied to CLS because CLS's viewpoint was religious in nature. The Hastings RSO policy treats religious and secular views identically—it prohibits discrimination whether based on religious viewpoints or secular ones. CLS's contention that the

Hastings policy discriminates on the basis of religious viewpoints, Pet. Br. 20, 42, therefore also is incorrect.

The question presented here is not whether CLS should be allowed to discriminate against students it disfavors. The question instead is whether a public law school is *required* to provide funding and other benefits to such a group notwithstanding the group's exclusionary practices. Far from seeking to be treated equally with other student groups, CLS is seeking a preferential *exemption* from Hastings' general nondiscrimination policies. *See* J.A. 281.

Petitioner's position is particularly audacious in light of the Court's ruling in *Romer v. Evans*, in which the Court held unconstitutional a state constitutional amendment that excluded gay individuals from protection under generally applicable nondiscrimination laws. 517 U.S. at 635-36. Petitioner now asks this Court to rule that states, through their schools, are *required* to fund private groups that discriminate against gay students under supposed exceptions to otherwise applicable nondiscrimination policies. Petitioner would require the state to fund and support activity that the state is forbidden to engage in itself.

The implications of Petitioner's position should not be underestimated. Were the Court to credit CLS's contention that it is entitled to public funds and other benefits despite its discriminatory policies, other groups could circumvent state nondiscrimination policies simply by arguing, as CLS does here, that their viewpoints or religious convictions require them to discriminate. This would turn the Court's jurisprudence on its head, converting well-established protections against government interference in expressive activity into a new governmental *mandate to*

subsidize private expressive activities, even if they are discriminatory. If Petitioner's view of the law regarding access to government funding were correct, cases such as *FAIR*, *Bob Jones University*, and *Grove City College* would all be subject to reconsideration. The Court should decline Petitioner's invitation to make such a sweeping sea-change in its jurisprudence.

CONCLUSION

For the foregoing reasons, and for the reasons stated by Respondents and Respondent-Intervenor, the Court should affirm the judgment of the Court of Appeals.

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF AMICI CURIAE[1]

Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the family. Liberty Counsel has offices in Florida, Virginia and Washington, D.C. and has hundreds of affiliate attorneys in every state. Liberty Counsel has represented numerous faith-based non-profit organizations, including Child Evangelism Fellowship, in matters addressing free speech and free exercise rights, including equal access, under both the First Amendment of the United States Constitution and the Equal Access Act, 20 U.S.C.§ 4071.

Child Evangelism Fellowship ("CEF") is an international non-profit religious organization. Among the ministries operated by CEF is the Good News Club, which offers moral and character development from a Christian perspective at public elementary schools. CEF has dealt first hand with the conflict between equal access rights and the Establishment Clause, including as the plaintiff in federal court challenges throughout the United States. CEF has succeeded in protecting its equal access rights against various attempts to carve out

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[1] Amici file this brief with the consent of all parties. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this brief.

exceptions to this Court's clear directives. *See, e.g., Good News Club v. Milford Central School,* 533 U.S. 98 (2001).

Lamb's Chapel is an evangelical Christian church located in New York. Lamb's Chapel has also dealt first hand with equal access issues on public school campuses as the Petitioner in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).

Liberty Counsel, CEF and Lamb's Chapel are deeply concerned about the effect that the lower courts' decisions in this case would have upon the equal access rights they have fought so hard to protect. Amici believe that the lower court decisions, if left intact, could significantly undermine First Amendment rights.

SUMMARY OF ARGUMENT

This Court's and Congress' messages could hardly be clearer: Public schools must grant private religious organizations access equal to that granted to non-religious private organizations. Despite its apparent clarity, the message has been garbled by school officials looking for ways to translate "must grant equal access" into "need not grant equal access," "may grant similar access," or some comparable phrase that will permit them to limit or exclude religious organizations from public school campuses. As a result, CEF, other religious organizations and students have repeatedly had to ask courts to re-establish the parameters of First Amendment and statutory protection for private religious organizations seeking access to public

schools. Those efforts have been largely successful, if costly and time-consuming, in shoring up the wall of protection for religious expression in public schools.

The Ninth Circuit's decision in this case, however, creates a new crack in the foundation that will lead to a crumbling of the equal access rights this Court and Congress have found to be integral to the fundamental First Amendment rights enjoyed by all Americans. This Court should reverse the lower court's decision to halt the erosion of these cherished First Amendment rights.

LEGAL ARGUMENT

I. THE LOWER COURT'S DECISION UNDERMINES SOUND PRECEDENT ESTABLISHING AND PROTECTING FIRST AMENDMENT EQUAL ACCESS RIGHTS AT PUBLIC SCHOOLS.

More than a quarter century of precedent affirming that the First Amendment requires private religious organizations be granted equal access to public school speech fora should have settled the issue. *See Widmar v. Vincent*, 454 U.S. 263 (1981) *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). School officials have tried to invent clever schemes to get around this precedent. For the most part, courts have largely rejected these strategies and upheld the spirit and the letter of this Court's First Amendment jurisprudence. However, the decision

below undermines this Court's precedent, and it must be reversed

A. Religious Speech Must Be Afforded Equal Access To Public School Facilities.

Private religious speech in a public forum on otherwise permissible subjects is entitled to the highest protection under the First Amendment. *Good News Club*, 533 U.S. at 98; *Lambs Chapel*, 508 U.S. at 384; and *Widmar*, 454 U.S. at 276. However, in the school context, speech restrictions on religious viewpoints are frequently justified by school officials simply because the speech is religious.

In *Widmar*, university officials cited a regulation prohibiting the use of university buildings or grounds for "purposes of religious worship or religious teaching" as authority for excluding a Christian organization from facilities otherwise generally available for similar secular groups. *Id.* This Court held that once the university created a forum for use by student groups it could not exclude a group based upon the religious content of its message unless the exclusion was necessary to serve a compelling state interest and narrowly drawn to achieve that end. *Id.* at 270. The university's claim that it had to abide by the regulation prohibiting religious teaching to avoid violating the Establishment Clause did not satisfy the compelling interest standard. *Id.* at 271-273. Granting equal access would not violate the Establishment Clause because an open forum

policy including nondiscrimination against religious groups has a secular purpose, avoids entanglement with religion, and does not have the primary effect of advancing religion. *Id.* Of particular import in *Widmar* was the fact that there were over 100 religious and non-religious groups using school facilities, which militated against a finding that granting the Christian group access would represent endorsement of religion. *Id.* at 274.

Similarly, this Court found there was no danger that the community would think a school district was endorsing religion if it permitted a church to show a film series about parenting from a Christian perspective. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 395 (1993). As was true with the university in *Widmar*, the district in *Lamb's Chapel* had opened school facilities for use by community groups but denied the church's use because of a provision that prohibited the use of school facilities for religious purposes. *Id.* at 394. This Court applied its reasoning in *Widmar* to dispose of the district's claim that showing the film series would trigger an Establishment Clause violation. *Id.* at 395. Echoing its holding in *Widmar*, this Court held that "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Id.* at 394.

Even after *Widmar* and *Lamb's Chapel*, school districts continued to struggle with the equal access concept, prompting circuit courts to further

define the nature and extent of equal access rights under the First Amendment. *See e.g., Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir. 1996) *cert denied*, 519 U.S. 1040 (1996), *Good News/Good Sports Club v. School Dist of Ladue*, 28 F.3d 1501 (8th Cir. 1994) *cert denied*, 515 U.S. 1173 (1995).

In *Hsu*, the Second Circuit refused to permit a school district to use a nondiscrimination policy to escape its obligation to provide equal access to a Bible club. *Hsu*, 85 F.3d at 862. *Hsu* presented a factual scenario strikingly similar to the facts in this case but, unlike the Ninth Circuit here, the Second Circuit correctly found that the district's actions violated the organization's equal access rights. In *Hsu*, the district attempted to use its non-discrimination policy to control the content of the club's speech by conditioning official recognition on the club abandoning its requirement that leaders be Christian. *Id.* The Second Circuit held that the non-discrimination policy could not be used to deprive the Bible Club of equal access, *i.e.*, official recognition without restrictions. *Id.*[2] The court

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[2] While the *Hsu* court's overall ruling was correct, it mistakenly differentiated between club officers, saying that the requirement that leaders be Christian was acceptable for leadership positions for which religious beliefs were significant, but not necessarily for less religiously significant positions. *Hsu*, 85 F.3d at 857-858. Making such a differentiation would involve impermissible entanglement with religion, as it requires that the school determine which officers play religiously significant roles and thereby substitute its judgment for the organization's, which this Court found impermissible in *Democratic Party v Wisconsin*, 450 U.S. 107,123 (1981). Notably, *Hsu* was decided before this

explained that religious discrimination is not automatically invidious in a religious club and that there was no invidious discrimination present in the Bible club's requirements. *Id.* at 871. As well as avoiding discrimination, a school's mission may include encouraging tolerance of diverse political and religious views, so long as the views are not offensive or threatening. *Id.* The Bible club's leadership policy was neither. *Id.* Since the club's policy did not involve invidious discrimination or threatening and offensive points of view, the district could not justify violating the club's equal access rights. *Id.*

Complaints about the religious content of club meetings led the Ladue school board to attempt to foreclose access to school facilities until after 6 p.m. *Good News/Good Sports,* 28 F.3d at 1503. However, the board continued to permit Boy Scouts and athletic teams to use school facilities between 3 p.m. and 6 p.m., so long as the meetings were free from any religious speech. *Id.* School officials attempted to justify the exemption for the Boy Scouts based upon the "school district's 'long-standing tradition of cooperation with scout programs.'" *Id.* The district argued that this "long-standing tradition" and its concerns about a possible Establishment Clause violation provided sufficient justification for the new policy. *Id.* The district conceded that both the Scouts and Good News/Good Sports Club addressed the same issues–

Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and such a differentiation would no longer be permissible under *Dale*.

moral and character development–but argued that the club addressed a different "subject matter" because religious speech is a different category. *Id.* at 1506. The Eighth Circuit noted that this Court had rejected that argument in *Lamb's Chapel* and found it equally unavailing in *Good News/Good Sports*. *Id.* The club met its burden of demonstrating that the amended policy permitted the Scouts to express their viewpoint on moral and character development but prohibited the club's religious viewpoint on the same subject. *Id.* at 1507. The district failed to demonstrate that the new policy was necessary to avoid an Establishment Clause violation, particularly since the prior policy, under which the club was granted access, did not result in an establishment of religion. *Id.* at 1510.

Hsu and *Good News/Good Sports* clarified the primacy of the equal access rights established in *Widmar* and *Lamb's Chapel*. However, school districts continued to try to circumvent equal access by raising Establishment Clause concerns. Conflicts among circuit courts regarding the legitimacy of those claims set the stage for further clarification of First Amendment equal access rights in *Good News Club*, 533 U.S. at 98.

B. *Good News Club* Extended Equal Access Rights To Public Elementary Schools.

Despite having reached the proper conclusion regarding the Bible club in *Hsu*, the Second Circuit reversed course in *Good News Club*

when it determined that a New York school district properly denied the Good News Club's application for access to school facilities. *Good News Club v. Milford*, 533 U.S. at 105. Relying upon the same New York law that the Center Moriches district relied upon in *Lamb's Chapel*, the Milford school district determined that Good News Club meetings were not permissible discussions of secular subjects from a religious perspective but prohibited religious instruction. *Id.* The Second Circuit agreed with the district that the club was doing something more than simply teaching moral values. *Id.* at 111. The Second Circuit said that the Christian viewpoint is unique because it contains an "additional layer" in that it is focused on teaching children how to cultivate their relationship with God through Jesus Christ. *Id.* That made the club's activities "quintessentially religious" and took them out of the realm of pure moral and character development so that excluding the club from school facilities did not constitute viewpoint discrimination. *Id.*

This Court rejected the school district's arguments and found the exclusion of Good News Club from school facilities indistinguishable from the exclusions found unconstitutional in *Lamb's Chapel* and *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (finding that the university's denial of student activity fee revenues to a Christian publication was unconstitutional viewpoint discrimination). *Good News Club*, 535 U.S. at 107. As it did in *Lamb's Chapel*, this Court found that exclusion of the Good News Club from the school's forum was impermissible viewpoint discrimination. *Id.* at 109.

"The only apparent difference between the activity of Lamb's Chapel and the activities of the Good News Club is that the Club chooses to teach moral lessons from a Christian perspective through live storytelling and prayer, whereas Lamb's Chapel taught lessons through films. This distinction is inconsequential." *Id.* at 109-110. "What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty or patriotism by other associations to provide a foundation for their lessons." *Id.* "It is apparent that the unstated principle of the Court of Appeals' reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a 'pure' discussion of those issues." *Id.* at 111 "According to the Court of Appeals, reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not." *Id.* "We, however, have never reached such a conclusion." *Id.* "Instead we re-affirm our holdings in *Lamb's Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." *Id.* at 112.

Justice Scalia emphasized the error in the Second Circuit's attempt to differentiate between the Good News Club's Christian message and non-religious moral and character development programs. *Id.* at 123 (Scalia, J. concurring). The district said that organizations could use its forum

to teach moral values using Aesop's Fables but not the Bible because using Scripture went beyond merely stating a viewpoint. *Id.* at 124. "From no other group does respondent require the sterility of speech that it demands of petitioners." *Id.* "The Scouts can discuss keeping morally straight and living clean lives and give reasons why, but the Club cannot give its reasons why moral values should be fostered, i.e. because God wants and expects it, because it will make the Club members 'saintly' people, and because it emulates Jesus Christ." *Id.* "The Club may not, in other words, independently discuss the religious premise on which its views are based – that God exists and His assistance is necessary to morality." *Id.* "This is blatant viewpoint discrimination."*Id.*

As it had in *Widmar* and *Lamb's Chapel*, this Court rejected the district's argument that its interest in not violating the Establishment Clause somehow outweighed the club's interest in gaining equal access to school facilities. *Id.* at 112. The Court found unpersuasive the fact that the case, unlike *Lamb's Chapel* and *Widmar*, involved elementary-aged children, who, according to the district, would be more likely to be coerced into attending the meetings. *Id.* at 114. While prior decisions had acknowledged that young children are more impressionable than adults, "we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present." *Id.* at 115. Particularly since children could not attend club meetings

without parent permission, there was no valid Establishment Clause claim that could override the club's First Amendment rights. *Id.* at 117-118.

Read together, *Widmar*, *Lamb's Chapel* and *Good News Club* establish that when public schools, whether elementary, secondary or post-secondary, create a forum for expressive activities they must grant equal access to organizations that want to offer a religious viewpoint on an otherwise includible subject. School officials cannot use the Establishment Clause or state laws against religious instruction to evade their obligations to provide equal access to organizations or individuals who want to engage in religious expression.

C. Even After *Good News Club*, Individuals And Groups Continue To Struggle To Obtain Or Maintain Equal Access, And The Lower Court's Ruling Will Exacerbate That Struggle.

Despite the clear message in *Good News Club*, individuals, CEF and other organizations have continued to encounter obstacles when seeking access to school facilities for religiously-based programs. School officials have continued to try to justify differential treatment or even exclusion of religious organizations from school facilities by relying on state laws against religious instruction or policies crafted to exclude religious groups without closing the forum. Individuals, CEF and similar organizations have had to seek relief

from the courts, and their efforts have been largely successful in maintaining the integrity of this Court's equal access precedents. The Ninth Circuit's ruling in this case poses a significant threat to those successes and more importantly to the First Amendment equal access rights this Court has recognized as integral to protecting private organizations' rights of free speech, exercise and association.

The Third Circuit aptly described the efforts of the Punxsutawney school board– and subsequent efforts by other school districts–as "searching valiantly for a potential loophole" to avoid having to permit a Bible club to meet during a school activity period. *Donovan v. Punxsutawney Area School Board*, 336 F.3d 211, 227 (3d Cir. 2003). In *Donovan*, the school board denied the student-led club's request for official recognition and permission to meet during the activity period because of its "religious ties." *Id.* at 215. The Third Circuit found that the Bible club was a group that discussed current issues from a biblical perspective but was denied permission to meet during the school activity period solely because of its religious nature. *Id.* at 226. "This constitutes viewpoint discrimination." *Id.* The court rejected the school board's argument that making religious discussion available during a time of compulsory attendance would unconstitutionally advance religion. *Id.* at 227. That might be a concern if the district were dealing with release time classes taught by superintendent-approved sectarian teachers, but not where students merely sought an equal opportunity to express themselves along with other

like-minded students during the activity period. *Id.* The availability of various activities and the voluntary, student-initiated nature of the club "militate against any government endorsement or entanglement." *Id.* Consequently, there was no valid Establishment Clause concern that would justify the district's discriminatory conduct. *Id.*

Another example of a district's "valiant search for a loophole" is the Stafford Township district's attempt to justify excluding CEF from literature distribution fora for, *inter alia*, fear of creating "divisiveness between and amongst parents to parents and children to children, as well as the staff." *Child Evangelism Fellowship v. Stafford Township School Dist.*, 386 F.3d 514, 523 (3d Cir. 2004). The Stafford district put a new spin on the familiar Establishment Clause defense when it cited concerns about how CEF's requests would affect students and the school-parent relationship and how complying with CEF's requests would affect opening the schools as limited public fora in the future. *Id.* District officials claimed that their exclusion of CEF was viewpoint neutral because they excluded all groups that represented "special interests," espoused "divisive" or "controversial" viewpoints, promoted any point of view, proselytized, spoke about religion and engaged in anything other than "mundane recreational activities." *Id.* at 527. The Third Circuit rejected these arguments as "rationalizations" that "are either incoherent or euphemisms for viewpoint-based religious discrimination." *Id.* The district went beyond merely discriminating against CEF for teaching moral values from a religious

perspective to actually disfavoring CEF because of its particular religious views. *Id.* at 529. District officials granted access to groups such as the Scouts and Elks Club, which espoused religious views and encouraged members to endorse them. *Id.* However, they denied CEF access because, "[w]e were concerned that, what the Child Evangelism Fellowship teaches appears to be inconsistent with what we're obligated to teach, that being diversity and tolerance." *Id.* at 530. The court concluded that "[s]uppressing speech on this ground is indisputably viewpoint-based." *Id.*

After its proposed loopholes of avoiding "separation of church and state," proselytizing and evangelicalism failed, the Montgomery County, Maryland district resorted to an equally unsuccessful claim that granting access to CEF would violate the Establishment Clause. *Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools*, 373 F.3d 589, 594 (4th Cir. 2004). At first the district denied CEF's request to distribute fliers because of their religious nature and concerns about "separation of church and state," even though the district permitted fliers from other organizations such as the Salvation Army, a community church, Boy and Girl Scouts and the Jewish Community Center. *Id.* at 592-593. Later, the district claimed that its denial was not based upon the religious viewpoint of CEF's fliers but on the fact that its forum was not open to "proselytization" or "evangelical groups." *Id.* The district finally conceded that its exclusion of CEF was unconstitutional viewpoint discrimination, but that it was justified because granting CEF access

would constitute establishment of religion. *Id.* at 594. The Fourth Circuit rejected that argument. *Id.* at 596. The court held that simply distributing a flier mentioning a religious organization during school hours does not render the communication state speech or create a perception of endorsement or coercion by the government. *Id.* "Directing them to take home these diverse materials does not coerce them to engage in a religious activity, any more than it coerces them to engage in an environmental activity." *Id.* at 599. Without a viable Establishment Clause defense, the district could not justify its unconstitutional viewpoint discrimination against CEF. *Id.* at 602.

Two years later, the Fourth Circuit rejected Montgomery County's attempt to create a new loophole to exclude CEF from its literature distribution forum. *Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools*, 457 F.3d 376 (4th Cir. 2006) Instead of responding to the court's 2004 decision by granting CEF access to the forum, the district attempted to restructure the forum to exclude CEF. *Id.* at 379-380. The new policy purported to limit literature distribution to five groups, but gave school officials discretion to approve any flier and the right to withdraw approval if officials determined that distribution would undermine the intent of the policy. *Id.* at 380 The Fourth Circuit held that the new policy did not provide the viewpoint neutrality required under the First Amendment. *Id.* at 389. Viewpoint neutrality means more than merely refraining from explicit discrimination, but also maintaining safeguards to prevent the improper exclusion of

viewpoints. *Id.* at 384. The new policy did not provide sufficient safeguards and therefore did not adequately protect against viewpoint discrimination. *Id.* at 389.

The policies enacted by the Anderson School District suffered from similar infirmities and were similarly ruled unconstitutional by the Fourth Circuit in *Child Evangelism Fellowship of South Carolina v. Anderson School Dist. Five*, 470 F.3d 1062 (4th Cir. 2006) In *CEF v. Anderson*, the district refused to grant CEF a waiver of facilities use fees even though it provided a waiver to the Boy Scouts and other non-profit organizations. *Id.* at 1065. The policy in effect at the time that CEF first sought a fee waiver included a "catch-all" provision in which the district reserved the right to waive fees as determined to be "in the district's best interest." *Id.* CEF sought a waiver under that provision, which was the basis for waivers for scout troops, but was denied. *Id* at 1066. As did the school district in *Good News/Good Sports Club v. Ladue,* the Anderson district cited its history of granting free access to the scouts as a justification for granting the scouts but not CEF a fee waiver. *Id.* Two months after CEF filed suit, the district adopted a new policy that replaced the "best interest" waiver with a waiver for groups that began using school facilities before fees were charged or had used school facilities for at least 20 years. *Id.* Only scouting organizations fit the definition. *Id.* Citing *Lamb's Chapel*, the Fourth Circuit said, "[r]ecent Supreme Court decisions establish that any tension between the Establishment and Free Speech Clauses that may

have motivated past exclusion of religious groups from government forums is more apparent than real." *Id.* at 1068. "Government need not fear an Establishment Clause violation from allowing religious groups to speak under the same reasonable, viewpoint-neutral terms as other private parties, even if some speakers are denied forum access under these neutral principles." *Id.* The court re-iterated that viewpoint neutrality means not merely lack of discriminatory treatment, but also adequate standards to ensure that government officials do not have unfettered discretion to burden or ban speech. *Id.* The original "best interest" waiver did not contain those safeguards, and the new policy did not solve the problem. *Id* at 1072.

The unfettered discretion that proved fatal to the policies in *Montgomery County* and *Anderson* also plagued the policy found unconstitutional in *Child Evangelism Fellowship of Virginia v. Williamsburg-James City County School Bd.*, No. 4:08cv4, 2008 WL 3348227 (E.D. Va. August 8, 2008) ("*CEF v. WJCC*"). In *CEF v. WJCC*, the school board's policy waived usage fees for five undefined groups, including scout troops, "school-sponsored activities" and "specific events" run by local charitable organizations. *Id.* at *1. CEF was denied a fee waiver even after it informed the district of *Good News Club v. Milford* and similar precedents defining school districts' equal access obligations under the First Amendment. *Id.* at *2. The district court granted CEF's request for a preliminary injunction, finding that *Anderson* compelled a finding that the school board's actions

were unconstitutional. *Id.* at *4. "Defendant's policy is no better than the 'best interest' policy at issue in *Anderson*." *Id.* at *5. "This vague policy, granting unfettered discretion to the superintendent, violates Plaintiff's First Amendment rights." *Id.*

The school district in Elk River, Minnesota tried to find a statutory loophole in the form of the Boy Scout Equal Access Act, 20 U.S.C. § 7905, discussed *infra*. *Child Evangelism Fellowship of Minnesota v. Elk River Area School District #728*, 599 F. Supp.2d 1136 (D. Minn. 2009) Elk River officials claimed that the statute essentially superseded *Good News Club v. Milford* so as to permit them to grant access to the Scouts and deny access to CEF. *Id.* at 1141. The district court rejected that argument, finding that "the holding in *Milford* dictates that if Elk River allows the Boy Scouts, or any other listed 'patriotic youth group,' access to its limited public fora but does not allow the Good News Club access, it has violated the Free Speech Clause of the First Amendment." *Id.*

As these cases illustrate, even this Court's definitive statement in *Good News Club v. Milford* failed to dampen school districts' resolve to restrict or exclude religious organizations' access to schools' free speech fora. Districts have tried to use the Establishment Clause,""separation of church and state," obligations to "teach diversity and tolerance" and nondiscrimination policies to try to justify restricting or excluding religious expression at public schools.

Districts have also frequently resorted to creative policy writing, trying to "write out" religious organizations while leaving in their long-time users or re-characterize activities to circumvent precedent. An example of the latter strategy is New York City's effort to draft a policy that would prohibit churches from using school facilities on weekends without running afoul of *Good News Club v. Milford*. *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 94 (2d Cir. 2007). School officials read *Good News Club v. Milford* as permitting the exclusion of "pure worship" services, as distinct from religious instruction, from public school campuses and rewrote its policy to provide:

> No permit shall be granted for the purpose of *holding religious worship services*, or *otherwise using a school as a house of worship*. Permits may be granted to religious clubs for students that are sponsored by outside organizations and otherwise satisfy the requirements of this chapter on the same basis that they are granted to other clubs for students that are sponsored by outside organizations.

Id. (emphasis in original). The Second Circuit panel vacated a permanent injunction without reaching a consensus on whether the new policy constituted viewpoint discrimination. *Id.* at 91. Judge Calabresi's analysis in support of the school board's position that there was no viewpoint discrimination demonstrates the extremes to which school officials

will go to try to justify discriminatory treatment of religious organizations. *Id.* at 103-104. (Calabresi, J., concurring). Organizations that engaged in Bible studies, religious instruction and singing of Christian hymns could use school facilities under the New York policy. *Id.* However, plaintiffs could not use school facilities for their Bible studies, religious instruction and singing of Christian hymns that included baptism and communion. *Id.* Judge Calabresi agreed with the school board that plaintiffs' activities were not a different perspective on an includible subject matter, but a categorically different subject matter which could be excluded. *Id.* at 100. "Worship is the sui generis subject 'that the District has placed off limits to any and all speakers,' regardless of their perspective." *Id.* Therefore, Judge Calabresi concluded, the exclusion was based upon subject matter, not viewpoint, and was permissible. *Id.* In another concurrence, Judge Leval offered the district another possible avenue for denying the church access. *Id.* at 120. Examining the intricacies of the church's membership policies, Judge Leval suggested that the district could deny access on the grounds that the church was not open to "everyone" and therefore did not comply with state law. *Id.* In particular, Judge Leval noted that Bronx Household's policies permit excommunication of someone who publicly advocates Islam, and suggested that such exclusionary policies could justify denying equal access to school facilities. *Id.*

Judge Calabresi's and Judge Leval's analyses, while not precedential, exemplify the herculean efforts that school officials have

undertaken to try to circumvent equal access. As the other cases discussed above illustrate, religious organizations have made significant progress in halting these efforts, as the circuit courts have largely rejected school officials' arguments and maintained the integrity of this Court's ruling in *Good News Club v. Milford*. The Ninth Circuit's decision here threatens that progress. If the decision is upheld by this Court, then school districts will become emboldened and will implement or use existing nondiscrimination policies to create new obstacles to religious expression in public schools. If *Widmar, Lamb's Chapel* and *Good News Club* are to have any meaning, then this latest maneuver by school officials must be overturned.

II. THE NINTH CIRCUIT'S DECISION THREATENS STATUTORY RIGHTS TO EQUAL ACCESS AT PUBLIC SCHOOLS.

Congress also sent a clear message that discrimination will not be tolerated in public school speech fora when it passed the Equal Access Act, 20 U.S.C. § 4071 and the Boy Scout Equal Access Act, 20 U.S.C. § 7905 The lower court's decision threatens to undermine these statutory protections by sanctioning evasive maneuvers clothed in the language of tolerance and diversity. As is true with First Amendment equal access rights, statutory equal access rights have been hampered by school district efforts to surreptitiously restrict or exclude religious expression without violating the statutes. As they did in the constitutional equal access arena, school districts have tried to use the

Establishment Clause, strategic re-definition of essential terms and creative categorization of activities to evade the statutory requirements. Those efforts have been rejected by this Court and circuit courts, but could be resurrected if the lower court's decision is permitted to stand.

A. Congress Responded To Discrimination On Public School Campuses By Instituting Statutory Equal Access Rights Modeled After *Widmar*.

Congress enacted the Equal Access Act as a direct response to increasing discrimination against religious speech on public school campuses. S. REP. NO. 98-357, at 16 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2348, 2367. "When schools deny equal access to religious clubs they are clearly conditioning receipt of a state benefit upon an agreement to avoid religious speech." S. REP. NO. 98-357, at 20. "Such a denial has a substantial chilling effect on something that for many religious persons is one of the most important aspects of their lives, the ability to talk about their faith and what it means to them." S. REP. NO. 98-357, at 20. "It would be hard to imagine a more significant restraint on their right to exercise their religion freely than denying them the opportunity for religious speech during their school hours." S. REP. NO. 98-357, at 20.

As have the courts, Congress rejected the argument that exclusion of religious speech is

justified to avoid violating the Establishment Clause. S. REP. NO. 98-357, at 20. "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." S. REP. NO. 98-357, at 20 (citing *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)). Debunking some of the myths that had been perpetuated by school districts regarding the Establishment Clause, Congress explained that "the Constitution does not require that the government affirmatively protect the non-religious student from religion, but only that the government restrain itself from participating in religious inculcation." S. REP. NO. 98-357, at 29. "The fundamental rights of free speech, association and exercise of religion of students who view religion as a vital part of their daily lives should not be sacrificed to speculative misperception of misinformed students." S. REP. NO. 98-357, at 29. Rather than fostering these misperceptions by excluding speakers, schools should seek to overcome them by educating students about the First Amendment. S. REP. NO. 98-357, at 29.

Congress modeled the Equal Access Act ("the Act") after this Court's decision in *Widmar*. S. REP. NO. 98-357, at 32. Under the Act, if a school permits a non-curriculum related, student-initiated, student-led club to meet on campus, then it cannot deny equal access to a religious student club. S. REP. NO. 98-357, at 30. The Act does not require that schools permit such clubs, but merely prohibits

discrimination against them if one secular club is permitted. S. REP. NO. 98-357, at 30. Congress adopted this Court's definition of "equal access" in *Widmar, i.e.,* religiously oriented extracurricular activities must be allowed under the same terms and conditions as are other extracurricular activities. S. REP. NO. 98-357, at 32. As has proven true with *Widmar*, what should have been a straightforward concept of equal access for religious speech has become convoluted by school districts' efforts to find loopholes through which they can escape from equal access requirements.

1. In *Mergens*, This Court Rejected Attempts To Weaken Or Overturn The Equal Access Act.

Unfazed by Congress' clear message that *Widmar*'s equal access requirements apply equally to secondary schools, officials of Westside Community Schools trod familiar ground when they denied students' requests for official recognition of a Christian club. *Bd of Educ of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). Following the same path as did the districts in *CEF v. Montgomery County* and *CEF v. Stafford*, the Westside board argued that the Equal Access Act did not apply, and, even if it did, it violated the Establishment Clause. *Id* at 233. This Court rejected both contentions and upheld the constitutionality of the Act.

School officials claimed that they did not have a "limited open forum" as defined under the

Act because their student clubs were all curriculum-related and tied to the educational function of the school. *Id.* This Court rejected the district's narrow reading of the Act's provisions and adopted a definition more in keeping with Congress' intent. *Id.* at 239-240. "We think that the term "noncurriculum related student group" is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school." *Id.* at 239. A group "directly relates" to the curriculum if its subject matter is or soon will be taught in a regularly offered course, concerns the whole body of courses, is required for a course or will result in academic credit. *Id.* "We think this limited definition of groups that directly relate to the curriculum is a commonsense interpretation of the Act that is consistent with Congress' intent to provide a low threshold for triggering the Act's requirements." *Id.* at 240. By contrast, the district's rendering of "curriculum related" as anything remotely related to abstract educational goals would render the Act meaningless, as it would permit districts to evade the Act by strategically describing existing clubs to meet its goals. *Id.* at 244. Under the Court's definition, Westside had at least one "non-curriculum related" club and therefore had a "limited open forum" under the Act. *Id.* at 245. Consequently, its denial of official recognition to the Christian club was a denial of equal access under the statute. *Id.*

This Court found that its analysis under *Widmar* applied equally to the Equal Access Act to defeat Westside's claim that granting the Christian

club official recognition would violate the Establishment Clause. *Id.* at 248. This Court rejected the school's argument that complying with the Act would have the primary effect of endorsing religion. *Id.* at 249. Secondary school students are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. *Id.* at 250. In addition, faculty and staff participation is strictly limited and meetings are held during non-instructional time, which eliminates concerns about official state endorsement. *Id.* at 251. Furthermore, the broad spectrum of student groups and the fact that students are free to initiate and organize additional clubs counteracts any possible message of endorsement of a particular religious belief. *Id.* at 252. This Court also rejected the district's claim that the Act leads to excessive entanglement with religion. *Id.* In fact, the opposite is true: "a denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur." *Id.* at 253. Consequently, the Equal Access Act does not violate the Establishment Clause. *Id.*

That determination should have settled the matter for school officials and lower courts. However, as this litigation illustrates, that has not been the case.

2. School Districts Have Continued To Try To Undermine The Equal Access Act, But Courts Have Largely Rejected Those Efforts.

Even the definitive statement by this Court in *Mergens* did not prevent school districts from attempting to circumvent the Act, just as they attempted to circumvent their constitutional obligation to provide equal access to extracurricular religious speech. With the notable exceptions of this case and the case upon which the Ninth Circuit based its opinion, *Truth v. Kent School District*, 542 F.3d 634 (9th Cir. 2008), courts have largely rejected attempts to undermine the Act.

The Third Circuit utilized the *Mergens* definition of "curriculum-related" to overturn a district's claim that it properly rejected a Bible club's application because the Equal Access Act did not apply to its group of solely "curriculum-related" clubs. *Pope v. East Brunswick Bd of Educ.*, 12 F.3d 1244 (3d Cir. 1993). The Third Circuit explained: "*Mergens* did not hold that the activities of a student organization need only relate in some marginal way to something taught in class." *Id.* at 1253. "Rather, the Court said that the *subject matter* of the student group must be taught in a class." *Id.* A few isolated club activities do not transform an otherwise non-curriculum related student group into a curriculum-related one. *Id.* Instead, whether an activity is "curriculum-related" is determined by reviewing the primary focus of the

activity and measuring that against the topics taught in the course to which the club is supposed to relate. *Id.* The relationship that the district tried to draw between the Key Club and the history curriculum was too attenuated to meet the *Mergens* definition. *Id.* Therefore the Key Club was a non-curriculum club that triggered the Equal Access Act. *Id.* Consequently, the schools' refusal to certify the Bible club violated the Act. *Id.* at 1254.

The Third Circuit found the ski club and anti-drug and alcohol clubs in Punxsutawney even less tangentially related to the curriculum than was the Key Club in *Pope*. *Donovan v. Punxsutawney Area School Board*, 336 F.3d 211, 221 (3d Cir. 2003) "School systems may not evade the Act's requirements by strategically describing existing student groups." *Id.* In addition, districts cannot escape the provisions of the Act by claiming that an activity time prior to the first class is "instructional time" because students must be at school. *Id.* "To conclude that mandatory attendance means that any school period is actual classroom instruction is to undercut both the specific language and the statutory purpose of the Equal Access Act." *Id.* at 223. "It is not mandatory attendance at the school, but mandatory attendance *at the group's meeting* that raises Establishment Clause concerns." *Id. at* 224 (emphasis in original). "Schools may not evade the Act's requirements by strategically describing an activity period." *Id.* "Just as putting a 'Horse' sign around a cow's neck does not make a bovine equine, a school's decision that a free-wheeling activity

period constitutes actual classroom instructional time does not make it so." *Id.*

The Ninth Circuit rejected a district's attempt to interpret the Equal Access Act as requiring either equal access or a fair opportunity to meet. *Prince v. Jacoby*, 303 F.3d 1074, 1079 (9th Cir. 2002) *cert denied* 540 U.S. 813 (2003). In *Prince*, the district claimed that the Act's provision making it unlawful to "deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting" meant that a school did not have to provide equal access if it provided a "fair opportunity" for access. *Id.* The Ninth Circuit rejected that restrictive reading of the Act as antithetical to Congress' purpose. *Id.* at 1081. The term "equal access means what the Supreme Court said in *Widmar*: religiously-oriented student activities must be allowed under the same terms and conditions as other extracurricular activities, once the secondary school has established a limited open forum." *Id.* Congress' objective was to "prohibit discrimination between religious and political clubs on the one hand and other noncurriculum-related student groups on the other." *Id.* at 1082 (citing *Mergens*, 496 U.S. at 238). Denying the Christian club equal access to school facilities violated that standard, and merely providing a "fair opportunity" is not a suitable replacement. *Id.* at 1083. The Ninth Circuit also rejected the district's argument that granting official recognition to the club would result in prohibited "sponsorship" in violation of the Act and the Establishment Clause. *Id.* at 1084. Under the Act, once the district establishes a

limited open forum" it *must* provide the Christian club with equal access to that forum." *Id.* (emphasis in original). If state regulations required sponsorship under the Act, then the regulations must give way. *Id.*

The Second Circuit similarly concluded that the Equal Access Act requires both equal access and a fair opportunity to meet. *Hsu*, 85 F.3d at 854 n. 8. The *Hsu* court found that the Act protected the Bible club's Christian officer requirement and prohibited the district from conditioning recognition on abandoning the requirement. *Id.* at 862. "We conclude that, in light of the Supreme Court's command that we construe the Act broadly, the term 'speech' includes the . . . club's leadership policy provision, to the extent it is designed to ensure a certain type of religious speech will take place at the Club's meetings." *Id.* at 856. The Act was intended to protect both free speech and free association rights, and therefore contains the implicit right of expressive association when the goal of the association is to meet for a purpose protected by the Act. *Id.* at 859. Equal access might require that schools permit exemptions from neutrally applicable rules when those rules impede one or another club from expressing the beliefs that it was formed to express. *Id.* at 860. "When a sectarian religious club discriminates on the basis of religion for the purpose of assuring the sectarian religious character of its meetings, a school must permit it to do so unless that club's specific form of discrimination would be invidious or would otherwise disrupt or impair the school's educational

mission." *Id.* at. 872-873. The club's leadership requirement did neither. *Id.*

In startling contrast to that determination, and to the Ninth Circuit's similar determination in *Prince*, stands the Ninth Circuit's decision in *Truth*, which was the basis for its summary affirmance of the district court's ruling in this case. *Truth v. Kent School Dist.* 542 F.3d 634, 645 (9th Cir. 2008) *cert denied* 129 S.Ct. 2889 (2009). In *Truth*, the Ninth Circuit held that a high school did not violate the Act when it denied official recognition to a Christian club because the denial was based upon the school's nondiscrimination policy, not "speech." *Id.* School officials determined that the club's requirement that members desire to grow in a relationship with Jesus Christ and comply with Christian principles inherently excluded non-Christians in violation of the district's non-discrimination policy. *Id.* The Ninth Circuit concluded that the Act only prevents denial of access or discrimination on the basis of religious content of speech. *Id.* The district's actions did not violate the Act because they were not based on the religious content of the group's speech. *Id.* The court found that the district's non-discrimination policies were content neutral and did not preclude or discriminate against religious speech. *Id.* at 647. Truth did not establish that the district's decision was based upon "the content of a message Truth's discriminatory conduct may attempt to convey." *Id.* "Therefore, to the extent they proscribe Truth's discriminatory general membership restrictions, the policies do not implicate any rights that Truth might enjoy under the Act." *Id.* Although clearly

contrary to the Second Circuit's decision in *Hsu*, the Ninth Circuit held that its decision was consistent because *Hsu* dealt with specific leadership requirements while *Truth* dealt with general membership conditions. *Id.* According to the Ninth Circuit, the specific leadership policies of the club in *Hsu* constituted speech, but Truth's general membership requirements did not. *Id.*

The Ninth Circuit's convoluted logic in *Truth*, and, by extension, in this case, represents the very kind of evasive re-definition this Court rejected in *Mergens*, 496 U.S. at 244. Accepting the Ninth Circuit's reasoning would effectively overrule *Mergens* and render the Act meaningless. The wall of protection Congress built against viewpoint discrimination in public school extracurricular activities would be significantly undermined. School officials would follow the lead of the Kent School District and Hastings and require that CEF and similar organizations cleanse themselves of their religious viewpoint or be excluded from school fora for engaging in "discriminatory conduct." Censorship of religious viewpoints in voluntary extracurricular activities would become acceptable practice on public school campuses unless this Court reverses the lower courts' determinations.

B. Congress Enacted The Boy Scouts Equal Access Act As Further Protection Against Discrimination At Public Schools.

A wave of school restrictions and exclusions of Boy Scout troops prompted Congress to enact the Boy Scouts of America Equal Access Act ("BSEAA") as part of the No Child Left Behind Act of 2001. Pub. L. No. 107-110, § 9525, codified at 20 U.S.C. § 7905. After this Court upheld the Boy Scouts' right to exclude homosexuals from membership and leadership in *Boy Scouts of America v. Dale*, 530 US 640 (2000), school districts began restricting or eliminating the Scouts' rights to use school facilities. 147 Cong. Rec. H2618, S6256 House and Senate members presented evidence that "all over the country the Boy Scouts are under attack and being thrown out of public facilities that are open to other similarly situated groups. From Florida to California, the Boy Scouts are being removed, not because they support an illegal right, but as retribution for the Supreme Court's ruling in the Boy Scouts of America versus Dale." Testimony of Rep. Van Hilleary (R-TN), 147 Cong. Rec. H2618. "A number of school districts have prohibited the Scouts from meeting on public school property or have pressured local Scouting troops to denounce their very principles on which the organization was founded before they can have meetings there." Testimony of Sen. Michael Enzi (R-WY), 147 Cong. Rec. S6256.

In response, Congress adopted the BSEAA, which provides:

> Notwithstanding any other provision of law, no public elementary school, public secondary school, local educational agency, or State educational agency that has a designated open forum or a limited public forum and that receives funds made available through the Department shall deny equal access or a fair opportunity to meet to, or discriminate against, any group officially affiliated with the Boy Scouts of America, or any other youth group listed in Title 36 of the United States Code (as a patriotic society), that wishes to conduct a meeting within that designated open forum or limited public forum, including denying such access or opportunity or discriminating for reasons based on the membership or leadership criteria or oath of allegiance to God and country of the Boy Scouts of America or of the youth group listed in Title 36 of the United States Code (as a patriotic society).

20 U.S.C. § 7905(b)(1). As is true with the Equal Access Act, the BSEAA does not mandate that public schools provide access to the Boy Scouts or similar organizations. Instead, it provides that *if* a school opens its facilities for use by outside

organizations, *then* it must provide equal access to Boy Scout troops and similar organizations or risk losing federal funding.

Instead of simply integrating the BSEAA into their policies to provide the Scouts, CEF and other groups with equal access, school districts have used the BSEAA to try to circumvent the Equal Access Act and this Court's decision in *Good News Club v. Milford*. In *CEF v. Elk River*, the district decided that the BSEAA effectively overruled *CEF v. Milford* so as to permit the district to grant equal access to the Scouts, but not CEF. *CEF v. Elk River*, 599 F. Supp.2d at 1142. The district argued that because it was compelled to grant equal access to the Boy Scouts under the BSEAA, it was somehow not also compelled to grant equal access to CEF, despite this Court's ruling in *Good News Club v. Milford*. *CEF v. Elk River*, 599 F. Supp.2d at 1141. The court rejected that analysis and correctly held that the BSEAA must be read in concert with *Good News Club v. Milford* so that if the Boy Scouts are granted access to a free speech forum, then CEF must be granted equal access. *CEF v. Elk River*, 599 F. Supp.2d at 1141.

The *CEF v. Elk River* case illustrates how, left unchecked by the courts, school officials will look for every opportunity to restrict or exclude extracurricular religious activities from public school campuses. Hastings' exclusion of the Christian Legal Society in this case is a further illustration of that phenomenon. If its actions are left unchecked by this Court, then school districts

can be expected to adopt similar strategies to restrict or exclude extracurricular religious activities. That result would be antithetical to this Court's long history of protecting the right to engage in voluntary religious speech on public school campuses.

CONCLUSION

The Ninth Circuit's decision poses a substantial threat to First Amendment rights on public school campuses. If left intact, the decision threatens to undermine the wall of protection erected by this Court in *Good News Club v. Milford* and by Congress in the Equal Access Act and Boy Scouts Equal Access Act.

Unless reversed by this Court, Hastings' actions will be replicated in elementary and secondary school districts as officials seek to circumvent their obligation to provide equal access for religious extracurricular activities.

For these reasons, the decision of the Ninth Circuit should be reversed.

February 4, 2010

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AMICUS CURIAE BRIEF

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In The

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW

Petitioner,

v.

LEO P. MARTINEZ, *et. al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Ninth Circuit erred when it held, directly contrary to the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), that the Constitution allows a state law school to deny recognition of a religious student organization because the group requires its officers and voting members to agree with its core religious viewpoints.

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INTEREST OF AMICI CURIAE

The protection of First Amendment freedoms is critical in the university setting. "The [college] classroom [with its surrounding environs] is peculiarly the 'marketplace of ideas.'" *Keyishian v. Bd. of Regents of University of State of New York*, 385 U.S. 589, 603 (1967). A free society depends upon individuals trained in a setting where there is wide exposure to a robust exchange of ideas that is free from any government selection or modification. The marketplace of ideas is not served by the homogenization of thought.

Many faith-based student groups seek to preserve their identity and the expression of their identity by establishing standards of belief for their membership. While this case specifically involves the faith-based student group's interest in controlling its message, the impact of this case is not limited to faith-based student groups. Its impact will be felt by any student association that is centered on a core set of values, thoughts, or beliefs. A decision by this Court that authorizes universities to force student associations to alter their identity in order to gain access to a public forum would devalue the marketplace by diminishing the free exchange of ideas. Its effect would be to restrict – rather than promote – diversity.

The amici states have a strong interest in preserving the vigorous exchange of ideas in their public universities, and ensuring that public universities establish policies that respect the rights of

free speech and expressive association under the First Amendment.[1]

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[1] The West Virginia Attorney General Darrell McGraw wishes to disclose that his daughter, Elliotte Catherine McGraw, is a student at Hastings College of Law and the President of the Hastings Democrats. The Hastings Democrats were recently notified by the school that in order to maintain the Club's standing as a student organization, it was required to open its membership to all students, irrespective of party affiliation.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's First Amendment decisions make two things clear. First, the Constitution recognizes the right of expressive association, and it prohibits the government from unconstitutionally infringing upon that right by forcing a group to accept members it does not desire. Second, the Constitution prohibits discriminatory exclusion from a public forum based on the religious content of a group's intended speech. The imposition by the University of California at Hastings ("Hastings") of its non-discrimination policy to the Christian Legal Society ("CLS") here undermines both principles.

Hastings has no obligation to underwrite the cost of a student association in enabling it to hold meetings or express its ideas. But once Hastings establishes a process by which it provides funding and allows access to its facilities to student groups, this process must comply with the First Amendment. Hastings has conditioned a student association's access to these benefits on complying with a non-discrimination policy, which prohibits the association from requiring its members to adhere to certain beliefs. In doing so, Hastings has discriminated against CLS based on its core set of beliefs, excluding it from access to funding and its facilities, thereby inhibiting its ability to express its identity. The First Amendment's rights to free association and free expression are paramount in this setting.

Implicit in the First Amendment "freedom to speak, worship, and petition the government" is the "correlative [right] to engage in group effort toward

those ends." *Roberts v. United States Jaycees,* 468 U.S. 609, 622 (1984). The freedom to associate with others for this purpose "plainly presupposes a freedom not to associate." *Boy Scouts of America v. Dale,* 530 U.S. 640, 648 (2000)(quoting *Roberts*, 468 U.S. at 623). Similarly, freedom of speech presupposes the right of individuals or groups to decide what not to say. *Hurley and South Boston Allied War Veterans Council v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574 (1995).

Student groups, like CLS, are engaged in constitutionally-protected expressive activity and are contributing to the exchange of ideas on campuses. The government unconstitutionally infringes upon a student group's right of expressive association by the forced inclusion of members who hold beliefs that are contrary to or inconsistent with the group. When a group is formed around a core set of values, beliefs, or thoughts, the forced inclusion of individuals who proclaim a different set of values, beliefs, or thoughts compromises the group's ability to control and disseminate its ideological message.

The right to control one's speech is a right that can only be infringed upon when the government has a compelling interest to do so. While the policy of prohibiting discrimination underpinning Hastings' nondiscrimination policy is laudable, it nonetheless violates the First Amendment, when imposed on a student association like CLS. Hastings' current nondiscrimination policy effectively forces groups to include those individuals who do not share the beliefs or views of the group. CLS, however, wishes to preserve its ideological message by establishing

criteria for its membership. And it is the message of a group that is the core of its expressive activity. Therefore, as applied to CLS and other similar groups, Hastings' policy modifies the expressive activity of the group, an interference that is prohibited by the First Amendment.

"While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579. Because the only interest served by Hastings' nondiscrimination policy is an interest this Court has already held must bow to the right of expressive association, it is not sufficient to uphold the infringement of the First Amendment.

There is no difference here between requiring inclusion and conditioning access to a public forum on the inclusion. Either way, the government is forcing an expressive association to abandon its right of self-definition and to alter its message in order to disseminate that message in a public forum. This Court has made it clear that the First Amendment prohibits that type of interference.

Further, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 828 (1995)(citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)). In *Widmar*, this Court struck down a university's regulation prohibiting the use of

university facilities "for purposes of religious worship or religious teaching." *Widmar v. Vincent*, 454 U.S. 263, 265 (1981)(citations omitted). This Court held that the First Amendment precluded a university from "discriminatory exclusion from a public forum based on the religious content of a group's intended speech." *Widmar*, 454 U.S. at 269-70.

Similarly, in *Rosenberger*, this Court held that a university violated the free speech rights of a Christian publication when it denied student activity funds because of the publication's religious viewpoint. *Rosenberger*, 515 U.S. at 834-37. Here, whether Hastings directly denies access to CLS based on its religious viewpoint, which this Court condemned in *Rosenberger*, or conditions access to a public forum on CLS' modification of its religious viewpoint, the effect is the same: the government has violated the First Amendment rights of CLS.

In limiting recognition to student groups that do not establish eligibility criteria based on beliefs, Hastings has limited the ability of student associations predicated on beliefs to access the benefits the university provides. Thus, the ability of student associations that are predicated on ideas to thrive in the university setting is placed in jeopardy. The religious student groups must either abandon any requirements or forgo recognition. The same is true for political or philosophical societies. The student association here implicated by these policies was CLS, but could have been an Orthodox Jewish student association or an Islamic student association, or the College Republicans or College Democrats. The safeguard for diversity of thought is to allow the robust

exchange of ideas and to allow students to establish their own associations. The First Amendment requires no less once a public university provides access to its facilities for student associations.

ARGUMENT

I. The University's policy violated the First Amendment by compromising the right of expressive association – requiring CLS to accept members inconsistent with its identity – in order to gain access to the public forum.

The Constitution protects the right to express a particular viewpoint, be it religious, political, or other. Nowhere is the protection of the First Amendment more critical than in the university setting. "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us." *Keyishian*, 385 U.S. at 603. This right to express a particular viewpoint necessarily includes the right to associate with others who share that view.

A. It is well established that the First Amendment freedoms of speech, assembly, and petition include the freedom of expressive association.

"[T]he freedom of association is not explicitly set out in the [First] Amendment [but] it has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy v. James*, 408 U.S. 169, 181 (1972). "An individual's freedom to speak, to worship, and to petition the government could not be guaranteed unless a correlative freedom to engage in group effort

toward those ends were not also guaranteed." *Roberts*, 468 U.S. at 622.

The freedom to associate assures that neither a majority nor powerful minority can force its views on groups who choose to express a different or unpopular viewpoint. *Dale*, 530 U.S. at 647-48. A "collective effort on behalf of shared goals" must be protected in order to preserve "political and cultural diversity" and to shield "dissident expression from suppression." *Roberts*, 468 U.S. at 622. Consequently, this Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622. This Court has also understood that the "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623).

Similarly, "'[s]ince all speech inherently involves choices of what to say and what to leave unsaid', one important . . . principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley*, 515 U.S. at 573 (quoting *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 11, 16 (1986)). Thus, the state may not compel a speaker to affirm a belief that the speaker does not agree with. The principle "applies not only to expressions of value[s] [or] opinion[s] but equally to statements of fact that the speaker [does not want to endorse]." *Hurley*, 515 U.S. at 573-74.

There is "no doubt that the First Amendment rights of speech and association extend to the campuses of state universities." *Widmar*, 454 U.S. at 268-69 (1981). In *Healy*, this Court declared:

> The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of destruction thus becomes immaterial. The College, acting here as the instrumentality of the States, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent. [*Healy*, 408 U.S. at 187-88.]

There is also no doubt that the government is capable of unconstitutionally infringing upon the right of expressive association. As noted in *Roberts*, the government may unconstitutionally infringe on the freedom of association in a number of ways:

> Among other things, government may seek to impose penalties or withhold benefits from individuals because of their membership in a disfavored group, *e.g.*, *Healy v. James*, 408 U.S. 169, 180-184 (1972); it may attempt to require disclosure of the fact of membership in a

> group seeking anonymity, *e.g.*, *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 91-92 (1982); and it may try to interfere with the internal organization or affairs of the group, *e.g.*, *Cousins v. Wigoda*, 419 U.S. 477, 487-488 (1975). [*Roberts*, 468 U.S. at 622-23.]

This Court specifically noted that the government "may unconstitutionally burden [the] freedom of association" through a "'regulation that forces the group to accept members it does not desire.'" *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623).

B. The Christian Legal Society is an organization that is engaged in expressive activity that is entitled to First Amendment protection.

In order to be protected by the First Amendment's expressive association right, a group must engage in expressive association. The protection is not limited to advocacy groups. See *Dale*, 530 U.S. at 648. In *Dale*, this Court concluded that the Boy Scouts was an association that engaged in expressive activity. This Court determined that the general mission of the Boy Scouts was "to instill values in young people" and stated that "[i]t seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." *Dale*, 530 U.S. at 649, 650 (citations omitted). Similarly, in *Hurley*, this Court held that the organizers of a St. Patrick's Day parade in Boston constituted expressive activity because the organization was making a "collective point, not just to

each other, but to bystanders along the way." *Hurley*, 515 U.S. at 56.

In the present case, CLS engages in expressive activity. CLS is a nationwide association of lawyers, law students, law professors, and judges who profess faith in Jesus Christ. According to the CLS constitution, its purposes include providing a means of society, fellowship, and nurture among Christian lawyers. The stated mission of the Hastings' chapter is to maintain a vibrant Christian law fellowship that enables its members, individually and as a group, to fulfill Christ's mandate as that mandate is defined by the organization.

Thus, like the Boy Scouts, the mission of CLS is to instill certain values in its membership and – like the organizers of the St. Patrick's Day parade – CLS wishes to express a certain collective point, to its members and others. Therefore, CLS is engaged in expressive association and it falls within the ambit of First Amendment protection.

CLS is not the only student organization that falls within the ambit of First Amendment protection. Hastings has no fewer than 60 recognized student groups in the 2009-2010 academic year. They include the Law Students for Reproductive Justice, the Clara Foltz Feminist Society, the Hastings Catholic Law Students Association, Hastings OUTLAW, the American Constitution Society, and the Hastings International Human Rights Organization.[2] The

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[2]http://www.uchastings.edu/student-services/student-org/index.html(follow "current students" hyperlink; then follow "student organizations" hyperlink).

individuals comprising these groups represent a variety of different thoughts regarding the United States Constitution, politics, religion, and social values. The ability and opportunity of these individuals "to combine with others to advance one's views is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals against the government." *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 13 (1988).

Not only is it important to protect the right of expression for the individual groups, it is critical to protect the diversity of thought and robust debate that is essential to the marketplace of ideas. The marketplace of ideas is not served by the homogenization of thought.

Requiring student groups formed for the purpose of expressing a particular message to accept members who do not share that viewpoint diminishes their expressive activity. The forced inclusion of those who do not accept CLS's statement of faith significantly affects its ability to advocate its viewpoint or engage in its stated expressive mission. CLS's policy of limiting its membership to persons who share Christian beliefs stands at the core of its expressive identity. CLS's membership is solely related to its expressive message. It does not exclude anyone on the basis of anything other than the individual's refusal to adopt its statement of faith. Moreover, those who do not accept CLS's statement of faith are free to form their own ideologically-based student group and participate in the intellectual debate on campus with their own message. When any group is formed around a core set of beliefs, values, or thoughts, the forced inclusion of

individuals who proclaim a different set of values, beliefs, or thoughts significantly diminishes the group's ability to control its ideological message. The group controls its ideological message by establishing its membership criteria. Controlling the ideological message of a group is expressive activity.

The ability of students to join together under a common mission, or identity, is central to promoting ideas on campus. The policy of requiring inclusion regardless of belief hinders any student association that defines itself based on belief. The university will ultimately undermine the diversity of belief-based student associations if such students cannot join together and be recognized.

Thus, prohibiting CLS from exercising its right to expressive association in this case authorizes public universities to limit the message of any ideologically-based student group. The limiting of a group's ideological message undermines the state's interest in maintaining a diverse range of thought on its public campuses. A government that suppresses the free exchange of ideas on campus runs the risk of undermining the intellectual development of its students. The First Amendment requires this conclusion once the university decides to designate a public forum and to provide benefits to different student associations. The students in associations based on belief should not be second-class citizens.

As noted by the Seventh Circuit in *Christian Legal Society v. Walker*, 453 F.3d 853, 862 (2006), to ask the question – i.e., whether the forced inclusion of individuals with contrary beliefs significantly affects

the ability of a belief-centered group to advocate its position – "is very nearly to answer it." CLS is a faith-based organization. Among its beliefs are a faith in Jesus Christ and an affirmance of traditional marriage and a traditional moral code. It would be difficult for CLS to convey its specific message of devotion to Christ to its members or others if it must accept members and officers who do not share its beliefs in Christ and who advocate conduct that the organization contends contradicts Christian teaching. CLS maintains that to require such membership would effectively impair its ability to convey its message to members and nonmembers. An organization's view of what would impair its expression is given deference by this Court. *Dale*, 530 U.S. at 653 (citation omitted).

Moreover, as this Court noted in *Dale*, "[t]he presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with the Boy Scouts policy." *Dale*, 530 U.S. at 655-56. The same is true in this case. The presence of an avowed atheist or other activist with a contrary message sends a distinct message of endorsement that CLS has the right not to send.

This case is not like *Roberts* in which this Court determined that requiring the organization to admit women did not violate its member's associational rights. In *Roberts*, the Jaycees threatened to revoke the charters of two of its chapters because they were admitting women as regular members in violation of the organization's bylaws. *Roberts*, 468 U.S. at 614. The chapters filed charges of discrimination with the

Minnesota Department of Human Rights, alleging that the exclusion of women from full membership violated the Minnesota Human Rights Act. *Roberts*, 648 U.S. at 614-15. This Court held that the Minnesota Human Rights Act outweighed the organizations' interest in excluding women. The Court concluded that the enforcement of the antidiscrimination law would not materially interfere with the ideas that the organization sought to express. This Court based that conclusion on the fact that the law "impose[d] no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Roberts*, 648 U.S. at 627.

Unlike the Jaycees, CLS excludes members only because their ideologies or philosophies are different from those of its statement of faith. It is CLS's ideology that defines the organization, and, thus, the enforcement of the nondiscrimination policy in this case would materially interfere with the ideas that the organization seeks to express.

There is no merit to the argument that the nondiscrimination policy does not significantly affect CLS's ability to advocate its viewpoints because CLS may exist and advocate outside of the campus community. This Court has rejected the argument that withdrawal of recognized-status privileges is too insubstantial to infringe on an organization's First Amendment rights. In *Healy*, this Court stated:

> There can be no doubt that denial of official recognition, without justification, to college organizations burdens or

> abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes. . . . If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organizations' ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial. [*Healy*, 408 U.S. at 181-82.]

The withdrawal of recognized status not only significantly affects the ability of the individual student group to express its message, the infringement on that ability affects the overall intellectual debate on university campuses. As stated by this Court in *Rosenberger*, "[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses." *Rosenberger*, 515 U.S. at 836.

C. The right of expressive association in a designated public forum, such as in this case, can only be infringed upon by the government when it possesses a compelling state interest.

The level of state interest required to overcome a group's expressive association right is determined by the type of forum at issue. "The government can exclude a speaker from a traditional public forum 'only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.'" *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998)(quoting *Cornelius v. NAACP*, 473 U.S. 788, 800 (1985)). The same standard applies to a "designated public forum," which is created when the government opens a nontraditional public forum for public discourse. See *Forbes*, 523 U.S. at 682; see also *Rosenberger*, 515 U.S. at 829 ("These principles provide the framework forbidding the State to exercise viewpoint discrimination, even when the limited public forum is one of its own creation.").

Hastings has created a designated public forum for its student groups. Hence, it can only exclude a student group when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. The apparent purpose underpinning Hastings' nondiscrimination policy is to prohibit discrimination on campus. The policy, while laudable, must yield here in the context of the First Amendment. Hastings' current nondiscrimination policy forces groups to include those individuals who do not share the beliefs or views of the

group. No one disputes a university's interest in prohibiting discrimination when the discrimination is unrelated to the expressive activity. But here, CLS is not discriminating nor is it excluding any individual for reasons other than the refusal to adopt its statement of faith. In fact, CLS welcomes any member of the student body that adopts its statement of faith. It, however, wishes to control its ideological message by establishing criteria for membership. As noted above, establishing standards for one's own message of a group is expressive activity. Therefore, as applied to CLS and other similar groups, Hastings' interest lies solely in modifying the expressive activity of CLS, an interest prohibited by the First Amendment.

"The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, [offends] the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Hurley*, 515 U.S. at 579. Furthermore, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579. Hastings' nondiscrimination policy clearly favors a viewpoint of openness and acceptance over CLS's expression of orthodoxy in belief. This Court has rejected this use of state power. "Disapproval of a private speaker's statement does not legitimatize use of the [state]'s power to compel the speaker to alter the message by including one more acceptable to others." *Hurley*, 515 U.S. at 581.

Because the only interest served by the nondiscrimination policy is an interest that this Court has already held must bow to the right of expressive association, the interests of the First Amendment must prevail.

What the above cases of *Dale* and *Hurley* make clear is that the government may not, without a compelling interest, force a group to include individuals when the forced inclusion would significantly affect the expressive activity of the group. While Hastings has not directly forced CLS to include individuals that do not embrace its core set of beliefs, there is no difference between requiring inclusion, as in *Dale* and *Hurley*, and conditioning access to a public forum on the inclusion, as in this case. Either way, the government has required an expressive association to abandon its right of self-definition and to alter its message in order to disseminate that message in a public forum. This Court has made it clear that the First Amendment prohibits that type of intrusion.

II. The University's policy violated the First Amendment by excluding CLS from a public forum based on the religious content of its intended speech.

Hastings has no obligation to provide a public forum or underwrite the cost of a student association. But once Hastings established a process by which it allowed access to its facilities to student groups, the process must comply with the First Amendment. "It is axiomatic that the government may not regulate speech based on its substantive content or the message

it conveys." *Rosenberger*, 515 U.S. at 828 (citing *Mosley*, 408 U.S. at 96. The government must abstain from regulating speech when the specific motivating ideology or opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829.

In *Widmar*, this Court addressed the question whether a state university which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use them for religious worship and religious discussion. The case involved an organization of evangelical Christians who wanted to hold on-campus meetings in the student center. *Widmar*, 454 U.S. at 265-66. The university prohibited the meetings based upon a regulation that prohibited the use of university buildings or grounds "for purposes of religious worship or religious teaching." *Widmar*, 454 U.S. at 265 (citation omitted).

This Court first reaffirmed the principle that a university, by opening up their facilities for student meetings, can create a public forum generally open for use by student groups. *Widmar*, 454 U.S. at 267. This Court then struck down the university's regulation because it had discriminated against the student group based on its desire to engage in religious worship and discussion, i.e., the religious content of its intended speech, and the university could not justify the discriminatory exclusion with a compelling interest. *Widmar*, 454 U.S. at 277.

In *Rosenberger*, a Christian organization requested funds to pay the organization's outside

printer for its newspaper printing costs. The request was made pursuant to guidelines set by the University of Virginia, which authorized student groups to request funds to pay outside contractors for the printing costs of publications issued by the group. *Rosenberger*, 515 U.S. at 823. The university denied the request on the ground that the publication "promoted or manifested a particular belief in or about a deity or an ultimate reality." *Rosenberger*, 515 U.S. at 827. The university claimed that the exclusion was constitutional because it was viewpoint neutral in that the regulation drew lines based on content, not viewpoint. *Rosenberger*, 515 U.S. at 830. This Court noted, however, that the distinction between viewpoint discrimination and content discrimination is not a precise one noting that "[r]eligion may be a vast area of inquiry, but it also provides. . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Rosenberger*, 515 U.S. at 831. This Court then determined:

> The Guideline invoked by the University to deny third-party contractor payments on behalf of WAP [Wide Awake Productions] effects a sweeping restriction on student thought and student inquiry in the context of University sponsored publications. The prohibition on funding on behalf of publications that "primarily promote or manifest a particular belief in or about a deity or an ultimate reality," is in its ordinary and common-sense meaning, has a vast potential reach. . . . Based on the principles we have discussed, we hold

> that the regulation involved to deny SAF [Student Activity Fund] support, both in its terms and in its application to these petitioners, is a denial of their right of free speech guaranteed by the First Amendment. [*Rosenberger*, 515 U.S. at 836-37.]

What *Widmar* and *Rosenberger* make clear is that a university may not discriminate against a student group based on the religious viewpoint of a group's speech. These cases, of course, apply with equal force to speech regarding politics, sexual orientation, or other subjects. Government regulation may not favor one viewpoint over another.

What *Rosenberger* makes clear is that even ostensibly content-neutral regulation can, in fact, discriminate based on viewpoint. The case at bar is a perfect example. Hastings' nondiscrimination policy, while attempting to prohibit discrimination of religious, political, and other expression, actually singles out religious, political, and other belief-centered groups and discriminates against them by forcing them to modify their expression if they want access to the public forum. The policies are not viewpoint neutral because they single out those student groups whose chosen expression depends upon maintaining core belief through their membership criteria.

Viewpoint discrimination by the government is at the core of what the First Amendment prohibits. Here, whether Hastings directly denies access to CLS based on its religious viewpoint, which this Court condemned in *Rosenberger*, or conditions access to a

public forum on CLS's modification of its religious viewpoint, the effect is the same: the government has favored one viewpoint over another. To hold otherwise would undermine this Court's decisions in *Widmar* and *Rosenberger*.

While Hastings in this case did not directly deny access based upon CLS's religious speech, it conditioned its access to the public forum on the group's abandonment of its distinctive message. There is no meaningful difference between directly denying access based on the content of a group's message and conditioning access on a group's abandonment of its distinctive message, and this Court's precedent forbids it. The amici states have an interest in ensuring that public universities comply with the First Amendment. As aptly stated by Dean Joan Howarth, of Michigan State University College of Law:

> The First Amendment protects expressive associations because they are identity-forming, idea-forming entities. This is why encouraging a variety of autonomous student groups is a central aspect of many school's missions of preparing students to participate effectively in democracy. . . . Expressive associations create opportunities for self-expression, advocacy, tolerance, and autonomy. Schools may teach those values best by facilitating public forums for student organizations. [Joan Howarth, Teaching Freedom: Exclusionary Rights of Student Groups, 41 U.C. Davis L. Rev. 889, 894 (2009)].

The freedom of the students to determine the basis of their association is at the core of the First Amendment – the university cannot render such an association as secondary and then deny it access to the benefits the university provides. Student groups based on belief play a vital role in the university setting. The First Amendment requires that the government cannot discriminate against them. States are strengthened when their public campuses are allowed to reflect the diverse beliefs of their students. This is true diversity.

CONCLUSION

The decision of the court of appeals should be reversed.

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
MAR 15 2010
OFFICE OF THE CLERK

No. 08-1371

IN THE

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL LGBT BAR ASSOCIATION, THE NATIONAL LGBT BAR ASSOCIATION LAW STUDENT DIVISION AND 55 LGBT LAW STUDENT ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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March 15, 2010

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INTEREST OF *AMICI*[1]

Amici, the National LGBT Bar Association, the National LGBT Bar Association Law Student Division, and the 55 LGBT law student groups listed in the Appendix, are organizations committed to fighting discrimination against lesbian, gay, bisexual and transgender ("LGBT") people on law school campuses, in the legal profession and in society at large. *Amici* and their members work to promote equality for all people regardless of sexual orientation, and serve in their roles as lawyers and future lawyers to fight discrimination against LGBT people where it continues to exist.

Amici are further committed to fostering a legal profession that is open to all qualified people, regardless of sexual orientation. In order to achieve the goal of a profession that reflects the diverse elements of our society, *amici* believe that law schools must provide an environment in which LGBT students feel welcome and capable of participating in all aspects of their legal education. The law student groups that are *amici* in this case further this goal on a daily basis by protecting the interests of LGBT students on law school campuses, and promoting the interests of *all* law students, by fighting the persistent discrimination that unfortunately continues to exist at the nation's law schools.

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[1] *Amici* have obtained written consent from all parties to file this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

At issue in this case is whether a law school, in an attempt to ensure that all students—including LGBT students—have equal access to registered student groups, can adopt a policy that does no more than prohibit discrimination based on a law student's status, including his or her sexual orientation, or beliefs. To hold that a law school cannot apply this basic principle, but must *subsidize* groups that engage in discrimination, would ignore the strong interests of the law school, the legal profession and society at large in promoting equal treatment without regard to sexual orientation.

SUMMARY OF ARGUMENT

The University of California Hastings College of the Law ("Hastings" or "Law School"), a state actor, has adopted a nondiscrimination policy that requires all recognized student groups to provide equal access to all law students to participate as members or leaders. Petitioner argues that the Law School's policy is unlawful because it infringes on Petitioner's First Amendment rights. It does not. For purposes of this Court's First Amendment analysis, the Law School's extracurricular program is a "limited public forum," in which the Law School retains discretion to place certain limitations on conduct and speech. Here, the Law School has not exceeded its discretion.

As an initial matter, the Law School's nondiscrimination policy is not a restriction on speech, but rather a generally applicable restriction on the *act* of discrimination. But even if it were viewed as a regulation of speech, the policy passes muster because it applies neutrally to all groups without regard to the viewpoint of the speaker and it

is "reasonable" in light of the Law School's purpose in the forum. That purpose is coterminous with the Law School's general purpose: to educate and train the next generation of lawyers in California and throughout the country. As an arm of the State of California, Hastings has a societal interest in addressing discrimination based on sexual orientation, in light of the State's unfortunate history of discrimination against gays and lesbians. The Law School's policy is consistent with, and furthers, the State's goal of equal treatment for all Californians.

The Law School's policy is also consistent with the legal profession's important interest in reducing discrimination in its own ranks. The profession has taken steps to improve the status of gays and lesbians in the practice of law. But a great deal more work remains. According to a recent study, nearly one out of four LGBT first-year law students experiences discrimination in law school. *See infra* Part II.B.3. This Court should not force Hastings and other law schools that wish to provide welcoming, discrimination-free environments for all students, including gay and lesbian students, to subsidize discrimination against their own students.

ARGUMENT

I. THE REGISTERED STUDENT ORGANIZATION PROGRAM IS A LIMITED PUBLIC FORUM, IN WHICH THE LAW SCHOOL MAY IMPOSE REASONABLE, VIEWPOINT-NEUTRAL RESTRICTIONS ON CONDUCT.

Adopted in 1990, and amended in 2002, the Law School's nondiscrimination policy prohibits unlawful discrimination on the basis of "race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation." JA 220 ¶¶ 15-16. The policy applies with equal force to all groups within the Law School, "including administration, faculty, student governments, College-owned student residence facilities and programs sponsored by the College," and extends to "admissions, access and treatment in Hastings-sponsored programs and activities." *Id.* at 220 ¶ 15. The policy reflects a clear statement that the Law School does not tolerate "legally impermissible, arbitrary or unreasonable discriminatory practices." *Id.*

The Law School does not exempt its registered student organizations ("RSOs") from its general nondiscrimination policy. Rather, the RSO program requires that the bylaws of all RSOs make clear that they will abide by the policy in their membership decisions. *Id.* at 221 ¶ 17. And reasonably so. The RSO program is an extension of the classroom education and professional training that the Law School provides. Given the Law School's commitment to nondiscrimination, it makes good sense that the Law School should ensure that the

policy applies to all facets of the education—both curricular and extracurricular—that it provides.

It also makes constitutional sense. As this Court has held, when a university authorizes its students to form student groups, those groups are deemed to exist in a "limited" public forum. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-30 (1995) (applying limited public forum analysis to the distribution of funding to student groups). By contrast to a public forum, in which restrictions only for time, place and manner are allowed, a limited public forum is susceptible to greater regulation to ensure that the forum is used for the purpose to which it has been committed. Accordingly, when an educational institution transforms otherwise non-public property into a limited public forum within it, it does not concede its power to control, at least to some extent, the content of the forum. "[L]ike the private owner of property, [a school] may legally preserve the property under its control for the use to which it is dedicated." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993); *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Perry Educ. Ass'n v. Perry Educators' Ass'n*, 460 U.S. 37, 46 (1983); *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129-130 (1981); *Greer v. Spock*, 424 U.S. 828, 836 (1976); *Adderley v. Florida*, 385 U.S. 39, 47 (1966).

When the Law School instituted the RSO program, it created a limited public forum to complement the in-class education that its students receive. *See* JA 349 ¶ 4 ("[S]tudent organizations provide Hastings students with opportunities to

pursue academic and social interests outside of the classroom that further their education, contribute to developing leadership skills, and generally contribute to the Hastings community and experience."). The Law School did not forfeit the ability to place restrictions on the program that are consistent with the overall purpose of the school. As this Court has consistently reasoned, the Law School is "justif[ied] . . . in reserving [its forum] for certain groups or for the discussion of certain topics" in light of "[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created." *Rosenberger*, 515 U.S. at 829; *see also Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 49.

The Law School has made it clear that RSOs do not exist separate and apart from the law school community, but are part of that community, and thus must comply with the community's rules. As outlined in the Handbook for Student Organizations, which includes "Excerpts of Policies and Regulations Applying to College Activities, Organizations and Students":

> "In order to carry on its work of teaching, research and public service, the College has an obligation to maintain conditions under which the work of the College can go forward freely, in accordance with the highest standards of quality, institutional integrity and freedom of expression, with full recognition by all concerned of the rights and privileges, as well as the responsibilities, of those who comprise the College community. Each member of the College shares the responsibility for

> maintaining conditions conducive to the achievement of the College's purpose."

Pet. App. 74a.

Groups like Petitioner, even though not recognized as RSOs, may apply to use classrooms on campus for their activities, Pet. App. 7a-8a, and there is no evidence in the record that any non-registered group has ever been denied access on the Law School campus. The Law School has decided that it will provide *additional* access and greater resources to those groups that apply to become RSOs, conform to the Law School's rules and further its educational interests. After all, whatever else is true about the steps the Law School can and should take to combat discrimination, the Constitution does not require it to subsidize groups that engage in discrimination. *See* Hastings Br. 51-54.

II. THE LAW SCHOOL'S POLICY IS VIEWPOINT-NEUTRAL AND REASONABLE IN LIGHT OF THE PURPOSE OF THE FORUM.

Even were it the case that the Law School's policy effected a restriction on speech, not conduct,[2]

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[2] As the district court recognized, Pet. App. 24a-27a, and as we argue below, *see infra* Part II.A.2, Hastings' policy should be viewed as a restriction on the conduct of student groups in the forum. Because Hastings' policy satisfies the standard that this Court has used to evaluate limited public forums for speech, it *a fortiori* satisfies the standard for limits on expressive conduct articulated in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

the law is clear that restrictions on speech are permissible within a limited public forum so long as the restrictions are viewpoint-neutral and reasonable in light of the purpose served by the forum. *Lamb's Chapel*, 508 U.S. at 392-93. Both prongs of the test are met here.

A. The Law School's Policy Is Viewpoint-Neutral.

By prohibiting discrimination and requiring that all registered student groups accept "all-comers," the Law School's policy does not single out the viewpoint espoused by Petitioner.

1. Petitioner enjoys substantial protection to express its moral disapproval of homosexuality. Ultimately, however, the Law School is permitted to prohibit discriminatory *conduct* within its voluntary, subsidized RSO program. This Court has repeatedly recognized that, while the First Amendment protects a particular subject or opinion, the same protection is not afforded to all of its associated behaviors and modes of delivery. *Hill v. Colorado*, 530 U.S. 703, 735-37 (2000) (Souter, J., concurring); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 758, 769-770 (1994); *O'Brien*, 391 U.S. at 376-77.

2. This Court has also repeatedly held that antidiscrimination laws regulate conduct, not speech. *See, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572 (1995) (holding that a public accommodations law "[did] not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against

individuals"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (holding that, "[o]n its face," a public accommodations law "[did] not aim at the suppression of speech, [did] not distinguish between prohibited and permitted activity on the basis of viewpoint, and [did] not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria"); *cf. Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) (upholding the Solomon Amendment on the ground that "[a]s a general matter, [it] regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.")

The Law School's nondiscrimination policy is no different from the laws that this Court has already held to be regulations of conduct. Just like those laws, Hastings' nondiscrimination policy targets conduct, as it merely seeks to ensure that RSOs like Petitioner Christian Legal Society ("CLS") do not engage in the *act* of discrimination, regardless of the viewpoint they would express.

By the same token, a registered group that preaches against miscegenation cannot exclude an interracial couple from applying for membership (however unlikely that may be). Nor can a gay and lesbian group that has been recognized by the Law School exclude heterosexuals on the belief that the message of "gay pride" would be diluted by their presence. In short, *no* group that operates within the RSO program, and receives the benefits of that official affiliation with the Law School, can express

its adopted viewpoints through the exclusion of others.

3. As the District Court recognized, by arguing that CLS seeks to exclude homosexuals in order to promote its own viewpoint, Petitioner "is confusing the appropriate analysis by focusing on the reasons CLS is acting, as opposed to the reasons underlying Hastings' Nondiscrimination Policy." Pet. App. 34a. There is no indication that Hastings' prohibition of discrimination targets the viewpoint of Petitioner or any particular group. As such, Hastings' policy—which does not allow Petitioner, or *any* group, to exclude *any* student from membership within an RSO—is not viewpoint-based. *See Madsen*, 512 U.S. at 762-63 (a prohibition on demonstrating outside an abortion clinic was not viewpoint-based, even though the injunction only applied to abortion protestors).

B. The Law School's Policy Is Reasonable In Light Of The Law School's Purpose In Establishing The RSO Program.

Studies show that gay and lesbian law students continue to experience discrimination in law school, and perceive that law schools are not uniformly welcoming to gay and lesbian people. *See infra* Part II.B.3. Through adoption of its nondiscrimination policy, Hastings has made it clear that it will not subsidize or tolerate acts of discrimination towards its students, including based on sexual orientation. The policy applies to *all* those who act on behalf of the Law School, including faculty, administration and RSOs. It does not apply to students who organize outside the reach of the RSO program,

where their conduct is not Law School-sponsored and therefore not subject to the policy.

By adopting an "open-membership policy" with respect to its RSO program, Hastings has made it clear that exclusion of *any* student from the opportunities provided by the Law School is improper. The RSO program—which includes, among others, numerous student groups that are devoted to various areas of legal study and practice—is an extension of the legal education that the Law School offers its students in the classroom. The reasonableness of the Law School's decision to provide these opportunities on an equal footing to all students, and, in particular, without regard to sexual orientation, cannot seriously be questioned. *See Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (stating that the Court will defer to "[t]he law school's educational judgment that . . . diversity is essential to its educational mission").

Furthermore, the Law School's refusal to allow discrimination in the RSO program based on sexual orientation serves society's strong interest in equal treatment. Unfortunately, the State of California has demonstrated a long history of discrimination against gays and lesbians, which the State generally, and through its public universities specifically, has sought to eradicate. The Law School's nondiscrimination policy is consistent with, and furthers, that effort. *See infra* Part II.B.1.

The Law School's nondiscrimination policy also furthers the interests of the legal profession that it serves. A nondiscrimination policy that applies not only to the Law School's faculty and administration

but to *all* Law School-sponsored actors aptly reflects the central feature of equal treatment for all, which is the hallmark of our profession. Like society at large, the legal profession generally has an unfortunate history of discrimination against gays and lesbians. Studies conducted by California bar associations and the judiciary have shown the existence of significant bias in all aspects of the profession, including hiring, advancement and compensation of gay and lesbian attorneys, and demonstrate that gay and lesbian attorneys continue to experience discriminatory attitudes or treatment from co-workers or clients. A policy that seeks to instill the value of nondiscrimination in law students furthers the goal of the legal profession to remove the remnants of discrimination from its midst. *See infra* Part II.B.2.

In an attempt to ensure optimal diversity within the ranks of the legal profession, there is a pressing need for law schools—which are, after all, the nearly exclusive avenue by which to enter the profession—to provide a welcoming environment for all students, including gays and lesbians. The Law School's commitment to seeking equal treatment for all law students, without regard to sexual orientation, rather than subsidizing discrimination against some of its students, cannot be second-guessed as an unreasonable path towards that goal. *See infra* Part II.B.3.

1. The State Of California Has An Interest In Prohibiting Discrimination Based On Sexual Orientation.

The Law School's nondiscrimination policy reflects and serves the interest of the University of California, and the State of California generally, in ensuring equal treatment to all students without regard to sexual orientation. As detailed in William N. Eskridge, *Foreword: The Marriage Cases—Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 Cal. L. Rev. 1785 (2009) ("Eskridge, *Foreword*"), gays and lesbians in the State of California have endured a history of cruel discrimination, which went unaddressed until the 1970s. California has since adopted anti-discrimination laws to address that history, including a law prohibiting sexual orientation discrimination "in 'any program or activity conducted by any postsecondary educational institution' that receives [State funding]." *See* Hastings Br. 33-34 (quoting Cal. Educ. Code § 66270; Cal. Gov. Code § 11135(a)). Consequently, State law *requires* the Law School to ensure that no registered student group discriminates on the basis of sexual orientation. *Id.* In light of the general State prohibition on discrimination in schools—and the history that provides the backdrop for that prohibition—there is no basis on which to view the Law School's policy mandating simple nondiscrimination as anything but "reasonable."

1. In 1850, California criminalized the act of sodomy—which the legislature then characterized as "[t]he infamous crime against nature." Eskridge,

Foreword, at 1789 (citing 1850 Cal. Stat. 234 § 48). However, because of the difficulty of convicting consenting adults for private acts, there were very few sodomy convictions before 1890. *Id.*

In the early twentieth century, California experienced an increased anxiety about growing homosexual populations in large urban areas such as San Francisco and Los Angeles. *Id.* at 1790. The public considered homosexuals to be "mental inverts" and "degenerates," "devils" and "sodomites," who violated natural law and threatened the "fabric of society." *Id.* at 1789. Responding to this public anxiety, in the 1920s and 1930s, the police in California systematically designed undercover stake-outs in order to arrest homosexuals who met in public spaces. *Id.* at 1790. The police also spied on homosexuals in their own homes. *Id.* at 1792.

Licensed professionals, including lawyers, doctors, dentists and teachers, could be subjected to disciplinary action upon conviction for a sex crime, even when the crime was based on consensual conduct. *Id.* at 1794. After 1947, gays and lesbians convicted of sodomy in California were required to register as sex offenders with the police in their local jurisdictions. *Id.*

Until 1952, the sodomy laws of California imposed a maximum possible sentence of 15 years for first time offenders and second-time sodomy offenders were subject to an automatic life sentence. *Id.* In 1952, the legislature increased the maximum sentence for a first-time offender to life imprisonment. *Id.* at 1794. In addition, those convicted who failed to register as sex offenders were

subject to proceedings for indefinite commitment as "psychopathic offender[s]." *Id.* at 1793. By 1930, more than 7,000 people—many of them homosexuals—were categorized by the State as "moral or sexual pervert[s]" and underwent forced sterilization procedures. *Id.* at 1792.

In 1954, California opened the Atascadero Hospital, which experimented with new theories of treating "sexual psychopaths." *Id.* at 1793. Gay inmates were subjected to horrific "therapies" such as lobotomies and electric and pharmacological shock in order to "cure" them of their "perversion." *Id.*

2. Gays and lesbians whose lives were impacted by the California laws of the 1940s and 1950s found new freedom in the 1960s when society began to question the efficacy of criminal sodomy laws as applied to consenting adults. *Id.* at 1797-98. In 1955, the American Law Institute ("ALI") voted to exclude consensual sodomy from the Model Penal Code because criminalizing such conduct served no public interest and "engendered police corruption." *Id.* at 1798. Likewise, between 1964 and 1967, the California Legislature's Penal Code Revision Project drafted—but ultimately did not implement—new versions of the law consistent with the ALI's direction. *Id.* It was not until 1975 that the California legislature repealed the sodomy laws as they applied to consenting adults. *Id.*

3. During this period, the California courts intervened in support of preventing discrimination against gays and lesbians. In 1969, the California Supreme Court held that a public school teacher could not be terminated based only on the fact that

he was gay without a showing that he was unfit to teach. *Morrison v. State Bd. of Educ.*, 461 P.2d 375 (Cal. 1969). In 1979, the California Supreme Court narrowed the State's lewd vagrancy law, after finding it had been discriminatorily used to arrest gay men who accepted invitations to consensual activities that posed no legitimate threat to public order. *Pryor v. Mun. Ct.*, 599 P.2d 636, 645, 647-48 (Cal. 1979).

In 1979, Governor Jerry Brown issued an executive order barring sexual orientation discrimination against state employees. Eskridge, *Foreword*, at 1801. That year, the California Supreme Court held that the California Constitution's equal protection clause prohibited a quasi-public utility company from discriminating based on sexual orientation in its hiring decisions. *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 610 (Cal. 1979).

During this time, new ordinances barring discrimination by private employers based on sexual orientation were enacted by city councils all over California: San Francisco (1978), Los Angeles (1979), Oakland (1984), Santa Monica (1984), Sacramento (1986), Long Beach (1987) and San Diego (1990). Eskridge, *Foreword*, at 1804-05.

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Against this backdrop, in 1990, Hastings adopted its nondiscrimination policy, prohibiting discrimination based on a number of classifications, including sexual orientation. Then, as today, the policy provided a simple assurance that gay and

lesbian students would receive equal access to all facets of the education offered by the Law School.

2. The Law School's Policy Furthers The Legal Profession's Strong Interests In Diversity And Equality.

Hastings' policy is eminently "reasonable," not only for the inherent value of limiting discrimination in the State of California and society at large, but because of the particular importance of nondiscrimination in the legal profession and in the schools that prepare students to enter the profession. Given the particular interests of the legal profession in ensuring diversity in its ranks (and in training lawyers who will, as lawyers have historically done, serve society's interest in nondiscrimination), a law school's decision to adopt a robust nondiscrimination policy must not be second-guessed as unreasonable. As this Court recognized in *Grutter*:

> "[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders . . . . In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals . . . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate."

539 U.S. at 332. A nondiscrimination policy, like the Hastings policy, categorically applies to *all* actors. It does not promote or restrict any particular group and aptly reflects the central feature of equal access for all that this Court has recognized as an aspiration of the profession.

1. Like many professions, the legal profession's history with regard to discrimination is mixed. In the 1950s, while Thurgood Marshall and the legal giants of the Civil Rights Era battled for social justice, gay and lesbian lawyers were forced to hide their sexual orientation, often on pain of being denied admission into, or being disbarred from, the practice of law.[3]

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[3] *See, e.g., State ex rel. Fla. Bar v. Kimball*, 96 So. 2d 825 (Fla. 1957) (per curiam). After being disbarred in Florida, Mr. Kimball's application for admission to the New York bar was also denied, and the denial was upheld by the Appellate Division. *In re Kimball*, 339 N.Y.S.2d 302 (N.Y. App. Div. 1973) (per curiam). The New York Court of Appeals subsequently reversed, offering a seemingly mixed verdict on whether the bar could and should consider a lawyer's sexual orientation and conduct: "While [Kimball's] status and past conduct may be now and has been in the past violative of accepted norms, they are not controlling, albeit relevant, in assessing character bearing on the right to practice law in this State." *In re Kimball*, 301 N.E.2d 436, 436 (N.Y. 1973) (per curiam). It was not until 1978 that the Florida Supreme Court held that an "applicant with an admitted homosexual orientation" could be admitted to the bar, but explicitly left open the "circumstance where evidence establishes that an individual has actually engaged in homosexual acts." *In re Fla. Bd. of Bar Exam'rs*, 358 So. 2d 7, 8 (Fla. 1978) (per curiam).

Studies show that even into the mid-1980s, a "bar applicant's 'sexual conduct or lifestyle' [could] still trigger a bar investigation in nearly 40% of the states," even if "such an investigation would be unlikely to lead to a denial of admission." William B. Rubenstein, *In Communities Begin Responsibilities: Obligations at the Gay Bar*, 48 Hastings L.J. 1101, 1110 (1997) (citing Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 Yale L.J. 491, 532-33, 580-81 (1985) ("Rhode, *Moral Character*")). In 1981, an applicant to the Florida bar who reported having been excluded from military service on grounds of homosexuality was subjected "to an hour and a half of 'every tricky question about his sex life [the bar examiners] could dream of.'" *Id.* at 1110-11 (citing Rhode, *Moral Character*, at 580-81 & n.422).

Unsurprisingly, discrimination against gay and lesbian lawyers strongly affected their ability to be open about their sexual orientation. In a 1989 interview with the New York Times, Justice Richard Failla, the first openly gay man to serve on the New York Supreme Court, reflected on his decision to "come out" in the 1970s: "It was easy for me to assume at that point that I could lose my license, lose my job, lose my ability to practice law—something I had worked so long for." E.R. Shipp, *Homosexual Lawyers Keep Fighting Barriers*, N.Y. Times, Feb. 3, 1989, at B11.

2. While the legal profession has reflected society's unfortunate prejudices against gays and lesbians, it has also taken strides in remedying those biases. A number of bar associations, notably in California, are to be commended for the initial steps

they took in surveying sexual orientation discrimination in the legal profession in the early 1990s. The results of these surveys, however, were disheartening.

In 1991, the Committee on Lesbian and Gay Issues of the San Francisco Bar Association ("S.F. Committee") conducted a study on the issue of sexual orientation bias in the legal profession.[4] The S.F. Committee identified broad problems in three categories: (i) antidiscrimination policies; (ii) recruitment and hiring; and (iii) retention, advancement and compensation. 1991 S.F. Report at 4-12.

Many employers did not include explicit prohibitions against sexual orientation discrimination in their antidiscrimination policies, thus "fail[ing] to send a clear message to their employees that manifestations of hostility and prejudice toward gay men and lesbians [would] not be tolerated." *Id.* at 5. In terms of recruiting, the S.F. Committee found instances where hiring committees screened out applicants whose resumes reflected involvement in gay and lesbian activities. *Id.* at 5-6. The S.F. Committee also learned of occurrences where interviewers made overtly anti-gay comments or alienated gay and lesbian

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[4] Bar Association of San Francisco, *Creating an Environment Conducive to Diversity: A Guide for Legal Employers on Eliminating Sexual Orientation Discrimination* (1991) ("1991 S.F. Report"), *available at* http://LGBTbar.org/documents/AGuideforLegalEmployersonEliminatingSexualOrientationDiscrimination.pdf.

applicants through particular lines of questioning. *Id.* at 6-8.[5]

More generally, employers were found to have failed to create a hospitable workplace for gays and lesbians. *Id.* at 8-12. Lawyers were subject to pressures to remain in the "closet," and some employers insisted that openly gay and lesbian attorneys keep their personal life separate from their professional life, even "in situations in which heterosexual attorneys are expected to do the opposite." *Id.* at 9-10. Many employers catered to their clients' actual (or assumed) desires not to work with a gay or lesbian lawyer. *Id.* at 10-11. According to the S.F. Committee, this difficult work environment led to increased stress, a lack of productivity and, ultimately, the loss of valuable gay and lesbian employees. *Id.* at 10. In an effort to remediate these problems, the S.F. Committee made 23 recommendations which were adopted by the Bar Association of San Francisco. *Id.* at 12-21.

In 1994, the Los Angeles County Bar Association published a study concerning the experience of gays and lesbians in the legal profession.[6] The study

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[5] "In one reported interview with a promising Ivy League applicant, a partner in a major San Francisco firm listed among the City's few disadvantages its 'gay community.' The interviewee, in fact, was a lesbian whose interest in bringing her talents to a San Francisco law firm was largely motivated by the City's reputation for being open and hospitable to gay men and lesbians." 1991 S.F. Report at 7.

[6] The Los Angeles County Bar Association Committee on Sexual Orientation Bias, *Report* (1994) ("1994 L.A. Report"),

concluded that discrimination based on sexual orientation was prevalent in the Los Angeles bar and was strongly perceived by the gay and lesbian lawyers who suffered it. 1994 L.A. Report at i.

Roughly 15% of respondents, both heterosexual and homosexual, reported that their employers engaged in some form of anti-gay discrimination in hiring. *Id.* at 5. Over 40% of respondents believed their work environment was less hospitable to gay and lesbian lawyers than to heterosexual lawyers. *Id.* at 8. Survey respondents perceived that sexual orientation discrimination negatively affected recruitment, hiring, work environment, assignments, performance evaluations, promotions, career advancement and compensation. *Id.* at 5. Notably, 66% reported that attorneys in their office made homophobic comments or jokes. *Id.* at 8. Approximately 15% of attorney survey participants said clients had expressed a desire not to work with gay or lesbian attorneys. *Id.* at 13. Over 12% reported that partners in their office had expressed the same preference. *Id.* Visibility remained a major issue for gay and lesbian respondents. Only 39% of participants were out to most or all of their coworkers. *Id.* at 27. Fewer than 10% were out to clients, judges or opposing counsel. *Id.* Many gay and lesbian participants believed that bringing a same-sex partner to an event would be harmful to their career. *Id.* at 30.

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available at http://www.LGBTbar.org/documents/LACountyBarAssociationCommitteeOnSexualOrientationBias.pdf.

Also in 1994, the State Bar of California Standing Committee on Sexual Orientation Discrimination released the results of a study derived from data gathered as part of the State Bar Demographic Survey, a survey of over 14,000 randomly-selected active members of the California bar.[7] According to the report, as of the time of the study, 50% of heterosexual attorneys over the age of forty made more than $100,000 per year, compared with only 25% of gay and lesbian attorneys. Rubenstein, *Some Reflections*, at 392-93. Similarly, 54% of heterosexual attorneys earned more than $100,000 while only 33% of gay and lesbian attorneys earned that much. *Id.* at 393. After ten years in the profession, 38% of heterosexual attorneys were law firm partners while only 26% of gay and lesbian attorneys were. *Id.*

3. In 1995, the San Francisco Bar Association surveyed the employers whose employees had participated in the study described in the 1991 S.F. Report in order to measure how successfully its 23 recommendations had been implemented.[8] The

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[7] William B. Rubenstein, *Some Reflections on the Study of Sexual Orientation in the Legal Profession*, 8 UCLA Women's L.J. 379, 388 (1998) (citing Susan H. Russell & Cynthia L. Williamson, SRI Int'l, SRI Project 2310, *1991 Demographic Survey of the State Bar of California: Comparisons of Gay and Non-Gay State Bar Members* (1994) ("1994 Cal. State Bar Report")) ("Rubenstein, *Some Reflections*").

[8] Committee on Sexual Orientation Issues of the Bar Association of San Francisco, *Bar Association of San Francisco Report on Employment Policies for Gay and Lesbian Attorneys* (1996) ("1996 S.F. Report"), *available at* http://

results, published in 1996, found that compliance with the 12 recommendations classified as directly dealing with "equal treatment" tended to be higher than compliance with the 11 recommendations classified as ones that "fostered diversity." 1996 S.F. Report at 57-58. Firms indicated that many of these latter recommendations were often considered unnecessary because of the generally nondiscriminatory workplace perceived to exist. *Id.* at 58. The recommendations addressing diversity and sexual orientation training had among the lowest compliance rates of the survey, with only a minority of firms stating that they provided such training. *Id.* at 2.

4. Studies of the discrimination against gays and lesbians are made difficult by the fact that gays and lesbians often hide their sexual orientation in environments where discrimination is present. Indeed, the "apparent invisibility" of sexual orientation "present[s] unique problems for those attempting to define what actions evidence bias and to assess the precise quantity of such bias." Rubenstein, *Some Reflections*, at 390.

The California studies emphasized this difficulty. In the 1991 S.F. Report, the S.F. Committee stated that the "collecti[on] of data documenting sexual orientation discrimination" was challenging "because many gay and lesbian law students and attorneys are reluctant to reveal their sexual orientation." 1991 S.F. Report at 1 n.1. In

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lgbtbar.org/documents/EmploymentPoliciesforGayandLesbian Attorneys.pdf.

addition, "many legal organizations [were] reluctant to collect data on the numbers of openly gay and lesbian law students and employees," *id.*, perhaps reflecting an unwillingness to identify or address the absence of gay and lesbian lawyers.

The Los Angeles County Bar Association experienced the same obstacles in generating the 1994 L.A. Report. It noted that its "own experience in performing this study suggested apathy, even hostility, concerning the subject of sexual orientation bias." 1994 L.A. Report at 43. Moreover, the bar committee that conducted the survey received angry responses from many members of the bar. *Id.* at 43-44.

5. In addition to conducting studies and fostering awareness concerning the challenges that gay and lesbian attorneys face, the California legal profession and law schools there and elsewhere began to focus on other measures to redress the disparity in the number of openly gay and lesbian lawyers. In 1992, the American Bar Association formally accepted *amicus* the National LGBT Bar Association as an affiliate. Also, in the early 1990s, student groups like *amici* began to form on law school campuses to ensure that law schools would provide a welcoming environment for gay and lesbian students. As the legal profession has devoted tremendous resources to achieving civil rights victories for women and racial minorities, gay and lesbian interest groups within the profession have also strived to win landmark victories in the courtroom, including in this Court, underscoring the profession's commitment to equality for gays and lesbians throughout society. *See, e.g., Lawrence v.*

Texas, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

6. While most, if not all, of the sexual orientation bias studies conducted in the 1990s had been conducted by state or local bar associations, the judiciary has also shown a commitment to participate in implementing remedial measures. In 2001, a report on the role of sexual orientation discrimination in California's courts was published by the Fairness Subcommittee of the Judicial Council's Access and Fairness Advisory Committee ("Fairness Subcommittee").[9] The resulting 2001 California Courts Report "was among the first comprehensive, empirical studies of sexual orientation bias in an American court system." Todd Brower, *Obstacle Courts: Results of Two Studies on Sexual Orientation Fairness in the California Courts*, 11 Am. U. J. Gender Soc. Pol'y & L. 39, 40 (2002).

In and of itself, the mere undertaking of such a study by the judiciary was a promising sign for gay and lesbian attorneys. The findings contained in the Report, however, demonstrated that there was still much to be accomplished to eradicate sexual orientation bias in the California courts. 2001 Cal. Courts Report at 1. The Fairness Subcommittee, comprised of attorneys, sent surveys to two groups of

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[9] The Sexual Orientation Fairness Subcommittee of the Judicial Council's Access and Fairness Advisory Committee, *Final Report on Sexual Orientation Fairness in the California Courts* (2001) ("2001 Cal. Courts Report"), *available at* http://www.courtinfo.ca.gov/programs/access/documents/report.pdf.

individuals: (i) gay and lesbian court users and (ii) court employees, irrespective of their sexual orientation. *Id.* The study showed that gay and lesbian court users and employees in the California court system continued to face significant bias. For instance, "[f]ifty-six percent of the gay and lesbian respondents experienced or observed a negative comment or action toward gay men or lesbians." *Id.* at 3-4. "One out of every five court employee respondents heard derogatory terms, ridicule, snickering, or jokes about gay men or lesbians in open court, with the comments being made most frequently by judges, lawyers, or court employees." *Id.* at 4. Moreover, as in other earlier studies, the Fairness Subcommittee noted that the "survey . . . generated a number of negative responses. These negative statements underscore some of the findings from the survey, which indicate that some court employees are unconcerned or hostile with respect to sexual orientation issues in the courts." *Id.* at 13.[10]

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[10] The Report includes a sampling of those responses: "I have received your survey on sexual orientation and found it to be degrading and offensive . . . I am sure the Judicial Council could find better use of the talent, time and money that is being wasted on a minority of court personnel"; "I find it incredible, and as a taxpayer, I am offended, that money is allowed to be spent on such a stupid survey. I can further assure you that, as a court clerk, I have better things to do than keep track of extraneous remarks regarding gays and lesbians"; "I, as a heterosexual, am getting a little tired of the whole hoo-haw and feel that if any individual thinks he/she is being mistreated, he/she should bring this to the attention of the appropriate authority." 2001 Cal. Courts Report at 13.

7. More recently, in 2006, the State Bar of California published a report on the challenges faced by minorities in the legal profession, including the discrimination that LGBT attorneys continued to experience.[11] The Report described the results of the State Bar's online poll of California attorneys regarding discrimination they had personally experienced or witnessed. 2006 Cal. State Bar Report at 3. LGBT attorneys who responded to the survey reported facing discrimination and bias in the workplace, the courtroom and other legal venues. *Id.* at 16. They reported hearing inappropriate jokes and comments, experiencing denial of good work assignments, marginalization and receiving unequal pay. *Id.* Thirty-five percent of LGBT attorneys reported having been denied a promotion based on their sexual orientation. *Id.* at 17. Most notably, *none* of the 155 LGBT attorneys who indicated having experienced workplace discrimination reported such mistreatment to supervisors, possibly out of fear of not being taken seriously or, worse, out of fear of negative repercussions in the workplace. *Id.* By contrast, 51% of female lawyers, 40% of lawyers over 40 years old, and 52% of other minority lawyers who felt they had experienced discrimination reported it to management. *Id.* Among the remedial measures to be implemented, each of the State Bar committees recommended "that enforcement of

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[11] The State Bar of California, *Challenges to Employment and the Practice of Law Facing Attorneys from Diverse Backgrounds* 17 (2006) ("2006 Cal. State Bar Report"), *available at* http://calbar.ca.gov/calbar/pdfs/reports/2006_Diversity-Survey-Report.pdf.

existing anti-discrimination statutes and policies would make a difference." *Id.* at 21.

* * *

While the legal profession, both in California and beyond, has seen success internally in the number of gays and lesbians who are now openly represented in its ranks, major challenges remain. Discriminatory conduct toward, and attitudes about, gays and lesbians remain all too prevalent, and gay and lesbian attorneys remain concerned about whether their sexual orientation will be harmful to their career. As bias against gays and lesbians continues to exist, the legal profession has an important interest in remedying any remnants of discrimination in its own ranks based on sexual orientation. That interest is furthered at the law school level through policies adopted by schools like Hastings that clearly prohibit discrimination on any basis, including on the basis of sexual orientation.

3. Despite Recent Improvements, Law Schools Must Continue To Improve Their Efforts To Promote A Welcoming Environment For Gay And Lesbian Students.

As in the legal profession generally, law schools across the country have undertaken measures to promote tolerance and inclusion for—along with other protected groups—gay and lesbian students. Now "[v]irtually every American law school has a nondiscrimination policy that forbids discrimination on the basis of . . . sexual orientation," among other protected characteristics. Pamela S. Karlan,

Compelling Interests/Compelling Institutions: Law Schools as Constitutional Litigants, 54 UCLA L. Rev. 1613, 1628 (2007). The Association of American Law Schools has formalized nondiscrimination as a requirement for member schools.[12]

Over the past several years, the Law School Admission Council ("LSAC") conducted a series of surveys to quantify the progress of law schools in creating welcoming environments for LGBT students. The LSAC effort consisted of three parts: (1) a national survey of first-year law students in their second semester, asking them to identify themselves by a number of demographic subpopulations, including ethnicity, gender, political views, age, sexual orientation and sexual identity;[13] (2) a national survey of all LGBT law students ("LGBT Law Student Survey"); and (3) a series of small focus groups used to solicit narrative responses. *See* Kelly Strader *et al.*, *An Assessment of the Law School Climate for GLBT Students*, 58 J. Legal Educ. 214, 216-17 (2008).

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[12] *See* American Association of Law Schools, *AALS Handbook* § 6-3(a) (2008), *available at* http://www.aals.org/about_handbook_requirements.php ("A member school shall provide equality of opportunity in legal education for all persons, including . . . applicants for admission, enrolled students, and graduates, without discrimination or segregation on the ground of . . . sexual orientation.").

[13] Law School Admission Council, *The Climate in Law Schools for GLBT Persons: Results from a Survey of Law Students* at 2 (2006) ("Climate Survey"), *available at* http://lsacnet.lsac.org/publications/GLBT-Climate-Survey.pdf.

Approximately 93% of students who self-identified as LGBT law students reported that their law school had an LGBT organization. *Id.* at 229. LGBT participants in the survey recognized that the existence of an LGBT-friendly student organization "is an important criterion for assessing the law school climate for [LGBT] students." *Id.* at 228.

Another criterion that surveyed students identified to gauge the extent to which a law school climate is welcoming for LGBT students is whether issues related to sexual orientation are meaningfully represented in course offerings. *Id.* at 223. The LGBT Law Student Survey revealed that 60.7% of law schools have courses on law and sexual orientation or some other course in which a primary focus relates to legal issues facing LGBT people. *Id.* at 223.

While law schools have taken steps to create an inclusive environment, there is still much work to be done. Only 66.4% of LGBT law students report that they would be "very likely" to recommend their school to other LGBT students. *Id.* at 229. Fewer than half of all LGBT students (43.8%) reported feeling "very comfortable" discussing LGBT issues in the classroom. *Id.*

Even more troubling, the empirical evidence shows that there is still significant discrimination against LGBT students at law schools. Of the LGBT first-year law students who were questioned as part of the Climate Survey, 23% reported that they had witnessed discrimination based on sexual orientation; roughly the same number had experienced such discrimination themselves.

Climate Survey at 9. Those percentages were the highest of all affiliation groups identified by the survey. By comparison, 15.9% of racial-ethnic minority students, 14.7% of socioeconomically disadvantaged students and 7.0% of female students reported experiencing discrimination because of their status as a member of the affiliation group. *Id.* As such, it is unsurprising that many LGBT students perceive their law school environment to be unwelcoming, or that "a significant number of students reported going at least partially back into the closet upon entering law school." Strader *et al.*, *An Assessment of the Law School Climate for GLBT Students*, at 221.

The continued existence of discrimination, as well as other unwelcoming aspects of the environment at certain law schools, influence the selection of law schools to which prospective LGBT students apply. When considering where to apply, surveyed LGBT students identified three law school climate issues, not otherwise listed by heterosexual students, among their top ten issues: friendliness to LGBT students, diversity and friendliness to women. *Id.* at 233. It is thus unsurprising that LGBT students (at least those who feel comfortable and confident enough to self-identify as such for an LSAC survey) tend to gravitate towards certain schools and away from others. In the Climate Survey, the percentage of LGBT students at individual schools ranged from zero, at some schools, to over 10%. Climate Survey at 2.

* * *

The refusal by law schools like Hastings to subsidize discrimination, in favor of a policy of allowing all students—including gay and lesbian students—to have equal access to school-recognized and school-funded activities is reasonable, and crucially important, in light of the legal profession's interest in ensuring diversity among its future members.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that this Court should affirm the result reached below by the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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March 15, 2010

APPENDIX

AMICI LGBT LAW STUDENT ORGANIZATIONS*

Albany Law School
OUTLAW
American University—
Washington College of Law
LAMBDA LAW SOCIETY
Arizona State University—
Sandra Day O'Connor College of Law
OUTLAW
Atlanta's John Marshall Law School
LAMBDA LAW SOCIETY
Boston University School of Law
OUTLAW
California Western School of Law
PRIDE LAW
Chapman University School of Law
OUTLAW
Chicago-Kent College of Law
LAMBDAS
Cleveland State University—
Marshall College of Law
ALLIES
Columbia Law School
OUTLAWS
Drexel University—
The Earle Mack School of Law
OUTLAW

*Appendix is a list of 55 LGBT law student organizations that join this brief as *amici* in their capacity as student organizations and offer the names of their affiliated law schools only for purposes of identification.

Georgetown University Law Center
OUTLAW
Golden Gate University School of Law
QUEER LAW STUDENTS ASSOCIATION
Hamline University School of Law
STONEWALL ALLIANCE
Hofstra University School of Law
OUTLAW
Indiana University—
Maurer School of Law
LAMBDA LAW SOCIETY
Indiana University School of Law-
Indianapolis
LAMBDA LAW SOCIETY
Loyola Law School-Los Angeles
OUTLAW
Loyola University-Chicago School of Law
OUTLAW
Northeastern University School of Law
QUEER CAUCUS
The Ohio State University—
Moritz College of Law
OUTLAWS
Pace University School of Law
LAMBDA LAW STUDENTS ORGANIZATION
Phoenix School of Law
JUSTICE FOR ALL
Saint Louis University School of Law
OUTLAWS
Santa Clara University School of Law
BGLAD
Seattle University School of Law
OUTLAWS
Southwestern Law School
OUTLAW

Stanford Law School
OUTLAW
Suffolk University Law School
QUEER LAW ALLIANCE
Texas Wesleyan Law School
OUT LAW
Thomas Jefferson School of Law
OUTLAW
Touro College—
Jacob D. Fuchsberg Law Center
AMICUS
University of Arkansas-Little Rock—
William H. Bowen School of Law
LAMBDA
University of California-Davis School of Law
LAMBDA LAW STUDENTS ASSOCIATION
UCLA School of Law
OUTLAW
University of Cincinnati College of Law
OUT & ALLIES
University of Colorado-Boulder Law School
OUTLAW
University of Connecticut School of Law
LAMBDA LAW SOCIETY
University of Idaho College of Law
OUTLAWS
University of Louisville—
Louis D. Brandeis School of Law
LAMBDA LAW CAUCUS
University of Minnesota Law School
OUT!LAW
The University of Mississippi School of Law
OUTLAW

University of the Pacific—
McGeorge School of Law
LAMBDA LAW STUDENTS ASSOCIATION
University of Pennsylvania Law School
LAMBDA LAW
University of San Francisco School of Law
PRIDE LAW
University of Wisconsin Law School
QLAW
Valparaiso University School of Law
LAMBDA STUDENT ASSOCIATION
Vermont Law School
ALLIANCE
Wake Forest University School of Law
OUTLAW
Washburn University School of Law
GAY-STRAIGHT LEGAL ALLIANCE
Wayne State University Law School
OUTLAWS
Western New England College—
School of Law
OUTLAW
Widener University School of Law
OUTLAW
William Mitchell College of Law
OUT!LAW
Yale Law School
OUTLAWS

AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF LAW, *Petitioner*,
v.
LEO P. MARTINEZ, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTERESTS OF *AMICI CURIAE* [1]

The National School Boards Association is a non-profit federation of state associations of school boards, representing the 95,000 school board members who govern nearly 15,000 local school districts across the United States. These local public school districts serve more than 46.5 million public school students, or approximately 90 percent of the elementary and secondary students in the nation. The California School Boards Association consists of the governing boards of school districts located in California.

The National Association of Secondary School Principals (NASSP) is the preeminent organization and the national voice for middle level and high school principals, assistant principals, and aspiring school leaders. NASSP promotes the intellectual growth, academic achievement, character development, leadership development, and physical well-being of youth through its programs and student leadership services.

The School Social Work Association of America (SSWAA) is a non-profit professional

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief.

organization promoting the importance of school social work in addressing barriers to student success. SSWAA members create linkages among schools, families, and communities and serve the mental health needs of students and families through early identification, prevention, intervention, counseling, and support.

Amici share a commitment to supporting and encouraging school boards and hundreds of thousands of local administrators in their efforts to promote effective learning environments that consistently reinforce the academic lessons and civic values it is their duty to impart to the heterogeneous population of children in grades K through twelve. As representatives of school boards and administrators, *amici* have an interest in implementing and enforcing reasonable nondiscrimination policies, including policies that in their educational judgment should be applied to school-funded or school-recognized student organizations. *Amici* also have an interest in ensuring that First Amendment law is clear so that school officials, without fear of liability, are able to adopt, implement, and enforce nondiscrimination policies that further educational objectives and respect the constitutional rights of all students while protecting educators and children alike from distractions from the academic mission.

SUMMARY OF ARGUMENT

I. Public school student groups do not have a constitutional right to public funding and other benefits of official school sponsorship while discriminating in contravention of the school's viewpoint-neutral open-membership policy. This Court has consistently held that the First Amendment has circumscribed application in the unique setting of public education, and the Court likewise has long recognized that school officials have broad discretion in managing school affairs. Public school districts are constitutionally permitted to further their vital educational mission by applying a neutral open-membership requirement to all school-recognized student groups.

A. An open-membership policy regulates non-expressive conduct, *i.e.*, bald discriminatory exclusion from the group. Such a policy does not regulate speech or prohibit a religious student organization from expressing in any way its faith and views. It also does not preclude groups from requiring their members with dissenting views to refrain from suggesting that the organization endorses those dissenting views.

B. To the extent that a school's non-discrimination policy regulates student speech, it is still constitutionally permissible. Under a limited-forum analysis, it is plainly viewpoint-neutral and eminently reasonable in light of the purposes of the educational forum.

C. In addition, a public school does not violate the First Amendment by declining to provide

taxpayer funds or attendant benefits of public school recognition to student groups that elect not to comply with an open-membership requirement. It is well-established that the government's decision not to subsidize the exercise of a fundamental right does not infringe the right. Indeed, student groups who wish to maintain exclusionary membership policies may choose to do so by simply declining to receive official school recognition.

II. Whether subject to intermediate scrutiny or a limited forum analysis, an open-membership requirement passes constitutional muster because it is content- and viewpoint-neutral and it furthers several substantial educational interests. School administrators are best situated to weigh the competing interests at work in the educational setting, and they should be given wide latitude in deciding whether to apply neutral nondiscrimination policies to student groups as a condition for receiving public funds or other benefits attendant to official school recognition. The need for such flexibility is particularly evident in the primary and secondary school environment, where students have widely varying ages, maturity levels, developmental needs, and socioeconomic backgrounds.

A. Studies show that student participation in extracurricular activities improves academic achievement. Notably, extracurricular activities may be especially valuable to students from disadvantaged socioeconomic backgrounds, a population often served by public schools. An open-membership requirement obviously furthers a school's legitimate interest in maximizing the

opportunities for students to participate in extracurricular student groups.

B. In addition to improved academic performance, studies demonstrate that participation in extracurricular activities enhances leadership, responsibility, and other civic values. Applying an open-membership policy to school-recognized and school-funded student groups therefore helps ensure for all public school students opportunities to develop social and leadership skills and other civic values. The policy thus furthers a school's substantial interest in inculcating fundamental values necessary to preserve democracy, including the development of social and leadership skills and the tolerance of divergent political and religious views.

C. A neutral nondiscrimination policy furthers the broad educational goals of public schools while at the same time protecting schools from burdensome administrative challenges and costly litigation risks. Forcing public schools to exempt certain student groups from an all-comers nondiscrimination policy would risk the perception of school-endorsed conduct or viewpoint—a heightened risk in the context of public primary and secondary schools, where students are younger and more impressionable. In addition, if school districts could not apply an open-membership policy to all student groups, school administrators would be in the untenable position of trying to assess the sincerity of the asserted religious or other expressive-based exclusion. Such significant administrative challenges would, at best, divert already stretched

resources and educators from the primary educational mission of public schools.

III. The Equal Access Act, 20 U.S.C. §§ 4071-4074, reinforces the need for school administrators to maintain flexibility in crafting reasonable policies and setting the terms and conditions of limited forum access. The Act prohibits public secondary schools from denying "equal" limited forum access to school-recognized groups based on the religious, political, philosophical, or other content of their speech. The plain terms of the Act require content and viewpoint neutrality. The Act therefore imposes no greater restrictions on public secondary schools than does the First Amendment.

ARGUMENT

I. A PUBLIC SCHOOL'S NEUTRAL NONDISCRIMINATION POLICY FOR RECOGNIZED STUDENT ORGANIZATIONS IS NOT SUBJECT TO STRICT SCRUTINY

This Court's precedents have consistently considered First Amendment claims by students against public schools in light of the unique setting of public education. Thus, while public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), their First Amendment rights "are not automatically coextensive with the rights of adults in other settings," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

Furthermore, this Court has repeatedly recognized that nothing in the Constitution "compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 n.4 (1988) (quoting *Fraser*, 478 U.S. at 686 (internal citation and quotation marks omitted)).

This Court also "has long recognized that local school boards have broad discretion in the management of school affairs." *Bd. of Educ. v. Pico*, 457 U.S. 853, 863 (1982) (plurality opinion). The need to balance free speech considerations with educators' responsibility for children is consistent with this Court's "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Hazelwood*, 484 U.S. at 273.

In light of those general principles, this Court should reject petitioner's novel contention that public students have a constitutional right to engage in blatant discrimination while simultaneously demanding official school recognition for student-initiated clubs as well as public funding and other school-sponsored benefits. Rather, the Court should uphold its precedent allowing public schools to implement reasonable, viewpoint-neutral policies to advance legitimate, indeed laudable, educational interests.

A. Schools' Nondiscrimination Policies Regulate Conduct

Public schools may constitutionally regulate student conduct by limiting public funds and school recognition to those student groups that comply with a nondiscrimination or "all-comers" policy. Requiring student organizations that wish to receive such public benefits to abide by an open membership policy "affects what [student groups] must *do* . . . not what they may or may not *say*." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* ("*F.A.I.R.*"), 547 U.S. 47, 60 (2006) (emphasis in original). This Court repeatedly has recognized that rules prohibiting discrimination regulate conduct. *See, e.g.*, *Wisconsin v. Mitchell*, 508 U.S. 476, 486-88 (1993) (recognizing Title VII and other antidiscrimination statutes as permissible content-neutral regulations of conduct); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 389-90 (1992) (same); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (same). A student group's exclusion of potential members on the basis of religion or non-marital sexual activity also is not inherently expressive conduct entitled to First Amendment protection. *See F.A.I.R.*, 547 U.S. at 66 (reiterating that First Amendment protection extends "only to conduct that is inherently expressive," and distinguishing exclusion of military recruiters from inherently expressive conduct of flag burning).

As with many public school policies, the Hastings Law School nondiscrimination policy in this case does not restrict a group's expression or ability to communicate the group's message. For instance, nothing in the school's policy purports to

prohibit religious student organizations from expressing their views and faith. Conversely, nothing in the policy bars groups from requiring students with dissenting views to refrain from suggesting that the organization endorses the dissenters' views. In other words, groups remain free to set rules with respect to "inherently expressive" activities. For instance, to the extent the Christian Legal Society ("CLS") has members or leaders who engage in pre-marital sex, CLS presumably could require that members and leaders refrain from speaking or appearing at a CLS event with a t-shirt or banner advocating pre-marital sex or similarly refrain from passing out condoms to students while wearing a CLS t-shirt. An all-comers requirement simply regulates non-expressive conduct, *i.e.*, bald discriminatory exclusion from the group.

A school's non-discrimination policy is constitutional if it "furthers an important or substantial government interest . . . unrelated to the suppression of free expression," and any "incidental restriction" on speech "is no greater than is essential to further that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *see Healy v. James*, 408 U.S. 169, 189 & n.20 (1972) (indicating that *O'Brien* intermediate scrutiny applies to the regulation of student group conduct that incidentally burdens expression).

B. A Nondiscrimination Policy, to the Extent It Regulates Speech, Is Subject to a Limited Forum Analysis

To the extent that a viewpoint-neutral all-comers policy regulates speech or burdens the associational rights of students, it is nonetheless constitutional as long as it reasonably furthers a legitimate governmental interest in the forum. This Court's cases addressing expressive association have applied heightened scrutiny because each case involved either a traditional public forum (where interests of private parties are at an apex) or a wholly private forum (where the government's regulatory interests are at their nadir). *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (public forum); *Roberts*, 468 U.S. 609 (private forum); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (private forum); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (private forum). By contrast, nondiscrimination policies adopted by public educational institutions are applied in a limited public forum where the balance of competing interests favors the government. Moreover, because expressive association is derivative of free speech rights, *see F.A.I.R.*, 547 U.S. at 68; *Roberts*, 468 U.S. at 622; *Rotary*, 481 U.S. at 544, expressive association rights in a limited public forum should be no greater than the free speech rights they are designed to further.

Under this Court's free speech precedents, public schools create a limited public forum by providing public funds and benefits to school-

sponsored student organizations. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995) (concluding that the university's student activities fund was limited public forum). Schools may regulate student expression in that limited forum in a viewpoint-neutral manner reasonably related to the purposes of the forum. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 230 (2000) (applying "[t]he standard of viewpoint neutrality found in the public forum cases" to the student activities fund at issue); *Rosenberger*, 515 U.S. at 830 ("The [Student Activities Fund] is a [limited public] forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.").

A neutral nondiscrimination policy, *i.e.*, one applied across the board to all school organizations, is not related to the suppression of viewpoint. Quite to the contrary, it is plainly viewpoint neutral. Laws prohibiting discrimination on the basis of enumerated factors, including religion, "make[] no distinctions on the basis of the organization's viewpoint," *Rotary*, 481 U.S. at 549, and are unrelated to the suppression of expression, *see Roberts*, 468 U.S. at 624 (public accommodations law "reflects the State's strong historical commitment to eliminating discrimination"). *See also Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 878 (1990) ("[I]f prohibiting the exercise of religion . . . is not the object of the [provision] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."). Not surprisingly, Petitioner

concedes the all-comers policy is "nominally neutral." Pet. Br. at 51.

Petitioner nevertheless argues that a concededly neutral policy is unconstitutional because it might have the "systematic effect" of burdening most heavily certain groups. *Id.* Petitioner's argument has been squarely rejected by this Court: "The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) ("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."). Here, the school's purpose is entirely content-neutral, as all groups are subject to the same policy.

C. Student Organizations Do Not Have a Fundamental Right to Discriminate While Demanding School Recognition and Funding

Because this case involves a request for government funds, assistance, and recognition, the private interests at stake are relatively weak. Public schools do not infringe students' First Amendment rights simply by declining to support discrimination with taxpayer funds or to otherwise facilitate exclusionary policies that offend the school's educational mission. It is well-established that the government's "decision not to subsidize the exercise of a fundamental right does not infringe the right."

Regan v. Taxation with Representation of Wash., 461 U.S. 540, 549 (1983); *Rust v. Sullivan*, 500 U.S. 173, 201 (1991) ("The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected."); *Maher v. Roe*, 432 U.S. 464, 475 (1977); *see also Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1098 (2009). Given that the Constitution and many state and local laws prohibit public schools themselves from discriminating, *see, e.g.*, Resp. Br. at 34, it is hardly surprising that school administrators may decide that the same principles should apply to student organizations that choose to request official school recognition or public funds.

For public primary and secondary schools, moreover, a student's "First Amendment rights [are] circumscribed 'in light of the special characteristics of the school environment.'" *Morse v. Frederick*, 551 U.S. 393, 405 (2007) (citation omitted). Thus, this Court has recognized that a public high school may decline to subsidize student speech even though the school may not freely prohibit that same speech: "The question whether the First Amendment requires a school to tolerate particular student speech . . . is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech." *Hazelwood*, 484 U.S. at 270-71.

Recognizing the risk of perceived school imprimatur of student speech in a school-sponsored newspaper, the Court in *Hazelwood* upheld a high school's content-based decision not to subsidize particular student speech (there, student newspaper articles on pregnancy and divorce). *Id.* The Court

explained that, in carrying out the vital responsibilities entrusted to public educators, "a school must be able to take into account the emotional maturity of the intended audience" when assessing student speech issues and "refuse to sponsor student speech that might reasonably be perceived to advocate" conduct inconsistent with civic values "or to associate the school with any position other than neutrality on matters of political controversy." *Id.* at 272.

Here, of course, the non-discrimination policy is content- and viewpoint-neutral. Petitioner, by contrast, argues that discrimination should be permitted based on the content of the group's message. But compelling a *content-based* exemption from a content-neutral nondiscrimination policy would risk that students and parents perceive public endorsement of a group's exclusionary practices. This risk is particularly acute in the context of public primary and secondary schools, where the line between school-endorsed expression and merely allowed expression is often blurred for young, impressionable students and their parents. *See id.* ("[A] school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting."); *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 96 (3d Cir. 2009) ("For elementary school students, the line between school-endorsed speech and merely allowable speech is blurred." (internal quotation marks omitted)).

II. A NONDISCRIMINATION POLICY SUBSTANTIALLY FURTHERS LEGITIMATE GOVERNMENTAL INTERESTS

Public schools should not be placed in a constitutional straightjacket that gives school administrators no choice but to permit school-sponsored or school-funded student organizations to discriminate. Public schools should be given wide latitude and flexibility to decide whether to adopt and implement neutral nondiscrimination policies for student groups as a condition for receiving public funds or other benefits, including official recognition. Many substantial governmental interests counsel in favor of establishing and enforcing open membership or other reasonable nondiscrimination policies. As set forth below, an all-comers requirement is reasonably related to the purpose of the public school's limited forum. Any incidental restriction on speech is no more than necessary to further the school's interest in equal access to student groups.

Importantly, school boards and public school administrators are best positioned to weigh the competing interests at stake in light of the "special characteristics" of the public school setting. For instance, public schools have heterogeneous student populations comprised of widely varying ages (ranging from five-year-old kindergarteners to eighteen-year-old high school seniors), maturity levels, developmental and special needs, and socioeconomic backgrounds. This Court has long recognized the distinct characteristics of primary and secondary public schools and the student populations that they serve, holding that the First

Amendment "must be applied in light of the special characteristics of the school environment." *Hazelwood*, 484 U.S. at 266; *Morse*, 551 U.S. at 397 (same); *see also Fraser*, 478 U.S. at 682 ("the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings"); *Southworth*, 529 U.S. at 239 n.4 (Souter, J., concurring) (noting that "high school[] students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education"). Primary and secondary schools must be able to implement reasonable policies—such as an open-membership policy for student groups—that account for the breadth of their institutional mission and the distinct pedagogical needs and developmental characteristics of their students.

A. Participation in Extracurricular Activities Improves Academic Achievement

A school may reasonably decide that requiring all student organizations to adopt an open membership policy maximizes student participation in student organizations and advances academic achievement. Improving student achievement is obviously a compelling objective of all primary and secondary public schools, especially in light of the No Child Left Behind Act.[2]

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[2] *See generally* 20 U.S.C. § 6317 ("in order to increase the opportunity for all students . . . to meet . . . student academic achievement standards," statute requires school districts to implement state academic assessments and other indicators to assess whether a school is making adequate yearly progress).

Notably, several studies have concluded that student membership in extracurricular activities results in higher academic performance. *See, e.g.*, Herbert W. Marsh & Sabina Kleitman, *Extracurricular School Activities: The Good, the Bad, and the Nonlinear*, 72 HARV. EDUC. REV. 464, 501-02 (2002) (finding that extracurricular activity participation had beneficial effects on a variety of outcomes, including academic achievement and educational and occupational aspirations); Susan B. Gerber, *Extracurricular Activities and Academic Achievement*, 30 J. RES. & DEV. EDUC. 42, 48 (1996) (concluding that research "results are consistent with the argument that participation in [extracurricular activities] promotes greater academic achievement"); Herbert W. Marsh, *Extracurricular Activities: Beneficial Extension of the Traditional Curriculum or Subversion of Academic Goals?*, 84 J. EDUC. PSYCHOL. 553, 557 (1992) (finding that extracurricular participation had positive effects on several educational outcomes, including GPA); *see also* Juan Antonio Moriana, et al., *Extra-curricular Activities and Academic Performance in Secondary Students*, 4 ELEC. J. RES. EDUC. PSYCHOL. 35, 36 (2006) (finding that extracurricular participation "yielded better academic performance"); National Center for Education Statistics, *Extracurricular Participation and Student Engagement* (June 1995) (finding that extracurricular participation is positively associated with academic achievement, consistent attendance, and aspirations for continuing education beyond high school); Neil G. Stevens & Gary L. Peltier, *A Review of Research on Small-School Student Participation in Extracurricular Activities*, 10 J. RES.

RURAL EDUC. 116, 118 (1994) (finding that "students who participate in high school activities are more likely to have a higher grade-point average and better attendance records"). Extracurricular activity participation may be particularly beneficial to students from disadvantaged socioeconomic backgrounds—a population more likely to attend public schools. *See* Marsh & Kleitman, *supra*, at 508 (noting that the benefits of extracurricular activity participation "tend to be larger, certainly not smaller, for disadvantaged students").

B. Participation in Extracurricular Activities Free from Discrimination Provides Students with Opportunities to Develop Social and Leadership Skills That Advance Democracy

Education furthers "the very foundation of good citizenship" and is "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Hazelwood*, 484 U.S. at 272 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). Public schools, particularly primary and secondary schools, also are entrusted to "'inculcat[e] fundamental values necessary to the maintenance of a democratic political system.'" *Pico*, 457 U.S. at 876 (Blackmun, J., concurring) (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979)); *see Fraser*, 478 U.S. at 681 (same); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("We have recognized the public schools as a most vital civic institution for the preservation of a democratic

system of government." (internal citation and quotation marks omitted)).

The pedagogical objectives of public schools include the inculcation of civic values, such as "tolerance of divergent political and religious views." *Fraser*, 478 U.S. at 681. Creating a learning environment free from discrimination and fostering interaction, tolerance, cooperation, and mutual respect among students of widely varying backgrounds are integral and essential to the educational mission of American public schools. *See, e.g., id.* at 683 ("The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.").

Studies have shown that student participation in extracurricular activities "is likely to provide the opportunity for enhanced leadership, responsibility, and perseverance" and thereby helps develop important social and leadership skills. Stevens & Peltier, *supra*, at 118; *see also* Patricia A. Harrison & Gopalakrishnan Narayan, *Differences in Behavior, Psychological Factors, and Environmental Factors Associated with Participation in School Sports and Other Activities in Adolescence*, 73 J. SCH. HEALTH 113, 118 (Mar. 2003) (finding for adolescents that "participation in extracurricular activities other than sports appears to have a unique association with doing homework and avoiding alcohol use, marijuana use, and vandalism").

Accordingly, public schools have a strong interest in ensuring that *all* students have the

opportunity to develop social and leadership skills that result from participation in extracurricular student organizations. *See generally Southworth*, 529 U.S. at 233-34 (acknowledging the educational value derived from extracurricular activities); *id.* at 242 (Souter, J., concurring); *Rosenberger*, 515 U.S. at 824 (noting university's recognition that the availability of a broad range of extracurricular opportunities for its students tended to "enhance the University environment," and was related to its educational purpose); *cf. Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.").

C. A Neutral Nondiscrimination Policy Protects Schools from Burdensome Entanglements and Litigation Risks

Petitioner recognizes that a religious group's purported right to discriminate stops at the point it is invidiously based on race (or perhaps sex) *or*, in other words, at the point the exclusion is not necessary to protect its particular group identity or freedom of expression. Pet. Br. at 43. Schools may legitimately decide, however, that such a framework would be unworkable in practice, or worse, would seriously divert educators and administrators from their primary mission of *educating* and would expose the school to substantial risk of costly and protracted

litigation. An all-comers policy thus has the salutary effect of obviating the need for school administrators (and their counsel) to assess whether a student was permissibly excluded from participation in a school-recognized student group. Without an open-membership requirement, school administrators would need to make fact-intensive inquiries and judgments as to the sincerity of a student group's religious-based exclusion of a particular student.

If schools were unable to apply an all-comers requirement across-the-board to all groups, public schools would be forced to try to discern which extracurricular organizations engage in "religious" or other "group" expression such that permitting discrimination is constitutionally mandated. Schools invariably and quickly would become embroiled in controversies with no easy answers, such as deciding whether the ability to discriminate is necessary for the religious expression of organizations centered around yoga, Scientology, Kabbalah, or Branch Davidians, or whether a claim of religious expression is merely a veil for invidious discrimination. *Cf.* A. BURLEIN, LIFT HIGH THE CROSS: WHERE WHITE SUPREMACY AND THE CHRISTIAN RIGHT CONVERGE (2002); *Hsu v. Rosyln Union Free Sch. Dist. No. 3*, 85 F.3d 839, 869 (2d Cir. 1996) (noting that "[i]f authorized by the School, [a] private act of invidious discrimination by a student club also constitutes a state act of invidious discrimination" in violation of the Equal Protection Clause). Schools should not have to be caught in the crosshairs of cultural battles—accusations of religious discrimination and counter-accusations of religious favoritism—which

would seriously divert scarce resources and educators from their primary mission.

For example, suppose a student group seeks to exclude African-Americans and other non-Caucasians, from its membership or leadership because it claims that, according to its religious beliefs, members of the Caucasian race are God's (or Allah's or Elohim's or Jehovah's) chosen people. Or suppose a student group seeks to exclude women for asserted religious reasons. Regardless of whether the school administrator ultimately concluded that the asserted religious belief is sincere, the distraction from educational objectives that such line-drawing would create would likely be only compounded by the ensuing controversy if, for example, school administrators permitted one religious group to exclude a seventh-grade girl or waived an all-comers requirement for other groups asserting a spiritual ground for their exclusionary acts.

Nor could an easy line be drawn that would permit religious organizations to exclude certain students from leadership positions. Public schools would then have the unenviable task of determining which of the group's various leadership positions—treasurer, social chair, secretary, among others—involved duties integral to the group's religious expression. *See, e.g.*, *Hsu*, 85 F.3d at 857-58 (finding that club's president, vice-president, and music coordinator are "calculated" to affect the religious content of the club's speech, but the club's secretary and activities coordinator were not). Such distinctions "are not easy for anyone to draw (whether federal judges or school principals)," *id.* at

858 n.18, and forcing school administrators to engage in such line-drawing is neither sensible nor constitutionally required. Giving public school administrators the flexibility to adopt an all-comers requirement minimizes distractions from educational goals, including controversy from an actual or perceived personal bias or inconsistency in granting exemptions.

Public schools are already common battlegrounds for the cultural wars waged in this country. Calling upon school administrators to engage in such line-drawing would further increase the risk of costly litigation. Those student groups denied a requested religious exemption from an open-membership requirement might challenge the denial on First Amendment grounds. And those students excluded from groups to whom schools granted religious exemptions likewise might charge the school (or individual administrators) with unlawful religious favoritism. According to one recent report, three of California's five largest school districts collectively paid $32.8 million in litigation costs in 2005 alone. *See* Citizens Against Lawsuit Abuse, *The Fourth 'R' of California's School Districts: 'Ripped off by Litigation'* 4 (Jan. 2008). Higher insurance premiums resulting from increased litigation costs would only add to the strain on public school resources.

Particularly at a time when public school budgets are already stretched, the threat of costly litigation—including increased consultation with outside attorneys prior to making a potentially controversial waiver decision, as well as litigation and settlement costs should litigation ensue—would

negatively affect public education, educators and the children they serve.

In addition, decisions that have the effect of subjecting educators to litigation and personal liability, even decisions rendered in good faith, exacerbate the challenge of school boards in recruiting and retaining qualified education officials. *See, e.g.*, Sarah Redfield, *The Convergence of Education and Law: A Class of Educators and Lawyers*, 36 IND. L. REV. 609, 623 (2003) (quoting school district attorney's statement that "educators feel as though they are under attack; the veterans with experience and expertise are fleeing to retire and many bright young people are not entering the field of education at all").

In short, public secondary and primary schools must retain the ability to establish and uniformly apply reasonable, age-appropriate nondiscrimination policies, including policies that require school-recognized student religious groups to accept all comers. Their authority to do so is consistent with well-established First Amendment law.

III. A PROPER INTERPRETATION OF THE EQUAL ACCESS ACT REINFORCES THE NEED FOR SCHOOL ADMINISTRATORS TO HAVE WIDE FLEXIBILITY AND WORKABLE RULES

The Equal Access Act applies to all public secondary schools that receive federal assistance and have created a "limited open forum" by "offering [an] opportunity for one or more noncurriculum related

student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b). The Act bars schools from denying equal access to that forum "on the basis of the religious, political, philosophical, or other content of the speech at [a student group's] meetings." *Id.* § 4071(a). Consistent with this Court's First Amendment jurisprudence, the Act does not compel public schools to subsidize or endorse practices of student groups that opt not to comply with their neutral, generally applicable nondiscrimination policies. *Cf. Smith*, 494 U.S. at 878-79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.").

As discussed, rules conditioning public benefits on a nondiscriminatory access policy are *conduct* based, not speech based. *See, e.g., F.A.I.R.*, 547 U.S. at 60; Section I.A, *supra*, pp. 8-10. The Act thus does not prohibit neutral regulations of student conduct. *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 235 (1990) (noting that through the Act, "Congress extended the reasoning of *Widmar* to public secondary schools"); *Widmar v. Vincent*, 454 U.S. 263, 277 & n.1 (1981) (prohibiting "exclusion from a public forum based on the religious content of a group's intended speech" but affirming the university's "right to exclude . . . First Amendment activities that violate reasonable campus rules"). Furthermore, because an all-comers requirement is content-neutral, it does not implicate the Act even if such a requirement were construed to regulate expression. By its terms, the Act is triggered only by content-based speech regulations. *See* 20 U.S.C. § 4071(a). Congress in passing the Act "clearly sought to prohibit schools from

discriminating on the basis of the content of a student group's speech." *Mergens*, 496 U.S. at 241; *see Truth v. Kent Sch. Dist.*, 542 F.3d 634, 646 (9th Cir. 2008).

Departing from the above principles, at least one lower court has held that conditioning access upon compliance with a neutral nondiscrimination policy violates the Act if the policy has the effect of burdening the speech of religious groups. For example, in *Hsu v. Roslyn Union Free School District No. 3*, the Second Circuit held that a public high school violated the Equal Access Act by denying forum access to a student religious group that required its officers to be Christians (contrary to the school's nondiscrimination policy). 85 F.3d at 850. The court concluded that the group was denied access on the basis of the religious content of its speech "to the extent that [its exclusionary officer policy] is reasonably designed to assure that a certain type of religious speech will take place at the Club's meetings." *Id.* at 856. As discussed above, however, determining whether a regulation is content-based by assessing its incidental effect on speech—as the *Hsu* court did—is an approach that has been squarely rejected by this Court. *See supra* p. 12 (addressing *Ward* and *Madsen*).

The Act mandates *equal* access; it should not be read to require public secondary schools to grant religious student groups *superior* access to a limited open forum. To interpret it as such would arguably compel public schools to become entangled in thorny and burdensome line-drawing and controversies that seriously detract from the primary mission of educators. *See supra*, pp. 21-24. Moreover, an

interpretation of the Act that grants superior access to religious groups would raise Establishment Clause concerns. *See Mergens*, 496 U.S. at 248-49 (finding that the Act did not offend the Establishment Clause because it offered access on identical terms to religious and non-religious groups, thereby conveying a message of neutrality); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (holding no Establishment Clause violation occurred where a student religious club sought "nothing more than to be treated neutrally and given access to speak about the same topics as are other groups").

The Act by its plain terms does not grant religious student groups a right to unqualified access, and school administrators must maintain wide latitude to fashion workable, age-appropriate rules, including setting the terms and conditions for equal access to a limited open forum. "The Court has long recognized that local school boards have broad discretion in the management of school affairs." *Pico*, 457 U.S. at 863; *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). Because the Equal Access Act requires only that any access granted student groups be content neutral, the Act places no greater restrictions on schools than the First Amendment would require. To construe it otherwise not only would contravene the plain language of the Act, but would create uncertainty and significant administrative challenges that would detract from the vital educational mission of the nation's secondary schools.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether the Ninth Circuit erred when it held, directly contrary to the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), that the Constitution allows a state law school to deny recognition to a religious student organization because the group requires its officers and voting members to agree with its core religious viewpoints.

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STATEMENT OF INTEREST[1]

Pacific Justice Institute ("PJI") is a nonprofit corporation organized for the purpose of engaging in litigation affecting the public interest. PJI has participated in litigation involving significant constitutional issues in both federal and state courts and has been involved in cases in this Court as an *amicus*, including the Pledge of Allegiance case, *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004) ("*Newdow*"), and the Kentucky and Texas Ten Commandments cases, *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) ("*McCreary*") and *Van Orden v. Perry*, 545 U.S. 677 (2005) ("*Van Orden*"). In addition, PJI is a legal defense organization specializing in the defense of religious freedom, parental rights, and other civil liberties.

Christian Service Charities ("CSC") is a nonprofit, religious charitable association. Its Mission is to facilitate the inclusion of "*Christian Charities you know and trust*" in charitable giving opportunities.

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[1] This brief is filed upon written consent of the legal counsel for Petitioner and Intervenor, which have been lodged with the Clerk of this Court. On December 29, 2009, Respondent's legal counsel filed a global Rule 37 consent for all prospective *amici*. Pursuant to Rule 37, *amici curiae* Pacific Justice Institute and Christian Service Charities, and their counsel of record, Peter D. Lepiscopo, hereby affirm that no counsel for any party authored this brief in whole or in part and that no person other than undersigned counsel drafted the brief. No person or entity, other than *amici*, made any monetary contribution to the preparation or submission of this brief.

CSC carefully screens Christian charities seeking membership to ensure that they meet CSC's standards. One of the ways that CSC ensures the integrity of its charities as distinctively faith-based ministries is by requiring that all member charities have a Christian statement of faith that applies at least to their board members.

CSC represents approximately seventy-seven Christian service charities, including some of the largest and most prominent faith-based service providers in the country. Among other things, CSC represents faith-based charities in the Combined Federal Campaign ("CFC"), a program through which federal employees contribute their own money to charities of their choosing. CSC is one of the largest federations in the CFC in terms of overall giving by federal employees. By aligning with CSC, faith-based charities are linked with other faith-based charities around the country, which increases their visibility and fundraising in the CFC and in other charitable giving opportunities. CSC emphasizes that it is filing the instant brief on its own behalf and not on behalf of any of its member charities.

INTRODUCTION

This case presents the opportunity for the Court to provide a bright-line approach for lower courts to protect the rights of religious associations from government action such as that by Hastings Law

School ("Hastings Law"). The Court has previously acknowledged the significant effects of this kind of government constraint on expression and association:

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it *does not desire*.

Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) ("*Roberts*") (emphasis added).

Petitioner, Christian Legal Society ("CLS"), requires that its voting members and officers' **conduct** comport with Biblical standards and that members and officers not only agree with but also:

> . . . exemplify the highest standards of morality set forth in Scripture, abstaining from acts of the sinful nature, including Galatians 5:19-21; Exodus 20; Matthew 15:19; Romans 1:27; 1 Corinthians 6:9-10.

Pet. App. 99a-108a.[2] Contrary to Intervenor Hastings Outlaw's assertion, CLS' Statement of Faith does not discriminate based on sexual **orientation**.[3]

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[2] All references to "Pet. App." shall refer to the Appendix to the Petition for Writ of *Certiorari*.

[3] CLS' policy focuses on conduct not orientation: "In view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS

(Continued on following page)

Contrary to its stated goal of promoting "*the expression of a variety of viewpoints*," Hastings Law School's Nondiscrimination Policy for Registered Student Organizations ("RSO") actually stifles viewpoint expression. The policy requires compulsory association and commands compulsory modification of CLS' Constitution and Statement of Faith by forcing it to accept in its leadership (Art. V) and voting membership (Art. IV) those who disagree with its Mission and Purpose (Art. II) and its Statement of Faith (Art. III). In purpose and effect Hastings Law School demands that CLS not only ignore but also abandon its ***religious*** viewpoint and core values and cease to engage in religious exercise. Pet. App. 8a-9a, 82a-88a.[4]

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membership." This policy applies to "all acts of sexual conduct outside of God's design for marriage between one man and one woman, which acts include fornication, adultery, and homosexual conduct." This policy applies to heterosexual as well as homosexual conduct. J.A. 146.

[4] The First Amendment protects against government action that penalizes or disfavors certain subjects or ***viewpoints*** (as in this case CLS' ***religious*** viewpoint and beliefs). *See, e.g., United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) ("*Playboy*"). This First Amendment principle applies with equal force in the free association context to prohibit the application of university regulations against student associations based on the university's disagreement with the student association's ***viewpoint***. *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 (1995) ("*Rosenberger*") (***religious*** editorial viewpoints).

As *Amici* argue in Part I of this brief, this Court should extend proper First Amendment protections to religious associations by clarifying that their associational freedoms cannot be impinged by non-discrimination policies like the one enforced by Hastings Law. Additionally, as argued in Part II, the Court should clarify and strengthen the right of association that protects groups like CLS by extending the protections of that right apart from the confusing categories of intimate and expressive association.

Amicus CSC is greatly concerned with the implications of the lower court decisions in this case, as well as the Second Circuit's decision in *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2003) ("*Wyman*") on which the district court relied. If this Court were to adopt the Ninth and Second Circuits' reasoning, then religious charities (such as CSC and its member charities) would be at risk of being prohibited from participating in the CFC system because CSC and their member charities require their leadership to sign and agree to abide by Christian statements of faith. The federal regulations governing the CFC include 5 CFR § 950.110, which provides:

> Discrimination for or against any individual or group on account of race, color, religion, sex, national origin, age, handicap, or political affiliation is prohibited in all aspects of the management and the execution of the CFC. Nothing herein denies eligibility to any organization, which is otherwise eligible

> under this part to participate in the CFC, merely because such organization is organized by, on behalf of, or to serve persons of a particular race, color, religion, sex, national origin, age, or handicap.

The CFC has so far interpreted this regulation to permit faith-based charities that limit board membership and/or employment to persons who share the charity's faith commitments to participate in the CFC. But a decision by this Court in favor of Hastings Law could place CSC's seventy-seven member charities at risk of exclusion from the CFC.

As will be discussed in greater detail below, *Wyman* applied a Connecticut regulation to exclude the Boy Scouts from participating in the state's charitable contribution campaign because of the Boy Scouts' exclusion of homosexuals from membership and employment positions. *Id.* at 92-98. CSC is concerned that if this Court were to adopt the reasoning of the Ninth and Second Circuits 5 CFR § 950.110 will be applied in the same manner in the federal context thereby preventing it and its member charities from participating in the CFC system.

As a final point, it is important to note that the district court in this case applied *Wyman* to find that Hastings Law's "*nondiscrimination*" policy was reasonable and viewpoint neutral, and, therefore, constitutional as applied to exclude CLS from becoming an RSO at Hastings Law. Pet. App. 33a-34a.

ARGUMENT

I. IN ORDER TO PREVENT CONTINUED INJURIES TO RELIGIOUS ASSOCIATIONS AND RELIGIOUS CHARITIES' RIGHT TO FREEDOM OF ASSOCIATION, THE COURT SHOULD ISSUE A STRONG DECISION CLARIFYING THEIR ASSOCIATIONAL RIGHTS

In the decision below, the Ninth Circuit issued a 3-page unpublished, memorandum decision that rests entirely on the conclusion that: "[Hastings Law's] *conditions on recognition are . . . viewpoint neutral and reasonable*." Pet. App. 2a-3a. The Ninth Circuit cited its 2008 decision in *Truth v. Kent School District*, 542 F.3d 634, 649-50 (9th Cir. 2008) ("*Truth*"). *Truth* arose in the context of public school district rather than a university or college setting and related to a high school Bible club (known as Truth). *Id.* at 637. In upholding the constitutionality of the school district's denial of recognition of Truth because it limited non-voting, "general members" to those who shared the group's Christian beliefs and who agreed to abide by Christian standards of conduct, the Ninth Circuit applied the reasonable, viewpoint neutral test:

> [The District] is not denying Truth access based solely on its religious viewpoint, but rather on its refusal to comply with the District's non-discrimination policy. The District was therefore not engaging in viewpoint discrimination; the "perspective of the speaker" was not the "rationale" for

> denying Truth access to the limited public forum.

Id. at 650.

Despite its factual distinctions, the Ninth Circuit extended *Truth* to control the case at Bar. This analysis ignores the fundamental First Amendment right of association and conflicts with the strict scrutiny test applied by this Court in *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) ("*Dale*") and the Seventh Circuit in *Christian Legal Society v. Walker*, 453 F.3d 853, 861 (7th Cir. 2006) ("*Walker*"). The Court should resolve this split by clarifying that *Dale* and *Walker* are controlling and should adopt and apply the strict scrutiny test of *Dale* and *Walker* for religious associations and religious charities within the First Amendment's Freedom of Association jurisprudence.

In this case, the district court followed the reasoning in *Wyman*. Pet. App. 33a-34a. The *Wyman* court concluded that it was a constitutionally reasonable, viewpoint neutral regulation to exclude the Boy Scouts from participating in the state's charitable contribution campaign because of the Boy Scouts' exclusion of homosexuals from membership and employment positions. *Id.* at 92-98.

Wyman is both legally flawed and factually distinguishable from the context of religious associations. First, unlike the Boy Scouts in *Wyman*, CLS, CSC, and CSC member charities are religious associations with free exercise protections (and corresponding establishment clause restraints on Hastings

Law). Furthermore, in *Wyman* Connecticut's statutory scheme had a provision exempting religious associations. Conn.Gen.Stat. § 46a-81p. No such provision is contained in Hastings Law's policy, thus under *Wyman* CLS and *Amici* would be treated in the same manner as the Boy Scouts (i.e., as though they are not religious associations). However, neither CLS nor CSC nor its member charities are arguing for a right to exclude anyone on the basis of **orientation** but rather on agreement with their religious views and standards of conduct consistent with those views. Moreover, they are evenly applied regardless of **orientation** and are based on conduct, not orientation.

Second, *Wyman* addressed the Boy Scouts' exclusion of persons based on their sexual orientation. Neither CLS nor CSC or its member charities discriminate on the basis of sexual orientation, but limit their members, leaders, and/or employees to those who agree with their religious beliefs and who seek to conduct themselves consistent with those religious beliefs. More importantly, the Boy Scouts are not a religious association, whereas CLS and CSC and its member charities are defined by their religious beliefs.

Third, *Wyman* permitted an unconstitutional condition to be placed upon the Boy Scouts requiring the organization to sacrifice constitutionally protected rights in order to participate in the state's charitable contribution campaign. Hastings Law has similarly conditioned its recognition of CLS as an RSO upon CLS sacrificing its religious beliefs by altering its

Statement of Faith standards for those who speak for, lead, and elect the association's leaders. The same result would be reached if *Wyman* were applied to *Amici* CSC and its member charities.

Amici believe that *Wyman* is inconsistent with this Court's decisions in *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1997) ("*Regan*") and *Rust v. Sullivan*, 500 U.S. 173 (1991) ("*Rust*"), which held the government may place certain conditions on government grants or subsidies without being unconstitutional. Although it applied *Wyman*, the district court in this case did not explain what grants or subsidies Hastings Law was providing to CLS to bring the case within the reasoning of *Regan* and *Rust*. Pet. App. 33a-34a, 42a. *Wyman* similarly treated a charitable campaign, where employees give their own money voluntarily, as a "subsidy."[5] This is the main problem with *Wyman*, as it treats every forum as though it were a subsidy because government always does something to create or facilitate a forum.

Fourth, *Wyman* improperly conflated the unconstitutional conditions doctrine with the *Regan* and *Rust* subsidy cases. *Regan* and *Rust* are the exceptions to the doctrine of unconstitutional conditions

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[5] In the case at Bar, the district court's adherence to *Wyman* is also particularly misplaced because an earlier decided Second Circuit case held that a public school could not apply a nondiscrimination rule to those positions in a religious student association that would affect its message. *Hsu v. Roslyn Union Free School District*, 85 F.3d 839 (2d Cir. 1996).

not the doctrine itself. In this regard, this Court in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) ("*FAIR*") emphasized that government may not do indirectly (by denying benefits) what it cannot do directly. Even assuming, *arguendo*, the contributions in *Wyman* were subsidies (even though no such finding was made), *Wyman* did not explain why government may require an organization to waive a constitutional right altogether in order to receive such a "*subsidy*."

Although it applied *Wyman*, the district court in this case did not explain what grants or subsidies Hastings Law was providing to CLS to bring the case within the reasoning of *Regan* and *Rust*. Pet. App. 33a-34a, 42a. This is a key problem with *Wyman*: its reasoning treats every forum as though it were a subsidy because government always does something to create or facilitate a forum. Moreover, *Amici* CSC is concerned about *Wyman* in this context because CSC and its member charities are involved with the CFC system, and, under *Wyman*, the funds disbursed through the CFC system might be held to be "*subsidies*," even though the funds distributed to CSC's member charities are not government money but the money of federal employees that they give of their own voluntary choice.

Fifth, *Wyman* held that either unconstitutional conditions or forum doctrine principles control, and then went on to indicate that it does not matter which is applied as both have the same test of reasonableness and viewpoint neutrality. *Wyman*, 335 F.3d

at 92. Interestingly, in holding that forum doctrine would apply viewpoint neutrality and reasonableness to the exclusion of the Scouts, *Wyman* does not cite an example where another court has applied forum analysis to a non-speech claim. Forum doctrine is a free speech doctrine and every case in which the Supreme Court has applied it has been to a speech claim. *Wyman* began a trend of applying the forum doctrine to expressive association claims by some courts, including the lower courts in this case. Pet. App. 33a-34a. Casting aside the proper protection of constitutional rights in this manner could have unexpected results. So, for example, under *Wyman* government could exclude African-Americans from meeting space in a public building and claim that only a "reasonable and viewpoint neutral" standard should apply instead of strict scrutiny under the Equal Protection Clause.

Finally, in the context of Christian charities, *Wyman* is distinguishable from *Regan* and *Rust* subsidy cases where the government promotes its own message and, therefore, can select between authorized viewpoints. *Wyman*'s reference to *Regan* and *Rust* cases as establishing a rule of viewpoint **neutrality** and reasonableness is mistaken, as those cases expressly permit **viewpoint** discrimination. In *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 229 (2000) ("*Southworth*"), this Court held that *Regan* and *Rust* are inapplicable in the university setting where the university was not the speaker but rather the speech

originated "*from the initiative of the students.*" As in *Southworth*, CLS and *Amici* CSC's association and speech activities do not constitute government speech.

Another example of how courts and states continue to deny appropriate First Amendment protections to religious charities that raises concerns similar to those in *Wyman* is *Association of Faith-Based Organizations v. Bablitch*, 454 F.Supp.2d 812 (W.D.Wis. 2006) ("*AFBO*"). In *AFBO*, section 30.05(11) of the Wisconsin Administrative Code ("WAC") was interpreted and applied by Wisconsin state officials to render a religious charity ineligible for participation if its governing board or staff are required to agree with the religious beliefs of the organization. *Id.* at 813.

Wisconsin's State Employees Combined Campaign ("SECC") is designed to facilitate voluntary contributions by state employees to state approved charitable organizations via payroll deductions. *Id.* at 812. In 2005, SECC officials denied the CLS' request to participate in the program because CLS required its board members and employees to agree to a statement of faith and affirm their Christian faith. *Id.* at 814. The officials relied on § 30.05(11) of the Wisconsin Administrative Code ("WAC"), which provided:

> The charitable organization shall have a policy and procedure of nondiscrimination in regard to race, color, religion, national origin,

> handicap, age, or sex applicable to persons served by the charitable organization, applicable charitable organization staff employment, and applicable to membership on the charitable organizations governing board.

Id.

In *AFBO,* the district court correctly held that the application to CLS and other AFBO members of WAC § 30.05(11) was unconstitutional because it was unreasonable, but nevertheless applied the wrong analysis. Specifically, the district court applied the non-public forum standard (i.e., reasonable, viewpoint neutral limitation on access to a non-public forum). The problem with this approach is that it skirts an appropriate consideration of the right of association raised by these type of cases. Contrary to the standard applied by the district court in *AFBO*, *Dale* and *Walker* would require that WAC § 30.05(11) serve "*compelling state interests unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of association freedoms.*" *Dale,* 530 U.S. at 648; *Walker,* 453 F.3d at 861-62.

Amici believe that the district court's application of the non-public forum standard in *AFBO* reflects a growing inconsistency in enforcement of association rights throughout the nation. In applying this standard, *AFBO* followed the reasoning of the Second Circuit's decision in *Wyman*.

Wyman and *AFBO* illustrate the danger posed to religious associations and religious charities by government intrusion into their beliefs, memberships, and leadership positions.[6] If this Court were to find that religious charities (such as *Amicus* CSC) and religious student associations (such as Petitioner CLS) were required to admit persons to membership and/or leadership positions who did not agree with or who were antagonistic toward their statements of faith, then these religious associations would effectively be excluded from any type of activity involving local, state, or federal governmental entities (e.g., park use for rallies (and after event cleaning); streets for parades (government processes permits, keeps schedules of parades, provides security, etc.); tax exemptions; and charitable campaigns).

This Court is confronted with a split between the Second and Ninth Circuits (*Wyman* and *Truth*), on the one hand, and the Seventh Circuit (*Walker*) on the other, as to whether or not strict scrutiny should be

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[6] Other state charitable campaigns have also excluded faith-based charities on the ground that they limited employment and board membership to Christians: *AFBO v. Granholm*, No. 06-00790 (W.D. Mich.) (Michigan settled by amending regulations to protect rights of faith-based charities in staffing); *AFBO v. Anderson*, No. 08-00111 (S.D. Iowa) (Iowa settled, amending regulations to permit charities to hire those who shared their religious beliefs and eliminating ban on organizations that advocate for a "religious viewpoint"); *AFBO v. Lewis*, No. 06-200 (N.D. Fla.) (Florida settled by amending regulations to clarify right of religious charities to employ and be lead by those who shared their beliefs).

applied to protect religious associations and religious charities. The Court should resolve this split by expressly disapproving *Truth* and *Wyman* and making clear that *Dale* and *Walker* are controlling. Accordingly, *Amici* respectfully request the Court to adopt and apply the strict scrutiny test of *Dale* and *Walker* relative to religious associations and religious charities within the First Amendment's Freedom of Association jurisprudence. The associational rights of the student members of the Christian Legal Society at Hastings Law in the case at Bar have already been irreparably harmed and irretrievably lost. The Court should consider these students and the harm inflicted upon them by Hastings Law when deciding whether or not to require lower courts to apply strict scrutiny rather than the lesser standard applied by the Ninth Circuit in this case and *Truth* and the Second Circuit in *Wyman*.

Hastings Law attempts to distinguish this case from *Walker* by suggesting that CLS' speech and association rights were far less burdened because "*Hastings told CLS that it was welcome to continue to meet on campus and to use other law school facilities.*" Opp. to Pet. at 21 n.10. This logic was rejected in *Healy v. James*, 408 U.S. 169 (1972) ("*Healy*"):

> Petitioners' associational interests also were circumscribed by the denial of the use of campus bulletin boards and the school newspaper. If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis,

> it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students. *Such impediments cannot be viewed as insubstantial.*

Id. at 181-82 (emphasis added). In contravention of *Healy*, Hastings Law's refusal to recognize CLS as an RSO deprived it of the following substantial benefits: (a) use of the Law School's name and logo; (b) use of certain bulletin boards in the basement of Snodgrass Hall; (c) eligibility for a Law School organization email address; (d) eligibility to send out mass emails through the Associated Students of the University of California at Hastings; (e) eligibility for a student organization account with fiscal services at the Law School; (f) eligibility to apply for student activity fee funding; (g) eligibility to apply for limited travel funds; (h) ability to place announcements in the Hastings Weekly, a weekly newsletter prepared and distributed by the Office of Student Services; (i) eligibility to apply for permission to use limited office space; (j) eligibility for the use of an organization voice mailbox for telephone messages; (k) listing on the Office of Student Services' website and any hard copy lists, including the Student Guidebook and admissions publications; (l) participation in the annual Student Organizations Faire; and (m) use of

the Student Information Center for distribution of organization materials to the Law School community. Pet. App. 7a.

Importantly, the Court in *Healy* also highlighted that denying official status to student groups inevitably affects the "***give and take of campus debate***." *Healy*, 408 U.S. at 181 (emphasis added). Genuine debate necessitates a genuine openness to different beliefs and groups. This openness is particularly salient in the context of higher education. As this Court noted in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957):

> The essentiality of freedom in the community of American universities is almost self-evident. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.

Hastings Law School and Hastings Outlaw assert that CLS' faith requirements for membership and leadership positions are discriminatory. But genuine difference is precisely what underlies religious freedom on our country: "*The ideal of free exercise is counter-assimilationist; it strives to allow individuals of different religious faiths to* ***maintain their differences in the face of powerful pressures to conform***." Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1139 (1990) (emphasis added). That such diversity leads to controversy is unsurprising. But

suppressing diversity to smooth or avoid controversy legitimizes the Heckler's Veto and limits expression based upon the reaction of outsiders to groups. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *Cox v. Louisiana*, 379 U.S. 536 (1965).

Amici note that these problems are amplified by the threat of legal action that would exist whenever religious charities solicited funds from government-sponsored charitable campaigns. If religious associations and charities have to go to court every time they decide to interact with state, local, or federal governments, then it will not be long before these associations find it economically infeasible to engage in such interaction. If the approach taken in *Wyman* and *AFBO* prevails, then religious associations and charities could be precluded from an entire segment of donors and state and federal employees may lose the opportunity to support the Christian charities they have loyally supported in their employee charitable campaigns.

The scope of this problem is boundless and could be applied to every church, synagogue, and mosque in the country to prevent their access to every non-public or limited public forum on the basis that their membership, leadership, and/or employment criteria discriminates on the basis of religion or sexual conduct. The very essence of these religious associations is their specific set of core values as expressed in their religious practices and statements of faith. In turn, these associations assemble their membership

and leadership teams based on their religious practices and statements of faith. Forcing these religious associations to accept members and leaders who disagree with or, worse, who are antagonistic or hostile towards the values expressed in their religious statements of faith would destroy those associations:

> [F]orcing [a religious association] to accept as members those who engage in or approve of homosexual conduct would cause the group as it currently identifies itself to *cease to exist*.

Walker, 453 F.3d at 863 (emphasis added).

As the case at Bar illustrates, the prediction in *Walker* is not hyperbole. Specifically, Intervenor Hastings Outlaw claims that: (1) its members must be able to become officers and voting members of any group on campus, including CLS; and (2) its members do not want their student activity fees supporting an organization they find offensive, such as CLS. Hastings Outlaw's Reply Br. re Mot. to Intervene, at 1, 2, 6; J.A. 98, 100 n.1.[7] If this Court affirms the opinion below, Hastings Outlaw's members could seek to become members of CLS' association and leadership team, and, consequently, would have the ability to attempt to change CLS' Statement of Faith. *Id.* This strategy of altering a religious association's statement of faith would be facilitated through **state action** (i.e., through Hastings Law's policies).

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[7] All references to "J.A." shall refer to the Joint Appendix.

Hastings Law's ironically named nondiscrimination policy places CLS in this vulnerable position and transgresses the First Amendment:

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.

Roberts, 468 U.S. at 623. Under the strict scrutiny analysis applied in *Walker*, Hastings Law's denial to recognize CLS as an RSO constitutes a violation of CLS' Freedom of Association. *Id.*; *Walker*, 453 F.3d at 863.

II. IN ORDER TO CREATE UNIFORMITY IN THE FIRST AMENDMENT'S FREEDOM OF ASSOCIATION JURISPRUDENCE, THE COURT SHOULD CLARIFY OR DISAPPROVE THE CATEGORIES OF INTIMATE AND EXPRESSIVE ASSOCIATION CREATED IN *ROBERTS v. UNITED STATES JAYCEES*

In *Roberts*, a case addressing the application of Minnesota's public accommodations statute to a non-religious association, the Court, through Justice Brennan, announced two categories of association: intimate association and expressive association. *Roberts*, 468 U.S. at 618-29. Although the parties here appear to agree that CLS can be characterized as an expressive association, this Court should consider whether the *Roberts* categories themselves

hinder a proper constitutional analysis of the issues raised in this case.

In *Roberts*, the Court announced for the first time:

> Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain *intimate* human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and *the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.*

Id. at 617-18 (emphasis added). In defining freedom of ***intimate*** association, the Court contended that:

> [C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical

> buffers between the individual and the power of the state.

Id. at 618-19. The Court then focused on relationships that are exclusively related to family: marriage, childbirth, the raising and education of children, cohabitation with one's relatives. *Id.* at 619. The Court concluded that an intimate association is "*an intrinsic element of personal liberty*" and listed factors "*that may be relevant*" for courts to consider in determining whether an association is of this type:

> We need not mark the potentially significant points on this terrain with any precision. We note only that factors that *may be relevant* include size, purpose, policies, selectivity, congeniality, and *other characteristics* that, in a particular case, may be pertinent.

Id. at 620 (emphasis added). This approach contracts rather than expands the sphere of constitutional protection by constraining the category of intimate association to exclude almost any group whose associational freedoms would be challenged by state regulation. For example, courts in applying the intimate association definition have refused to include: *religious* groups. *See, e.g., Salvation Army v. Department of Community Affairs of State of N.J.*, 919 F.2d 183 (3d Cir. 1990):

> Most religious groups do not exhibit the distinctive attributes the Court has identified [in Roberts] as helpful in determining whether the freedom of association is implicated . . . While the relationship between

> persons who choose to associate for religious purposes may ultimately be recognized as the kind of self-defining relationship the Court identifies as a crucial aspect of individual liberty . . . *the Supreme Court has not as yet taken this step.*

Id. at 198 (emphasis added). If the category of intimate association is to offer any meaningful constitutional protection, it would seem that it should encompass a religious association (like a local student chapter of CLS with less than 15 members at any given time). And yet this very kind of line-drawing (which seems warranted under the logic of the intimate association doctrine) would prove detrimental to other religious groups like *amici*, who, while lacking some of the characteristics that *Roberts* requires of intimate association, lack few of the values that *Roberts* ascribes to intimate association. *Roberts*, 468 U.S. at 619 (suggesting that intimate associations help define one's identity, foster diversity, and act as "critical buffers between the individual and the power of the state"). Indeed, the kind of charitable giving that *Amicus* CSC facilitates lies at the heart of some of these purposes. *Cf. Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) ("solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and . . . without solicitation the flow of such information and advocacy would likely cease."); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW

829-30 (2d ed. 1988) ("Solicitation of contributions, wherever it takes place" is an activity that has "historically been recognized as inextricably intertwined with speech or petition" and its regulation "must therefore be assessed with particular sensitivity to the possible constriction of that breathing space which freedom of speech requires in the society contemplated by the first amendment.").

The second category of association announced in *Roberts* was *expressive* association. The Court emphasized the value of *expressive* association to include " . . . *an individual's freedom to speak, to worship, and to petition the government for redress of grievances* . . . " *Id.* at 622. Its characterization of *expressive* association should extend broadly to the constitutional right of association:

> According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity, and in *shielding dissident expression from suppression of the majority* . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, *religious*, and cultural ends.

Id. (emphasis added). By identifying the protection of unpopular viewpoints from the "*suppression of the majority,*" *Roberts* gestures toward the kinds of protection that would prevent CLS from having its core values destroyed by Hastings Law.

Unfortunately, *Roberts* weakens the autonomy of associations through its categories of intimate and expressive association. These distinctions provide little useful guidance but instead confuse this area of the law. *See, e.g.*, AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 41 (1995) (contending that *Roberts* regarded expressive association "*as instrumental and therefore subject to greater government intrusion*"); GEORGE KATEB, *The Value of Association*, in FREEDOM OF ASSOCIATION, 46 (Amy Gutmann, ed. 1998) ("*Running through Brennan's opinion is the assumption that all nonintimate relationships are simply inferior to intimate ones.*"); *Every Nation Campus Ministries at San Diego State University v. Achtenberg*, 597 F.Supp.2d 1075, 1083 (S.D. Cal. 2009) ("*state action that burdens a group's ability to engage in expressive association* [need not] *always be subject to strict scrutiny, even if the group seeks to engage in expressive association through a limited public forum.*" (*quoting Truth v. Kent Sch. Dist.*, 542 F.3d 634, 652 (9th Cir. 2008) (Fisher, J., concurring)); *Conti v. City of Fremont*, 919 F.2d 1385, 1388 (9th Cir. 1990) ("*an activity receives no special first amendment protection if it qualifies neither as a form of 'intimate association' nor as a form of 'expressive association,' as those terms were described in Roberts.*"); *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 139 (2d Cir. 2007) ("The mere fact that the associational interest asserted is recognized by the First Amendment does not necessarily mean that a regulation which burdens that interest must satisfy strict scrutiny.").

As this case illustrates, central to a meaningful right of association is the ability to dissent from majoritarian views in a manner that preserves diversity. That is true whether an association is small or large, and whether it is expressive or inwardly focused on its own practices. The First Amendment freedoms of associations like CLS and *Amici* should be protected without having to fit those groups under the cumbersome labels of "*intimate*" or "*expressive*" association.

CONCLUSION

For the forgoing reasons the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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Counsel of Record

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February 4, 2010.

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

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5 CFR § 950.110 PROHIBITED DISCRIMINATION.

Discrimination for or against any individual or group on account of race, color, religion, sex, national origin, age, handicap, or political affiliation is prohibited in all aspects of the management and the execution of the CFC. Nothing herein denies eligibility to any organization, which is otherwise eligible under this part to participate in the CFC, merely because such organization is organized by, on behalf of, or to serve persons of a particular race, color, religion, sex, national origin, age, or handicap.

Conn.Gen.Stat., Sec. 46a-81p. Sexual orientation discrimination: Religious organizations.

The provisions of sections 4a-60a and 46a-81a to 46a-81o, inclusive, shall not apply to a religious corporation, entity, association, educational institution or society with respect to the employment of individuals

to perform work connected with the carrying on by such corporation, entity, association, educational institution or society of its activities, or with respect to matters of discipline, faith, internal organization or ecclesiastical rule, custom or law which are established by such corporation, entity, association, educational institution or society.

AMICUS CURIAE BRIEF

(25)

No. 08-1371

In The Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,
Petitioner,

v.

LEO P. MARTINEZ, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICUS CURIAE THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[*]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because the ruling below threatens the fundamental right of students to associate for a common cause and purpose, and in particular student groups who adhere to common religious beliefs. The decision of the Court of Appeals is contrary to the ideals of academic freedom recognized by this Court.

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[*] Pursuant to Sup. Ct. R. 37.6, *amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have consented to the filing of this *amicus curiae* brief.

STATEMENT OF FACTS

The Rutherford Institute, as *amicus curiae*, adopts by reference the Statement of Facts set forth in petitioner's brief filed with this Court. Careful scrutiny must be given to critical facts surrounding the governmental burdens imposed by the Hastings College of the Law of the University of California on the freedom of association and expression of the student chapter of the Christian Legal Society ("CLS"). Not only did Hastings attempt to exclude CLS from campus facilities because of its refusal to accept non-adherents into membership or leadership, it also "invited" CLS to discuss changing the core religious commitments reflected in its bylaws as a condition to obtaining recognition of CLS as a campus organization.[1] Such exclusion, inequitable treatment, and coercive conduct does violence to the very idea of a university and is contrary to centuries old traditions of free speech and academic freedom on the campuses of public institutions of higher learning in this country.

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[1] *See Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane*, 2006 U.S. Dist. LEXIS 27347 at *12 (N.D. Cal., April 17, 2006) (As Amended May 19, 2006). At the time Hastings sought to force CLS to accept in membership and leadership persons opposed to CLS's core values, Hastings permitted another student group (La Raza) to restrict its voting membership to students of Latino or Mexican descent. Joint Appendix 182, 319.

SUMMARY OF ARGUMENT

This case is but a 21st century reincarnation of the exclusionary policies invalidated in *Widmar v. Vincent,* 454 U.S. 263 (1981). Worse here, however, is the attempt by the Hastings College of the Law to force CLS to bargain away core religious beliefs in exchange for recognition and equal access to university facilities on the same basis provided to other student groups. Hastings' actions run contrary to longstanding traditions of intellectual freedom of association and speech on public university campuses, which historically have been guided by broadly-drawn policies providing venues for expression of all viewpoints, none excluded. Those principles, grounded in the First Amendment and academic freedom, must not be permitted to yield to the imposing hand of state censorship. The history of accommodation and acceptance of diverse student viewpoints in state university communities, and the necessity of academic freedom to the very idea of a public university, require reversal of the Ninth Circuit's decision in this case.

The early historical record in public universities reveals a pattern of freedom of association for student organizations. For example, Thomas Jefferson specifically approved of regular religious meetings for worship and teaching by students of differing sects on the public campus of the University of Virginia. When the University was established in 1819, Jefferson promised that scholars at Virginia could enjoy the "illimitable freedom of the

human mind," granting students free choice in the selection of courses and removing compulsory chapel attendance. These liberal policies allowed for maximum diversity of human inquiry and have continued to this day. In the 2006 Joint Statement on Student Academic Freedom, the American Association of University Professors ("AAUP") and other national educational groups have reaffirmed that "[c]ampus organizations, including those affiliated with an extramural organization, should be open to all students without respect to race, creed, or national origin, *except for religious qualifications* which may be required by organizations whose aims are primarily sectarian."[2]

Grounded in this Jeffersonian tradition, this Court's decisions --- most prominently *Widmar v. Vincent, supra* --- have bolstered longstanding principles of free inquiry and free association, especially on university campuses. The expansive freedoms to associate, to speak and to learn in these venues has contributed to distinguishing American universities from many others in the world in terms of the vitality of expression, exploration, creativity, advocacy and social betterment. To restrict artificially, and indeed to stigmatize, social and cultural viewpoints by excluding student organizations whose values may diverge from an institution's preferred viewpoints, and, indeed, to attempt to coerce abandonment of religious exercise

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[2] *See Joint Statement on Rights and Freedoms of Students,* AAUP POLICY DOCUMENTS AND REPORTS 275 (2006) (emphasis added).

by withdrawing governmental benefits --- as the Hastings College of the Law seeks to do here --- inflicts injury not only upon the rights of the students in question, but upon the university community and society as a whole.

It is not hyperbole to argue that the resolution of the exclusionary issues in this case ultimately threatens the future of public education as we know it. The centuries-old tradition in public universities of "freedom for the thought that we hate" has produced extraordinary creativity, vital debate, and countless contributions to American and world civilization. That tradition, mirrored in principles followed in numerous decisions of this Court, was perhaps first (and best) recounted by Justice Brandeis in *Whitney v. California*, where in considering the views of "those who won our independence," Brandeis observed: "Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in its worst form."[3] Instead, they knew that "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."[4] That path should likewise be followed in the decision of this case.

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[3] *See Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

[4] *Id.* at 375.

ARGUMENT

Introduction

Thirty years ago, in *Widmar v. Vincent,* 454 U.S. 263 (1981), this Court vindicated the rights of a student religious organization denied access to a public university classroom for meetings for worship and religious discussion. *Id.* at 265. The exclusion of the student group based on its religious speech violated the Free Speech Clause of the First Amendment. *Id.* at 273. Despite the decision in *Widmar*, student religious groups have nevertheless required continued intervention in the face of repeated First Amendment infringements by public authorities. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens,* 496 U.S. 226 (1990); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 555 (1986) (Powell, J., dissenting); *see also,* Mark W. Cordes, *Religion as Speech: the Growing Role of Free Speech Jurisprudence in Protecting Religious Liberty,* 38 Sw. U.L. Rev. 235, 247 (2008) ("[These] cases had generally the same fact pattern, similar to that in *Widmar.*")

The present case is but a 21st century reincarnation of *Widmar,* only worse in that Hastings College of the Law seeks to force a religious group to abandon core beliefs to gain equal access to university facilities on the same basis provided to other student groups. Just as the University of

Missouri at Kansas City asked this Court to uphold its denial of access to Vincent's Bible study on university facilities, Hastings asks this Court to uphold its bar on CLS's use of university facilities because of its religious beliefs, but goes one step further by offering its facilities on the condition that CLS abandon core values grounded in the Holy Scriptures. In Orwellian fashion, and notwithstanding *bona fide* religious objection, Hastings suggests that it may lawfully withdraw university benefits to CLS because CLS refuses to adhere to the university's viewpoint on sexual orientation. To obtain recognition and benefits, Hastings would require CLS to amend its bylaws to permit individuals who reject its core values to become members and/or serve as leaders. As applied to CLS, Hastings thus would compel CLS to associate with, and enfranchise within the organization, the very individuals who engage in, and/or advocate, conduct that the group with its Christian worldview and core beliefs disavows. If accepted, can there be any doubt that this indirectly coerced means of "packing the membership" will not result in a complete and total change of the organization's core values, purposes and governance?

This Court's "cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities." *Widmar*, 454 U.S. at 269 (citing *Healy v. James*, 408 U.S. 169, 180 (1972)). Moreover, this Court has made clear that even policies of ostensible neutral application may not operate in a discriminatory

manner to deny freedoms guaranteed by the Bill of Rights, including Free Speech and Free Exercise of Religion, which require compelling state interests and strict scrutiny to survive. *Employment Division v. Smith*, 494 U. S. 872 (1990); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Larsen v. Valente*, 456 U.S. 228 (1982); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). And the Court has been sensitive to state policies that send "a message . . . that [citizens] are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

Here, Hastings forces a Hobson's choice upon student organizations with legitimate creeds that conflict with the school's official orthodoxy: the student organization may either adhere to central tenets of faith and accept exclusion from university facilities, or adhere to the university's viewpoint and accept as members and leaders those who otherwise stand against the group's core values. With this sort of compelled choice and censorship, and interference with the governance of a religious organization, all groups and members of the Hastings academic community are at risk, and indeed, their rights, chilled and diminished. Students and student groups who subscribe to core values that contradict official orthodoxy must now suffer not only unequal treatment, but the brand and stigma of state disfavor, and banishment from public privileges and

benefits that all other student groups freely enjoy. The Hastings ultimatum imposes a severe burden on First Amendment rights and student academic freedom.

No doubt there are many "pigeon-holes" of constitutional jurisprudence that fit this case, but simplistic formulations are an inadequate substitute for two predicate questions: "Why do students on state university campuses associate in organized student groups?" and "Why should the state-prescribed orthodoxy in this case be immune from cardinal principles reflected in the First Amendment and longstanding tradition of student academic freedom?" In responding to these questions, timeless values espoused by the Framers provide important perspectives that are pertinent to the resolution of the issues in this case. The history of accommodation and acceptance of free association, and of freely expressed, diverse student viewpoints, within the academic community, and the imperative of academic freedom to the idea of the university, are relevant and critical to the decision of this case.

The Early Historical Record of Public Universities Reveals a Pattern of Freedom of Association For All Student Organizations

Formal student association on college campuses is not a Twentieth Century phenomena. Indeed, the history of organized student activities on university campuses can be traced to the American colonial period, including those closely associated

with Thomas Jefferson.[5] Early student activities were based on religious themes and strong discipline.[6] They evolved to literary organizations, debating societies, and athletic clubs that included organized social events, debates, or sporting contests.[7] Perhaps the most well-known example of an early student organization during this period was *Phi Beta Kappa*, formed in 1776 as a literary and debating society at the College of William & Mary in Virginia.[8] Founded by five *students*, its Greek letters stand for love of learning.[9] Since its inception, "the Society has embraced the principles of freedom of inquiry and liberty of thought and expression."[10]

Thomas Jefferson obtained his undergraduate and legal education at William & Mary, but possessed a grander vision for a university, which he described as having "a plan so broad and liberal and modern, as to be worth patronizing with the public support, and be a temptation to the youth of other States to come and drink of the cup of knowledge and

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[5] *See* NORBERT W. DUNKEL & JOHN C. SCHUH, ADVISING STUDENT GROUPS AND ORGANIZATIONS 18 (1997).

[6] *Id.*

[7] *Id.*

[8] *See* the website of The Phi Beta Kappa Society, http://www.pbk.org/infoview/PBK_InfoView.aspx?t=&id=8 (last viewed February 2, 2010).

[9] *Id.*

[10] *Id.*

fraternize with us."[11] After years of planning and persuasion by Jefferson, James Madison and others, the Commonwealth of Virginia chartered the University of Virginia in 1819, governed by a Rector and Board of Visitors, with Jefferson as its first Rector.[12] The question of the propagation of diverse religious views at the University of Virginia --- in particular, relating to Christianity --- was presented to Jefferson early in his tenure. In his annual report as Rector to the President and Directors of the Literary Fund of the University of Virginia dated October 7, 1822, approved by the Visitors of the University (of whom James Madison was one), Jefferson set forth his views in detail as follows:

> It was not . . . to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting from these relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation. The

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[11] *See* JOHN S. PATTON, JEFFERSON, CABELL AND THE UNIVERSITY OF VIRGINIA 16 (1906), quoting from a Jefferson letter to British scientist, Joseph Priestly.

[12] *See* The Jefferson Trust, http://www.alumni.virginia.edu/support/jeffersontrust/overview.aspx (last viewed February 2, 2010).

want of instruction in the various creeds of religious faith existing among our citizens presents therefore, a chasm in general institution of the useful sciences. . . . A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity full benefit the public provisions made for instruction in the other branches of science. . . . It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to establish their religious schools on the confines of the University, so as to give to their students ready and convenient access and attendance on the scientific lectures of the University; and to remain, by that means, those destined for religious professions on as high a standing of science, and of personal weight and respectability, as may be obtained by others from the benefits of the University. *Such establishments would offer the further great advantage of enabling the students of the University to attend religious exercise with the professor of their particular sect, either in rooms of the building still to be*

> *erected, and destined to that purpose under impartial regulations,* as proposed in the same report of the commissioners, *or in the lecturing room of such professor.* . . . Such an arrangement would complete the circle of the useful sciences embraced by this institution, and would fill the chasm now existing, on principles which would leave inviolate the constitutional freedom of religion. . . .[13]

Simply put, Jefferson was not opposed to conflicting religious views being advanced on the premises of the University of Virginia. In order to perpetuate and accommodate diverse religious beliefs and exercise of the students of the University of Virginia, Jefferson recommended that students be allowed to associate on the campus to pray and worship together or, if need be, to meet and pray with their professors on campus. Indeed, he even approved the practice of the different religious denominations holding weekly worship services at the Charlottesville Courthouse:

> In our village of Charlottesville, there is a good degree of religion, with a small spice only of fanaticism. We have four sects, but without either church or meeting-house. The court-house is the common temple, one Sunday in the

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[13] 19 THE WRITINGS OF THOMAS JEFFERSON 414-17 (Memorial ed., 1904) (emphasis added).

> month to each. Here, Episcopalian and Presbyterian, Methodist and Baptist, meet together, join in hymning their Maker, listen with attention and devotion to each others' preachers, and all mix in society with perfect harmony.[14]

Thus, even the "wall of separation between Church and State" attributed to Jefferson did not exclude religious education and viewpoints from the publicly run University of Virginia, nor for that matter did it prevent sectarian meetings in what Jefferson termed to be the "common temple" at the Charlottesville courthouse.[15]

In granting access for religious services and allowing sectarian views on campus, Jefferson also expanded religious liberty on the University of Virginia's campus, in a fashion that was atypical for some higher educational institutions of his day, by relaxing traditional protocol and eliminating

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[14] 4 THE WRITINGS OF THOMAS JEFFERSON 83 (Paul Leicester Ford, ed. 1892-1999).

[15] *See also,* Mark J. Chadsey, *Thomas Jefferson and the Establishment Clause,* 40 Akron L. Rev. 623, 640 (2007) (During his Presidency and only "two days after he penned his famous 'wall of separation' letter, President Jefferson attended, along with members of both chambers of Congress, religious services in the Hall of the House of Representatives.").

compulsory chapel attendance.[16] This did not mean that Jefferson was apathetic to religion or that he discouraged students from attending services. On the contrary, it was his wisdom to leave these decisions to the student's discretion. As the University's regulations drafted pursuant to Jefferson's views provided:

> Should the religious sects of this State, or any of them, according to the invitation held out to them, *establish within,* or adjacent to, *the precincts of the University,* schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour.[17]

With respect to the locale for student worship on the University's campus, "[i]n his plans, Mr. Jefferson himself suggested that there should be space for a building to be used for religious worship under what he called 'impartial regulation.' In the meantime two

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[16] *See* JENNINGS L. WAGONER, JR., JEFFERSON AND EDUCATION 139 (2004).

[17] *Regulations of the University,* (Oct. 4, 1824) Ch. II, Section 1 (emphasis added).

of the best rooms in the main building were to be set apart for the purpose."[18]

The intellectual freedom which Jefferson espoused was guided by a broadly-drawn concept of freedom in which all viewpoints could be expressed within the precincts of the university, few, if any, excluded. One of the first student organizations at the University was the Jefferson Literary and Debating Society, which continues to this day as "the oldest continuing existing collegiate debating society in North America and indeed the second-oldest Greek-lettered organization in the United States."[19] It was founded "on July 14, 1825, by sixteen disgruntled members of the now-defunct Patrick Henry Society."[20] Other student organizations abounded early on at the University. "In 1826, the Medical Society appears, then in 1831, the Academics Society," the latter founded by students as an "association for mutual improvement in the Art of Oratory."[21] It merged in 1835 into a "new body they

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[18] THE CENTENNIAL OF THE UNIVERSITY OF VIRGINIA *1819-1921* at 6-7 (1922). Building complications later caused this plan to be foregone and Jefferson instead suggested that students and faculty hold worship services in a room in the Rotunda, which occurred until mid-1837. *Id.* at 8.

[19] *See* the website of The Jefferson Society, http://www.jeffersonsociety.org/aboutus/index.php (last viewed February 2, 2010).

[20] *Id.*

[21] *See* JOHN S. PATTON, *supra* note 11, at 237, 245-46.

called the Washington Society, that its name, recalling the deeds of the 'Illustrious Father of American Liberty,' might animate them with the desire of using the power there attained for the good of their country, and the weal of their country men."[22] Some students left the Washington Society "to form the Philomathean Society in 1849 and the Parthenon Society in 1852."[23] Later followed the Columbian Society, as well as student magazines, the *Collegian*, the *Virginia University Magazine,* and the *Jefferson Monument Magazine*.[24] Perhaps the most remarkable initiative in the dynamic student organizational life of the University of Virginia was "a particular movement which had its rise in 1858" at the University, the Young Men's Christian Association ("YMCA"). [25] "For a number of years *prior* to the formation of the YMCA, student prayer meetings, initiated and maintained through their own efforts, were held regularly on Sunday afternoons. . . ."[26] These student-initiated associations led to the formation of the YMCA organization which now serves 45 million people

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[22] *See* the website of the Washington Literary Society and Debating Union at the University of Virginia, http://www.student.virginia.edu/~wash-soc/history.html (last viewed February 2, 2010).

[23] *Id.*

[24] *See* JOHN S. PATTON, *supra* note 11, at 254-56.

[25] CENTENNIAL, *supra* note 18, at 9.

[26] *Id.* at 12. (emphasis added).

worldwide through autonomous organizations in 120 nations.[27]

Alexis De Tocqueville worried in his 1831 survey of emerging America that its democratic institutions would compel members of the community "to live alike," in private as well as public life.[28] However, he came to reject this hypothesis, recognizing that "no state of society or laws can render men so much alike, [because] education, fortune, and tastes will always interpose some differences between them."[29] Despite concern over democracy's proclivity to social uniformity, De Tocqueville observed that Americans "will set up, close by the great political community, small private societies, united together by similitude of conditions, habits, and customs." This dynamic is evident in the several student organizations at Jefferson's University, and continues to this day within student organizations on public university campuses across the country, where faculty, administrators, and students generally acknowledge that student groups provide invaluable discourse, learning, advocacy and benefit for both the campus community and for society at large. Those principles, grounded in Free Speech and academic freedom, must not now be

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[27] http://www.YMCA.net/international (last viewed January 27, 2010).

[28] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 215 (1831) (Vol. II., Knopf 1956).

[29] *Id.*

permitted to yield to the imposing hand of state censorship.

Principles of Academic Freedom and Free Speech Provide Heightened Protection to Student Speech and Association

A university has been described as "a city, or a city within a city. . . . a community of learners, bent upon corporate life and action."[30] John Henry Newman declared more broadly the nature of the university in his classic work, *The Idea of a University*:

> It is the place to which a thousand schools make contributions; in which the intellect may safely range and speculate, sure to find its equal in some antagonist activity, and its judge in the tribunal of truth. It is a place where inquiry is pushed forward, and discoveries verified and perfected, and rashness rendered innocuous, and error

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[30] JACQUES BARZUN, THE AMERICAN UNIVERSITY 244 (1968). Barzun explained the academy as follows: "*Universitas* originally means a group, a collection, a community, . . . a *universitas studiorum* means a grouping of studies, hence a community of learners, bent upon corporate life and action." More colorfully, it has been said to be "a Paradise, Rivers of Knowledge are there, Arts and Sciences flow from thence . . . bottomless depths of unsearchable Counsels there." JOHN DONNE, Sermon No. 11, THE SERMONS OF JOHN DONNE, from THE WORKS OF JOHN DONNE, Vol. 4, 227 (1834).

> exposed, by the collision of mind with mind, and knowledge with knowledge. It is the place where the professor becomes eloquent, and is a missionary and a preacher, displaying his science in its most complete and most winning form, pouring it forth with the zeal of enthusiasm, and lighting up his own love of it in the breasts of his hearers. It is the place where the catechist makes good his ground as he goes, treading in the truth day by day into the ready memory, and wedging and tightening it into the expanding reason. It is a place which wins the admiration of the young by its celebrity, kindles the affections of the middle-aged by its beauty, and rivets the fidelity of the old by its associations.[31]

Recognition of the significant societal benefits of this collective, communal search for truth continues to this day. In the context of public education, it has been inexorably linked to the vibrancy of free speech rights and the pursuit of knowledge. In *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967), for example, this Court declared that "[o]ur Nation is deeply committed to safe-guarding academic freedom, which is of transcendent value to

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[31] John Henry Newman, *The Idea of a University* (1854), SELECTIONS FROM THE PROSE WRITINGS OF JOHN HENRY CARDINAL NEWMAN FOR THE USE OF SCHOOLS 162-163 (1906).

all of us and *not merely to the teachers concerned.* That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." (emphasis added). Likewise, in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978), Justice Powell recognized that academic freedom "long has been viewed as a special concern of the First Amendment." Moreover, the constitutional maxim that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein" is also appropriately implicated in the context of publicly provided education. *W. Va. State Bd. of Ed. v. Barnette,* 319 U.S. 624, 642 (1943).

Likewise, the Court has declared that "[t]he essentiality of freedom in the community of American universities is almost self-evident. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire,* 354 U.S. 234, 250 (1957). And when religious coercion occurs --- as it did here when the Hastings Office of Student Affairs approached CLS and "invited [it] to discuss changing"[32] the core religious commitments of its bylaws as a condition to obtaining recognition for CLS by the university --- First Amendment values are chilled and subjected to inappropriate and undue burdens. *Hobbie v. Unemployment Appeals Comm'n*

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[32] *Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, supra* note 1, 2006 U.S. Dist. LEXIS 27347 at *12.

of Florida, 480 U.S. 136 (1987); *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). Finally, unduly restricting the right of association does irreparable damage to the uniquely American dynamic of organized social advocacy, understanding and betterment. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as th[e] Court has more than once recognized by remarking upon the close nexus between the freedom of speech and assembly." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); *NAACP v. Button*, 371 U.S. 415 (1963), *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981).

Thomas Jefferson's approach to academic freedom, enjoyed by professors and students alike, marked him ahead of other American public university proctors by approximately 75 years. Jefferson launched the University of Virginia with the promise that scholars could enjoy the "illimitable freedom of the human mind."[33] A later American

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[33] *See* WAGONER, *supra* note 16 at 137 (citing Letter to Nathaniel Bowditch, October 26, 1818; Letter to Joseph Cabell, February 3, 1825) ("Perhaps the most striking feature of the Jeffersonian educational legacy was his dedication of the University of Virginia to the principles of intellectual freedom. At a time when conformity to doctrinal positions of sponsoring denominations was still expected on the part of faculty in both English and American institutions of higher learning, Jefferson launched his university with the promise that scholars at Virginia could enjoy the

model viewed academic freedom in the context of *Lehrfreiheit*, the German origin of "teaching freedom" which distinguished academics, who were civil servants, from other government employees. [34] By the late 1890s, American institutions of higher education, including Harvard and Princeton, had adopted this German model.[35] And in 1915, the newly formed AAUP issued its first report on academic freedom containing a "Declaration of

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'illimitable freedom of the human mind.' In recruiting professors, Jefferson assured candidates that, given the liberal character and tolerant disposition of members of the board, they would in effect have lifetime tenure in their posts and would be unfettered in their teaching. Unlike institutions which the board of trustees determined books that might be used in various classes, the Virginia trustees concurred with Jefferson that the choice of texts should be left with the individual professors since they would be much more knowledgeable about their respective fields than would any member of the board.")

[34] *See* Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. Rev. 461, 474-75 (2005). The "German thinkers drew from the wellspring of the Enlightenment, which in turn, drew from even deeper currents in intellectual history." MATTHEW W. FINKEN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDON 11 (2009).

[35] *See* J. Peter Byrne, *Academic Freedom: "A Special Concern of the First Amendment"*, 99 Yale L.J. 251, 269-270 n. 73 (1989) ("When Johns Hopkins University was founded in 1876, it was the first university to substitute institutionally a scientific for a religious model of truth.")

Principles" that reflected the German model,[36] which led to the adoption of a "1925 Statement on Principles on Academic Freedom", with a set of interpretive comments added in 1940.[37]

While the latter Principles focused mainly on faculty freedoms, "[t]here is also the question of *student* academic freedom which the Germans would call *Lernfreiheit.*"[38] This "learning freedom" also has parallel origins in constitutional jurisprudence, whether in recognition of religious exemption from state requirements infringing on religious liberties, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), or in the freedom to hear, learn, and to know, recognized to one degree or another in *Martin v. Struthers*, 319 U.S. 141, 143 (1943), *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), *Thomas v. Collins*, 323 U.S. 516, 534 (1945), *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386, 390 (1969), and *Board of Education v. Pico*, 457 U.S. 853 (1982). Indeed, the Court has emphasized that the *right to know* is "nowhere more vital than in our schools and universities." *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Shelton*

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[36] *Id.* at 276 ("[t]he AAUP's *1915 Declaration of Principles* is the single most important document relating to American academic freedom.")

[37] The interpretive comments were revised in 1970, and, in conjunction with the 1940 Statement, comprise the official position of the AAUP on matters concerning academic freedom.

[38] FINKEN & POST, *supra* note 34, at 79 (emphasis added).

v. Tucker, 364 U.S. 479, 487 (1960); *Sweezy*, 354 U.S. at 250.

Here, again, Jefferson was ahead of his time. Although the term *Lernfreiheit* was not then in vogue, the academic freedom Jefferson thought important for professors applied to the university's students as well. A basic ingredient in student freedom was total election of studies. Jefferson observed that he was "not fully informed of the practices at Harvard, but there is one from which we shall certainly vary. . . That is, the holding the students are all to one prescribed course of reading, and disallowing exclusive application to those branches only which are to qualify them for the particular vocations to which they are destined. We shall, on the contrary, allow them uncontrolled choice in the lectures they shall choose to attend, and requiring elementary qualification only, and sufficient age."[39] Accordingly, in regulations adopted on October 4, 1824, the visitors specified that "Every student shall be free to attend the schools of his choice, and no other than he chooses."[40]

One hundred and forty years later, *Lernfreiheit* was acknowledged by the AAUP and other key national education organizations through the implementation of several declarations with

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[39] *See* WAGONER, *supra* note 16, at 139.

[40] *Id.* (citing Letter to George Ticknor, July 16, 1823; University Regulations, October 4, 1824).

respect to student academic freedom.[41] The most recent *Joint Statement on Rights and Freedom of Students* provides, in pertinent part:

> Campus organizations, including those affiliated with an extramural organization, should be open to all students without respect to race, creed, or national origin, *except for religious qualifications which may be required by*

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[41] The AAUP's first commentary on academic freedom, entitled *Declaration of Principles,* was first published in 1915. In 1925, it was revised and retitled *Statement on Academic Freedom and Tenure*. These two works culminated in the AAUP's *1940 Statement of Principles on Academic Freedom and Tenure*. *See supra*, notes 36-37. In 1965, upon recommendation of an AAUP committee on Academic Freedom and Tenure, a committee was formed to prepare a *Statement on Academic Freedom of Students,* which was prepared and subsequently published in 51 A.A.U.P. Bull. 447 (1965). In 1967, the committee reconvened, and with the support of the United States National Student Association, the Association of American Colleges, the National Association of Student Personnel Administrators, and the National Association of Womens and Deans and Counselors, formulated a *Joint Statement on Rights and Freedoms of Students,* which was prepared and subsequently published in 54 A.A.U.P. Bull. 258 (1968). The AAUP's first *Joint Statement on Student Academic Freedom* has been affirmed many times since its inception, most recently in 2006. *See Joint Statement on Rights and Freedoms of Students* 273, AAUP POLICY DOCUMENTS AND REPORTS (2006).

> *organizations whose aims are primarily sectarian.*[42]

(emphasis added). This statement not only affirms the AAUP's initial 1968 *Joint Statement,* but includes an additional footnote explicitly recognizing that the "obligation of institutions with respect to nondiscrimination, *with the exception noted above for religious qualifications*, should be understood in accordance with the expanded statement on nondiscrimination in n. 3, above."[43] (referencing a broad nondiscrimination statement that includes sexual orientation) (emphasis added).

Thus, as recently as 2006 the AAUP acknowledged the academic freedom of student religious organizations to *choose* and *exclude* members and leaders, so long as any such exclusion is based on religiously-based sectarian considerations. The AAUP's 2006 *Joint Statement* also contains several other pertinent declarations relating to student academic freedom that apply in this case. These include declarations (a) that students "should be free to organize and join associations to promote their common interests,"[44] (b) that "institutional control of campus facilities

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[42] *Joint Statement* (2006), *supra* note 41, at 275.

[43] *Id.* at 279, n. 8.

[44] *Id.* at 274.

should not be used as a device of censorship,"[45] and (c) that "institutional authority should never be used to duplicate the function of general laws."[46] These important statements on student academic freedom parallel the substantive constitutional rights this Court has long recognized in the precedents previously set forth in this brief.

More Speech is Better Than Less Speech, Especially For Students and Student Organizations

The AAUP explicitly affirms that the intent of its academic freedom principles "is not to discourage what is 'controversial.' Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster." *See* 1940 Statement (with 1970 Interpretive Comments) at 5(2). Prior to the adoption of this Statement, the writings of John Stuart Mill,[47] Thomas Jefferson, and the judicial

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[45] *Id.* at 275.

[46] *Id.* at 276.

[47] J. S. Mill, *Essay on Liberty* (1859) ("Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right."); *see also*, Byrne, *supra* note 35, at 261 ("The judges who pioneered the modern doctrine of free speech followed Mill in arguing that even hateful speech must be tolerated, because such speech may be true.")

opinions of Justices Holmes and Brandeis[48] laid the intellectual foundation for this position, more commonly known as the "marketplace of ideas."[49]

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[48] *Whitney v. California*, *supra* note 3, at 375, n. 3 ("We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors...") (quoting Jefferson); *see also,* Vincent Blasi, *The First Amendment and the Ideal of Civil Courage: The Brandeis Opinion in* Whitney v. California, 29 Wm. & Mary L. Rev. 653, 685 n. 111 (1988) ("A few months after he wrote his opinion in *Whitney*, Brandeis made a trip to Monticello "to pay homage". Letter to Alice Harriet Grady (Sept. 22, 1927), *reprinted in* 5 LETTERS OF LOUIS D. BRANDEIS (citations omitted). He returned home from the visit "with the deepest conviction of T.J.'s greatness". Letter to Alfred Brandeis (Sept. 22, 1927), *id.* In various letters he referred to three different biographies of Jefferson, *id.* at 315, 411, 521, 648, and once described Jefferson as "our most civilized American and true Democrat." Letter to Bernard Flexner (Nov. 16, 1940), *id.* at 648. *See also* A. LIEF, BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL 478 (1936) ("Brandeis was willing to be called a Jeffersonian")).

[49] *Healy*, 408 U.S. at 180 ("The college classroom with its surrounding environs is peculiarly `the marketplace of ideas.'"); *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (introducing the "marketplace of ideas" by suggesting that "the ultimate good desired is best reached by free trade in ideas."); *Whitney,* 274 U.S. at 375 ("[the framers] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth...") (Brandeis, J., concurring); *see also,* Donald A. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development,* 81 Harv. L. Rev. 513, 517 (1968) ("The free competition of faiths and ideas is expected to guarantee their excellence and vitality to the benefit of the entire society.").

Ultimately "to Brandeis, as to Jefferson, the key to successful democracy lies in the spirit, the vitality, the daring, and the inventiveness of its citizens."[50] All of these thinkers would agree that "[t]o be afraid of ideas, any idea, is to be unfit for self-government."[51] Brandeis was of the view that free speech was the "safety valve" of society. His concurrence in *Whitney v. California* set a standard reflected in the modern Free Speech doctrine of this Court:

> Those who won our independence believed . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order

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[50] *See* Blasi, *supra* note 48, at 686.

[51] *See* ALEXANDER MEIKELJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 28 (1960).

> cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. *Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in its worst form.*

274 U.S. at 375-76 (Brandeis, J., concurring) (emphasis added). By silencing and restricting speech and association in the manner the university seeks to do here, viewpoints are driven underground without exposure to the light of reason, individuals are disenfranchised with little or no viable avenue for expression, longstanding religious traditions are stigmatized, and other societal dangers lurk in an environment of mistrust and misunderstanding. For these reasons, state censorship of association and speech in public universities should not be permitted to infringe on the academic freedom of student religious organizations to *choose* and *exclude* members and leaders, based on theological associations and should only be limited, if at all, to the regulation of conduct that imposes concrete injury.

CONCLUSION

Distinguished Jefferson biographer Dumas Malone concludes in *The Sage of Monticello* that "no other American of his generation did more to remove shackles from the mind."[52] Today, as Jefferson envisioned, "the mission of colleges and universities includes not only the intellectual development of students, but also the physical, social, vocational, ethical, and cultural development as well."[53] If this tradition is to continue, the freedom to associate voluntarily on campus for religious (or any other) purposes should not for the first time in our history be made subject to state censorship grounded in political ideology. In keeping with the Jeffersonian tradition of academic freedom, and the line of decisions beginning with *Widmar*, which both recognize the freedom for students to associate on campus on the same basis as other students for legitimate purposes with individuals of one's choice, this Court should now reverse the Memorandum Decision of the Court of Appeals for the Ninth Circuit and remand this case for proceedings consistent with this Court's opinion.

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[52] DUMAS MALONE, THE SAGE OF MONTICELLO 418, Vol. 6 of JEFFERSON AND HIS TIME (1981).

[53] *See* Annette Gibbs, *The First Amendment and College Student Organizations,* 55 Peabody Journal of Education: Issues and Trends in American Education 131-135, Taylor & Francis, Ltd. (Jan., 1978).

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AMICUS CURIAE BRIEF

No. 08-1371

Supreme Court, U.S.
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OFFICE OF THE

IN THE

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

—v.—

LEO P. MARTINEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE SOCIETY OF AMERICAN LAW TEACHERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The Society of American Law Teachers ("SALT") is an association of law faculty, administrators, and legal education professionals from over 170 law schools. SALT was founded by a group of leading law professors dedicated to improving the quality of legal education by making it more responsive to societal concerns. SALT was incorporated in 1974. As a membership organization of law teachers, SALT is particularly sensitive to the historic role the courts have played in upholding both nondiscrimination and anti-censorship principles, as well as in preserving the autonomy of academic institutions in pursuing their educational missions. SALT has appeared as *amicus curiae* in federal and state courts on behalf of historically under-represented groups to support their claims to equal access to education, employment and health care, and to full participation in civic life. SALT also has supported groups asserting First Amendment rights in courts and elsewhere.

The issues raised in this case are of particular significance to SALT's members, because the issues directly affect the law schools at which SALT's members teach, as well as the students whom they teach, mentor and advise. In particu-

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and such consents are being lodged herewith.

lar, this Court's decision could have significant consequences on the ability of law schools to institute and enforce neutral, generally applicable rules designed to further schools' educational objectives, some of which have been developed with the participation of SALT members.

SUMMARY OF ARGUMENT

This case arises as a result of the University of California, Hastings College of the Law ("Hastings") denying recognition as a registered student organization to the Christian Legal Society Chapter of University of California, Hastings College of Law ("CLS") for the 2004-2005 school year based on CLS' refusal to abide by Hastings' policy that all student organizations be open to any Hastings law student wishing to join (the "Open Membership Policy" or the "Policy"). As stipulated by the parties before the trial court, the Open Membership Policy requires, as a prerequisite to registration, that a prospective student organization's bylaws (1) "provide that its membership is open to all students"; and (2) indicate an agreement that the organization will abide by Hastings' nondiscrimination policy (J.A. 221), which prohibits discrimination "on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation" (J.A. 220). There is no dispute CLS failed to comply with the Open Membership Policy because it refused to agree that it would not discriminate on the basis of religion or sexual orientation. Nor is there any dispute that CLS' failure to comply with the Open Membership Policy is the reason its registration application was denied.

Under existing Court precedent, CLS' failure to comply with Hastings' Open Membership Policy should be dispositive. This Court has long acknowledged the unique nature of academic institutions and afforded them great deference in pursuing their educational objectives. Consonant with that deference, this Court explicitly recognized in *Healy v. James*, 408 U.S. 169 (1972), and again in *Widmar v. Vincent*, 454 U.S. 263 (1981), that universities permissibly may exclude prospective student organizations—notwithstanding the First Amendment—if the group fails to adhere to "reasonable campus rules." In light of this Court's repeated affirmations of the compelling interest in eradicating discrimination and its effects, as well as this Court's acknowledgment of the pedagogic value of fostering a university environment where students are exposed to classmates with a diversity of backgrounds, beliefs and experiences, there can be little question Hastings' Open Membership Policy is at least reasonable.

CLS contends, however, that the Constitution requires that CLS be exempted from compliance with the Open Membership Policy, and in particular the requirement that CLS agree to adhere to Hastings' general nondiscrimination policy, because the Open Membership Policy interferes with CLS' ability to constitute itself of only students who live their lives in accordance with, and share, CLS' conservative view of Christianity, including its views relating to homosexuality. Thus, CLS argues that although it will allow any student to attend CLS meetings, it is unconstitutional to preclude it from denying membership in CLS (and the privileges associated with it) to non-Christians—or even Christians with views that

differ from those of CLS—and to lesbian, gay, bisexual or transgender ("LGBT") students. However, there is no constitutional right to discriminate, in the name of religion or otherwise. Nor is there any basis in this Court's precedents or the factual record for invalidating Hastings' Open Membership Policy.

First, neither the Open Membership Policy, nor its requirement of compliance with Hastings' nondiscrimination policy, discriminates against CLS in words or effect. The Open Membership policy is directed solely at conduct—the act of excluding students from membership—and does not restrict CLS' ability to convey any message it chooses, including discriminatory messages on homosexuality. Moreover, neither the Open Membership Policy in general, nor its component requirement of adherence to Hastings' nondiscrimination policy, disparately impacts religion: the Open Membership Policy affects *every* group at Hastings, and the general nondiscrimination policy affects all groups, *secular or religious*, that seek to create a policy excluding students at Hastings on the basis of status or belief. Indeed, to the extent there are any concerns CLS might be impacted adversely by the Open Membership Policy, this Court need only look to the many years prior to the events at issue to allay those concerns. CLS existed at Hastings for more than a decade without an exclusionary membership policy of the sort it now seeks, and it concededly suffered no detrimental impact to its message.

Second, this Court should continue to defer to academic institutions with respect to their reasonable, viewpoint-neutral policies regarding reg-

istration of student groups. From *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967), to *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), to *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court has recognized the significant educational role played by institutions of higher learning, and the need for those institutions to have discretion in operating their institutions and making educational decisions. The Open Membership Policy is aimed directly at advancing Hastings' educational mission by ensuring an atmosphere of equality that permits students to obtain the full benefits of diversity, and by providing individual students access to a breadth of extracurricular opportunities in support of the formal curriculum. There may be other ways of achieving those goals but, absent differential application or enforcement of the Open Membership Policy (which was not found here), it is for Hastings—not CLS or the courts—to determine the most appropriate educational program for Hastings' students.

Finally, this Court should decline CLS' invitation to create a constitutionally-mandated exemption from generally applicable nondiscrimination policies. Whatever the merits of granting religious groups exemption from any law, there is no constitutional right to such an exemption, as this Court held in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and *City of Boerne v. Flores*, 521 U.S. 507 (1997). Indeed, particularly under the facts of this case, granting CLS an exemption would yield a jurisprudentially incoherent result and undermine decades of social progress. Contrary to CLS'

assertions, this is not a case where religious groups or viewpoints have been disadvantaged vis-á-vis their secular counterparts, as was the case in *Widmar, Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). Here, CLS has been affected in exactly the same way as every other student group at Hastings. If this Court rejects Hastings' neutral policy, the result will be (1) viewpoint discrimination in favor of religious points of view in violation of the First Amendment Free Speech Clause, and (2) preferential treatment of religion in violation of the First Amendment Establishment Clause. Just as it is impermissible under the Constitution to disadvantage religion, it is equally impermissible to give it preferential treatment.

ARGUMENT

I. THE OPEN MEMBERSHIP POLICY DOES NOT DISCRIMINATE AGAINST CLS OR ANY OTHER RELIGIOUS GROUP.

The central premise of CLS' position is that the Open Membership Policy impermissibly targets religious speech or practice in a way that is unconstitutional under this Court's holdings in its religious speech, expressive association, and free exercise decisions. Thus, CLS contends that the aspect of the Open Membership Policy requiring adherence to Hastings' nondiscrimination policy constitutes unconstitutional viewpoint discrimination because it has a unique impact on religious

speech. CLS also argues that restrictions on its ability to enforce a discriminatory membership policy substantially impede its ability to communicate its religious message.

However, this Court's precedents do not support CLS' position and, in fact, they illustrate why the Open Membership Policy is constitutional. Unlike in this Court's religious speech cases, on its face the Open Membership Policy does not regulate speech or any particular viewpoint, nor does the record reflect any identifiable message or viewpoint CLS was prevented from communicating as a result of the application of the Policy. Similarly, in contrast to the expressive association decisions relied upon by CLS, the record flatly belies CLS' assertion that the Open Membership Policy impairs CLS' ability to convey its intended message. Finally, there has been no religious discrimination here that would necessitate remediation by this Court; CLS is making a straightforward Free Exercise Clause claim involving a neutral law of general applicability, which should be denied under *Smith*.

A. The Open Membership Policy Is Viewpoint Neutral.

There can be no dispute that the Open Membership Policy is viewpoint neutral. The Policy applies to every registered student organization at Hastings, and prohibits any organization, irrespective of its viewpoint, from maintaining a closed membership policy. Nevertheless, CLS attempts to manufacture viewpoint discrimination at Hastings by focusing solely on the component of the Open Membership Policy that requires compliance with Hastings' nondiscrimination policy.

As to that aspect of Hastings' Policy, CLS argues it is "unconstitutional for precisely the same reason the discriminatory policies in *Widmar, Lamb's Chapel, Good News Club*, and *Rosenberger* were unconstitutional: It places groups organized on the basis of a religious viewpoint at a disadvantage compared to other groups." (Brief for Petitioner at 37 [hereinafter, "Pet. Br. at ___"].) However, even if CLS were permitted to change the case to focus solely on the nondiscrimination policy aspect of the Open Membership Policy, which Respondents contest (Brief of Hastings College of the Law Respondent at 19-23; Brief on the Merits for Respondent-Intervenor Hastings Outlaw at 18-25), *Widmar, Lamb's Chapel, Good News Club* and *Rosenberger* (the "Religious Speech Cases") do not support CLS' argument.

Although the Religious Speech Cases each stand for the proposition that discrimination on the basis of religious viewpoint (or any viewpoint for that matter) is impermissible, they do not speak to whether a nondiscrimination policy constitutes religious viewpoint discrimination. Each of those cases involved restrictions that facially regulated only religious speech or groups, and the application of the restrictions in each case precluded specific, identifiable speech. *See Good News Club*, 533 U.S. at 103 (religious group prohibited from using school to teach moral lessons through storytelling and prayer under regulation barring use of school "by any individual or organization for religious purposes"); *Rosenberger*, 515 U.S. at 822-23 (denying funding to student publication because the paper "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality"); *Lamb's Chapel*, 508 U.S. at 386-87 (reli-

gious group prohibited from using school to present film discussing need for traditional, Christian family values under regulation barring use of school "for religious purposes"); *Widmar*, 454 U.S. at 265 (restricting use of buildings only "for purposes of religious worship or religious teaching"). There is no facial regulation of religious speech here.

To the contrary, Hastings' nondiscrimination policy (like the Open Membership Policy generally) does not regulate speech at all, and it certainly does not regulate any particular viewpoint. As this Court consistently has found, nondiscrimination policies regulate conduct and are viewpoint neutral under the First Amendment. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 572-73 (1995) ("focal point" of state antidiscrimination law was not to target speech, "its prohibition being rather on the act of discriminating against individuals"); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (act barring discrimination in public accommodations does not distinguish activity based on viewpoint); *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984) (adoption and enforcement of nondiscrimination policy is "unrelated to the suppression of expression"); Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1930 (2006) ("By any traditional First Amendment definition of content neutrality, though, antidiscrimination rules are content-neutral . . . Associations are covered whether they express racist views or antiracist views, religious views or atheist views, pro-gay-rights views or anti-gay-rights views."); *see also*

Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 60 (2006) (Solomon Act regulates conduct as opposed to speech); *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 643 (1994) ("[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."). Accordingly, while nondiscrimination policies, such as the one incorporated by reference into the Open Membership Policy, unquestionably prohibit the act of discrimination, they in no way limit the ability of groups to express any viewpoint at all, even discriminatory viewpoints.

Notwithstanding this Court's clear interpretation of the viewpoint neutrality of nondiscrimination policies, CLS argues that requiring compliance with Hastings' nondiscrimination policy as a prerequisite for student group registration is viewpoint discriminatory because religious groups are the only "opinion-based organizations . . . stripped of their right to control their message by controlling their leadership" (Pet. Br. at 37), and "every other student group is permitted to insist that its leaders . . . practice what they preach" (Pet. Br. at 39). CLS grounds this argument in the premise that "religion" is the only category of the nondiscrimination policy that is belief-based (Pet. Br. at 36), and that "sexual orientation" is the only category that is conduct based (Pet. Br. at 39), which therefore burdens religious groups like CLS more than other student groups. However, CLS misconstrues both the nature of the protected categories and the impact of the nondiscrimination policy on other Hastings student groups.

First, religion is not the only "belief-based" group affected by application of the nondiscrimination policy, unless "belief" is defined exclusively in terms of religious faith. Other groups are organized around identity, and commitment to certain moral and ethical principles, and are equally affected by the policy requiring compliance with the nondiscrimination policy. Women's groups may not exclude avowed misogynists; the Black Law Students Association cannot exclude a white supremacist. No one is prohibited from forming a group that expresses a belief, but everyone is prohibited from excluding from their group individuals who do not share those beliefs.

Similarly false is CLS' contention that sexual orientation is the only protected category with a conduct element, and therefore religious groups are uniquely impacted by a proscription against sexual orientation discrimination. Other protected categories have conduct elements as well. For instance, disability has an integral conduct element to it, and members of a sports-oriented group, for example, could strongly feel that their organization is being fundamentally altered by not being permitted to exclude disabled students. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (challenge by professional golf association to order allowing disabled player to use a golf cart at tournaments). Even religion has a conduct element to it, as an integral component of virtually every faith is some form of worship or ritual. But more to the point, religious groups have no monopoly on sexual orientation discrimination. Therefore, nondiscrimination policies do not single out religious groups with respect to sexual orientation discrimination; the nondiscrimination policy pre-

cludes with equal force both religiously-motivated and secularly-motivated discrimination against LGBT students.

The principal fallacy of CLS' position, however, is that it assumes that a "belief based" group, or group in which "conduct" is significant to the group's identity, is burdened more than other student groups by a policy that prohibits exclusionary membership practices. Yet, by their nature, groups are organized around commonalities that are important to their members, and there are groups at Hastings that cover the entire spectrum of categories covered by the nondiscrimination policy. As to each of them, the nondiscrimination policy would preclude them from pursuing homogeneity no differently than it precludes CLS from doing so. Thus, the Vietnamese-Americans group cannot limit its membership to Vietnamese-Americans. A group of "non-traditional" law students, which includes those who are usually older students, could not limit membership to students over 27. An LGBT group could not exclude heterosexuals.

In all, nearly half (29 out of 60) of the registered student groups at Hastings during the 2004-2005 school year were prevented under the nondiscrimination policy from maintaining a membership limited solely to the group's core identity, because those groups are defined by such things as religion, ethnicity, gender, sexual orientation, or race. CLS is simply the only one of those student organizations unwilling to comply with Hastings' requirements, which speaks far more to the neutrality and reasonableness of Hastings' student group registration requirements than it does

to their purportedly discriminatory effect. Accordingly, although the plainly viewpoint-neutral Open Membership Policy is the relevant policy in this case, even if CLS could narrow the scope of this case to Hastings' requirement that student groups comply with the nondiscrimination policy, there is no basis to find Hastings' registration requirements unconstitutional as impermissible viewpoint discrimination.[2]

B. Application Of The Open Membership Policy Does Not Substantially Impact CLS' Ability To Communicate Its Message.

Just as the Open Membership Policy does not directly impact CLS' message through viewpoint discrimination, it is clear that CLS' ability to communicate its message has not been, nor will be, materially impacted by the Open Membership Policy in any indirect manner either. Relying principally on this Court's opinion in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), CLS argues—without pointing to any evidence what-

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[2] Although CLS does not specifically make the argument, this case also is very different from *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). In *R.A.V.*, this Court struck down St. Paul, Minnesota's "hate crimes" ordinance as being viewpoint discriminatory because it penalized fighting words in opposition to certain protected classes, but left other fighting words unregulated. *Id.* at 395-96. The general nondiscrimination policy here, however, does not suffer from such one-sidedness. To the contrary, nondiscrimination regulations restrict both discriminatory conduct and anti-discriminatory conduct (*i.e.*, reverse discrimination), *see Grutter*, 539 U.S. at 355, and thus regulate the full spectrum of discriminatory conduct relating to the traditional protected categories.

soever—that the Open Membership Policy threatens CLS' survival because CLS is precluded from having a membership of its choosing. (Pet. Br. at 30-31.) However, as this Court has explained, a group cannot "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message," *Dale*, 530 U.S. at 653, but rather the group must provide evidence to support such an assertion, *see Roberts*, 468 U.S. at 627-28. The evidence here, however, not only does not support CLS' claim, it proves the exact opposite.

CLS' long history at Hastings empirically demonstrates that CLS is not at risk of "ceas[ing] to exist," or having its voice compromised in any way, if it complies with the Open Membership Policy. (Pet. Br. at 30.) The National Christian Legal Society has had an affiliated chapter at Hastings since at least 1989. (J.A. 280.) In the years before this dispute arose over CLS' refusal to comply with the nondiscrimination policy, CLS' bylaws either acknowledged that CLS would abide by the *Policies and Regulations Applying to College Activities, Organizations, and Students* (J.A. 258), which require compliance with the nondiscrimination policy (J.A. 220), or the bylaws explicitly stated that CLS "welcomes all students of" Hastings (J.A. 272). Yet, there is no evidence in the record that at any time during that period any student attempted to "sabotage[ ]" CLS' message (Pet. Br. at 31) or acted in any way detrimental to CLS.

In fact, during the 2003-2004 school year, when CLS had a membership policy explicitly tracking Hastings' Open Membership Policy, two students

described as not having beliefs consistent with "orthodox Christianity,"[3] and one lesbian student, attended CLS meetings. (J.A. 224.) Significantly, the lesbian student actively engaged in at least one discussion in which she took the position that CLS' view on homosexuality "might not have been Biblically centered"—*i.e.*, a position directly at odds with CLS' viewpoint. (J.A. 325.) Yet, rather than such a discussion proving injurious to CLS, one CLS officer testified that "[i]t was a joy to have her" (J.A. 325), admitted she learned from the discussion (J.A. 327), and conceded that the student's participation was not inconsistent with the faith professed by CLS (J.A. 325; *see* J.A. 455 (counsel's explanation that, as a result of the discussion, "the contents and expression of CLS at Hastings was not changed in any way nor could it have been")). Indeed, when asked whether there was any expectation that any LGBT student might seek to join CLS during the 2005-2006 school year—after this dispute arose—the CLS officer testified: "I don't know. We would more than love to have people come in." (J.A. 329.)

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[3] What "orthodox Christianity" means is unclear, although presumably it is intended to indicate beliefs consistent with CLS' view of Christianity. There is enormous diversity among Christian churches (Baptist, Unitarian, Episcopal, Methodist, Universalist, Church of Christ, Jehovah's Witnesses, Pentecostal, Mormon, Lutheran, Catholic, Presbyterian, etc.), and numerous divisions within many churches, reflecting widely diverse Christian views on many topics, including sexuality. To suggest that CLS' vision of Christianity is more "orthodox" than the Mormon view, or the views of the Greek Orthodox Church or the Oriental Orthodox Church, serves little purpose other than as a rhetorical mechanism to marginalize interpretations of the Biblical teachings that do not conform to CLS' beliefs as being outside the "mainstream."

This case is thus fundamentally different than *Dale*. In *Dale*, the Boy Scouts of America had revoked the membership of James Dale after learning he was gay. As this Court found, the Boy Scouts took a consistent position that homosexuality is contrary to the Scout Oath and Scout Law, and therefore the Boy Scouts would not allow any homosexuals in the Boy Scouts. *Dale*, 530 U.S. at 652. On that basis, this Court reversed the New Jersey Supreme Court ruling that application of the state's public accommodations law required the Boy Scouts to readmit Dale, holding that "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653.

Here, CLS cannot argue that the Open Membership Policy changes its message because the Policy would allow non-Christians or LGBT students to be associated with CLS—CLS already allows non-Christians and LGBT students to attend meetings, lead prayers and engage in discussions on the selected Bible topics. (J.A. 231; Pet. Br. at 5.) Nor can CLS argue that its message is being altered by having "heterodox" attendees express views contradicting CLS' beliefs on homosexuality—CLS concedes that such discussions are not inconsistent with the faith professed by CLS (J.A. 325), and do not change "the contents and expression of CLS . . . in any way" (J.A. 455). Indeed, CLS cannot even argue that it has taken a consistent position that its membership must be limited on the basis of religion or sexual orientation, as CLS agreed to comply with the nondis-

crimination policy every year prior to the year of this dispute. The only argument CLS can make is that having a non-Christian or LGBT student as a member threatens CLS' message in some unique way. However, that is pure speculation, and it is belied by fifteen uneventful years. Thus, even putting aside that *Dale* did not involve the unique academic setting, and therefore is entirely inapposite, *Dale* offers no support for CLS' position.[4]

In contrast, this case is virtually indistinguishable from *Roberts* and *Rotary Club*, where this Court rejected expressive association claims. In both cases, this Court found that, because women—the group to be excluded from membership—were already participating in the organizations as non-voting members or attendees, there

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[4] CLS also relies on *Hurley* to support its expressive association claim. However, *Hurley* is equally inapposite. In *Hurley*, the organizers of the St. Patrick's Day parade in Boston, Massachusetts, refused a place in the parade to the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB") because it did not like GLIB's "gay pride" message that would have been expressed by GLIB members walking behind their banner. This Court held that the parade operators had a First Amendment right to exclude GLIB because the operators had a right to control the message conveyed by their parade. *Hurley*, 515 U.S. at 569-70, 575. Just as with *Dale*, however, *Hurley* was not decided in the academic context and, in any case, nothing about the Open Membership Policy, or the participation of students with views different from CLS, alters CLS' message. In fact, according to one of CLS' officers, CLS does not even have a unified message—it is a group of several individual messages: "Each person, part of the group has a position and is able to say what they believe [CLS] stands for. . . So there was never, you know, a banner that flew on a flag in the sky that said [CLS] says this." (J.A. 326-27.)

was no harm to the groups' messages. As this Court explained in *Roberts*,

> the Jaycees already invites women to share the group's views and philosophy and to participate in much of its training and community activities. Accordingly, any claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best.

468 U.S. at 627; *see Rotary Club*, 481 U.S. at 541 (noting that while women were not allowed to be members, they were permitted to attend meetings, give speeches, and receive awards). CLS' inclusion of non-CLS Christians and LGBT students in its meetings already has taken CLS down the road to openness. Simply going back to the open membership policy CLS had in 2003-2004 would have a limited effect, if any, on CLS, and does not give rise to an expressive association claim under *Dale* or *Hurley*.

Finally, the record belies any claim that CLS' speech rights currently are being impacted as a result of Hastings' denial of group registration. It is undisputed that Hastings has offered CLS access to classrooms, certain bulletins boards available for posting announcements, and chalk boards to communicate with students. (*See* J.A. 232.) This Court in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), found similar alternative channels sufficient to ensure that the Appellant teachers' union was not "seriously impinged" in its ability to communicate. *Id.* at 53 (union had access to channels ranging from

"bulletin boards to meeting facilities to the United States mail"). CLS declined to use those facilities (J.A. 232), yet its membership tripled in the year its registration was denied, and it continued to meet off-campus throughout the year. (J.A. 224, 229-30). Plainly, use of Hastings' facilities was not necessary for CLS either to access students or to carry on its mission, and it should hardly be heard now—after refusing access to facilities—to argue that the absence of such access was a substantial burden.

C. CLS Has Not Been Subjected To Intentional Religious Discrimination.

In a further effort to create the appearance that Hastings singled out CLS (or religious groups generally) for unequal treatment, CLS also asserts that its right to free exercise of religion has been infringed upon because the Open Membership Policy prevents it from choosing its leaders and requiring its members to conform to CLS' moral standards. (Pet. Br. at 41.) In this regard, CLS relies upon this Court's decision in *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1983), in which this Court struck down four ordinances after finding they had been adopted for the express purpose of preventing the Santeria religious group from performing ritual animal sacrifices that were a significant aspect of their faith. As this Court found, the ordinances were facially directed at the church's conduct, as demonstrated by the use of the words "sacrifice" and "ritual" in the statute, and there was significant evidence of gerrymandering such that, "although Santeria sacrifice is prohibited, [animal] killings that are

no more necessary or humane in almost all other circumstances are unpunished." *Id.* at 534-36.

This case, however, is very different than *Lukumi*. This is not a case where a regulation was manufactured specifically to target a religious group. The nondiscrimination policy with which CLS refused to comply has been in existence since 1990 (J.A. 167), and was compelled by California state law, *see* Cal. Educ. Code § 66292.2. Moreover, the Open Membership Policy is neither facially directed at CLS or other religious groups, nor does it contain exemptions that evidence an intent to discriminate against CLS or any other religion or religious group. *Lukumi*, 508 U.S. at 521. Rather, the Open Membership Policy applies to all student groups equally, whether the group is religious or secular, and, until this dispute arose, no religiously-oriented student group at Hastings—including CLS—ever felt it needed an exemption from the Policy to survive. Moreover, there is no evidence of any discriminatory intent against CLS. To the contrary, Hastings' Director of the Office of Student Services said it was "great" and "fantastic" that CLS wanted to register as a student organization. (J.A. 130.) In fact, even after CLS refused to comply with the Open Membership Policy, as noted above, Hastings nonetheless offered to make some law school facilities available to CLS. (J.A. 233.) This plainly is not the conduct of an institution holding religious animosity generally, or animosity specifically toward CLS, and it does not support a claim under *Lukumi*.

II. THE OPEN MEMBERSHIP POLICY IS A CONSTITUTIONAL EXERCISE OF HASTINGS' EDUCATIONAL AUTHORITY.

Unable to establish a viable claim that the Open Membership Policy disparately treats CLS (or religion generally) based on the viewpoint of its message, CLS can prevail under this Court's First Amendment jurisprudence only if the Open Membership Policy is found to be unreasonable. However, there is nothing unreasonable about the nondiscrimination principles promoted by the Open Membership Policy, which are a standard component of the constitutional and legislative framework of this nation, and have been both enforced and invoked by this Court to proscribe private conduct for decades. Nor is there anything unreasonable about the inclusive purpose and effect of the Policy, which reflects a pedagogic philosophy based on the benefits of diversity that is not only prevalent in academia, but has been recognized by this Court's decisions since *Bakke*. This Court has "never denied a university's authority to impose reasonable regulations compatible with [its educational] mission upon the use of its campus and facilities." *Widmar*, 454 U.S. at 268. CLS has provided no basis for this Court to do so here.

A. Hastings Is Permitted To Adopt Reasonable, Viewpoint Neutral Requirements For Registration Of Student Groups.

"[U]niversities occupy a special niche in our constitutional tradition." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 724 (2007) (quoting *Grutter*, 539 U.S. at 329). In recognition

of universities' unique role, this Court often has noted that education is the province of educators, and the courts are ill-suited to delve into matters of pedagogy. *See, e.g., Grutter*, at 328-29. As such, it is well settled that the First Amendment protects a university's freedom to make its own judgments regarding the education of its student body. *See id.* at 329; *Bakke*, 438 U.S. at 312; *Keyishian*, 385 U.S. at 602-603. As this Court has found:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university-to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Bakke, 438 U.S. at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

Consistent with that freedom, this Court has recognized the right of a university to establish reasonable requirements for the registration of student groups. *Widmar*, 454 U.S. at 268; *Healy*, 408 U.S. at 192-193. Thus,

> [a] college administration may impose a requirement . . . that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to peti-

> tion for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition.

Healy, 408 U.S. at 193; *see Widmar*, 454 U.S. at 276-77 ("[W]e affirm the continuing validity of cases . . . that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education."). In this regard, a university acts as a limited public forum, in which the university is permitted to impose even content-based restrictions on the use of the forum, so long as those restrictions are "reasonable in light of the purpose served by the forum" and are not viewpoint discriminatory. *Rosenberger*, 515 U.S. at 829 (internal citation omitted); *see also Perry Educ. Ass'n*, 460 U.S. at 46 ("In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.").

B. The Open Membership Policy Is Reasonable.

The Open Membership Policy plainly is viewpoint neutral and, as discussed above, Hastings' general nondiscrimination policy is as well (*see*

supra Section I.A.). Accordingly, the Open Membership Policy should be invalidated only if it is unreasonable in light of the purpose of the forum created for student organizations. It is not.

The student organization forum was created to "provide Hastings students with opportunities to pursue academic and social interests outside of the classroom that further their education, contribute to developing leadership skills, and generally contribute to the Hastings community and experience." (J.A. 349.) This purpose is consistent with the prevalent view that law student organizations play a critical role in encouraging interaction among diverse students, which leads to a greater understanding and acceptance among them of diverse perspectives and backgrounds.

Students spend only about ten to thirteen hours a week in the classroom, and thus much learning occurs outside the classroom. Student groups often provide the most sustained and intensive collaborative interactions that law students will experience. These collaborative engagements directly feed the core academic goal of familiarizing and enriching students with learning through exposure to diverse ideas and backgrounds. Student organizations also further the robust exchange of ideas that underlie the core value of academic freedom, and it is in substantial part through these student groups that the educational mission of inculcating principles of justice and fairness takes root.

The Open Membership Policy, at a minimum, is a reasonable effort to promote the educational objectives underpinning the student group forum. Through its incorporation by reference of the gen-

eral nondiscrimination policy, the Open Membership Policy appropriately promotes a campus environment built on the principle of equality. This Court has recognized that principle as being "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection." *Romer v. Evans*, 517 U.S. 620, 633 (1996). As Justice Kennedy noted in *Parents Involved*:

> Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain.

551 U.S. at 787 (Kennedy, J., concurring). To that end, this Court has held in numerous decisions that measures to eradicate discrimination and its effects are not just reasonable, but reflect a compelling state interest. *Univ. of Pa. v. E.E.O.C.*, 493 U.S. 182, 193 (1990) ("As Congress has recognized, the costs associated with racial and sexual discrimination in institutions of higher learning are very substantial. Few would deny that ferreting out this kind of invidious discrimination is a great, if not compelling, governmental interest."); *Rotary Club*, 481 U.S. at 549 (A "slight infringement on . . . members' right of expressive association . . . is justified because it serves the State's compelling interest in eliminating discrimination against women."); *Roberts*, 468 U.S. at 624 ("[E]liminating discrimination . . . plainly

serves compelling state interests of the highest order."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (upholding denial of tax benefit to religious university based on "the Government's fundamental, overriding interest in eradicating racial discrimination in education"). That interest is particularly vital in the educational setting because, without equality, students can be denied access to the opportunities for collaborative interaction, thereby undermining the educational purpose for which student organizations exist in the first place.

The open membership aspect of the Policy is equally reasonable as a method of furthering the educational benefits of the student group system. The open membership concept is reflective of an educational philosophy that inclusive activities enhance education by creating opportunities not only to interact with students of similar views and interests, but also with students of dissimilar views and interests. Lee C. Bollinger, *On Grutter and Gratz: Examining "Diversity" in Education*, 103 COLUM. L. REV. 1589, 1591 (2003) ("A fundamental goal of education . . . is to help students expand their capacities to imagine other ways of experiencing life and of seeing the world. For various reasons, this is extraordinarily hard to do, and we are never fully successful at doing it.").

This philosophy is hardly novel, and in fact was expressed by the President of Princeton University more than thirty years ago in *Bakke*:

> [A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who

> come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, "People do not learn very much when they are surrounded only by the likes of themselves."

Bakke, 438 U.S. at 312 n.48 (internal citation omitted); *see Keyishian*, 385 U.S. at 603 ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'" (internal citation omitted)). Indeed, the belief in the benefits of diversity forms the basis of this Court's decision in *Grutter*. 539 U.S. at 325; *see also Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring) ("The Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all.").

CLS' challenge to the Open Membership Policy offers little in the way of substance, and nothing to justify this Court deviating from its long-standing practice of deferring to universities' educational judgments. For example, CLS argues Hastings has no right to tell it not to discriminate and, in any event, Hastings has no interest in impeding the ability of "co-religionists to flock

together." (Pet. Br. at 43-44.) However, CLS' myopia distorts the issue. Hastings has not told CLS it cannot discriminate; it simply has told CLS it cannot both discriminate in its membership policies and also be registered as a student group. This is no different than the Internal Revenue Service telling Bob Jones University that it could not receive charitable organization tax treatment while it was discriminating against interracial couples, which this Court held was an appropriate exercise of governmental authority. *See Bob Jones*, 461 U.S. at 595.

Moreover, CLS is focused solely on the burden imposed on *it* by the Hastings Policy, but ignores both the interests of those individuals CLS seeks to exclude, and the need for the law school to maintain protections against religious discrimination even by religious student groups. It seems self evident, although ignored by CLS, that discrimination is a two-sided act involving both the discriminating party and the party who is being discriminated against. Even assuming there was a right to discriminate, and that it was equal to the right not to be discriminated against, Hastings' choice to side with the victim of discrimination rather than the perpetrator can hardly be considered unreasonable. This is particularly true in light of the universal condemnation of discrimination, and this Court's decision in *Romer* to strike down Colorado's effort to constitutionally prohibit nondiscrimination laws based on sexual orientation. 517 U.S. at 635.

Indeed, even CLS' call for selective application of religious nondiscrimination rules ignores the necessity of those rules in the context of student

organizations. CLS presents its argument against applying religious nondiscrimination rules to religious student groups through stark inter-faith examples, such as a Muslim leading a Bible study, or a Baptist leading a study of the Talmud. In such cases, CLS contends that it is not religious discrimination that motivates an exclusionary membership policy, but merely a desire to ensure that its members are able to practice their own faith. However, CLS entirely ignores the potential for *intra*-faith religious discrimination that arises from the fact that the vast majority of religious student organizations are nondenominational and adhere only to a generalized, faith-based belief system. CLS, for instance, is not limited to any particular Christian sect, and has explained during the course of litigation that its Statement of Faith reflects "certain Christian viewpoints commonly regarded in both the Roman Catholic and Protestant evangelical traditions as orthodox." (J.A. 66.) If the Protestant evangelical members of CLS decided they were going to stop admitting Roman Catholics simply because they are Roman Catholics, notwithstanding that the Roman Catholic students shared the exact same beliefs as the Protestant evangelical students, there would not be a faith-based rationale for that exclusion. That is invidious religious discrimination, which should not be permitted on any grounds.

It is not unreasonable (and certainly not illegitimate) for Hastings to choose to avoid the quagmire of trying to determine when an act of a religious group is an exercise of religious belief or one of religious discrimination. This is particularly the case where intra-faith or intra-church

discrimination based on subjective notions of orthodoxy are involved. Hastings has struck a balance that appears to work for religious groups at Hastings, with the lone exception of CLS, and this Court should defer to that balance.

Finally, CLS' assertion that the Open Membership Policy effectively creates "a majoritarian heckler's veto" that will stifle diversity is neither justified, nor a compelling basis to find the Hastings Policy unreasonable. (Pet. Br. at 51.) As CLS' own experience illustrates, there is little risk of such a "veto" emerging. CLS existed on the Hastings campus for fifteen years without the exclusionary membership policy it now asserts is central to its belief system. Yet, there is no evidence that a non-Christian ever sought membership, nor was CLS' message compromised at all (J.A. 455). It did, however, have a lesbian student participate in CLS meetings and express views contrary to the beliefs of CLS' teachings. The result: the participants "learned from each other," which is precisely the point of the Open Membership Policy. (J.A. 327; J.A. 455.)

In sum, rank speculation that there might be instances in the future where other groups of students exercise a "heckler's veto" cannot be the basis for any decision regarding the reasonableness of the Open Membership Policy. *See Perry Educ. Ass'n*, 460 U.S. at 48-49. There is little justification for such paternalism in the law school setting. Law students are adults, and the law should presume they will act like adults and respect their fellow classmates' right to meet, irrespective of whether they disagree with the group's view. Indeed, this is a critical aspect of a legal education, where interacting with people who

have different views and perspectives on issues implicates standards of behavior that are important to members of a profession—courtesy, mutual respect, and thoughtful consideration, even if in the end there is no agreement. There may be risks to an open membership policy, but schools certainly have mechanisms to deal with disruptive students if that occurs. But as future leaders of this country, *Grutter*, 539 U.S. at 308, law students should not be denied—or more importantly sheltered from—the opportunity to learn the obligations, burdens and benefits of participating in a pluralistic culture simply because some future student may have more to learn. And Hastings should not be denied the ability to decide that an open membership policy best effectuates its goal of developing future leaders who are prepared to operate effectively in that pluralistic culture.

III. THIS COURT SHOULD NOT CREATE A CONSTITUTIONAL EXEMPTION FROM THE OPEN MEMBERSHIP POLICY FOR RELIGIOUS STUDENT GROUPS.

Denuded of its untenable free speech and association claims, the true nature of CLS' claim is readily apparent: CLS seeks a constitutional exemption from the Open Membership Policy because it claims the Policy interferes with CLS' ability to exercise its religion. Indeed, CLS explicitly frames this dispute as a free exercise issue, when it explains: "For example, a Talmud study group is not invidiously 'discriminating' when it chooses a Jewish discussion leader rather than a Baptist. This is simply the free exercise of religion." (Pet. Br. at 43.) However, CLS' free exercise claim is flatly precluded under this Court's deci-

sion in *Smith*, which held that religious practices incidentally burdened by neutral laws of general applicability are constitutional so long as the law has a rational basis.[5] 494 U.S. at 878-79.

CLS effectively concedes that its claim fails under *Smith*, making only a half-hearted attempt to liken this case to *Lukumi*. As discussed in Section I.C., *supra*, that argument fails. However, in an apparent effort to make a so-called "hybrid rights" claim, CLS also suggests that because its speech and association claims involve *religious* speech and *religious* associations they are somehow entitled to greater weight or, more specifically, the Open Membership Policy is subject to greater scrutiny. (Pet. Br. at 41.) It is unclear whether such a claim can ever exist as formulated by CLS—*i.e.*, a hybrid claim where each independent claim fails—but we respectfully submit that this case is not an appropriate one for application of the hybrid rights theory in any event.

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[5] CLS' claim would fail even under pre-*Smith* precedent because the Open Membership Policy also meets the "compelling interest" test set forth in *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). *See Bob Jones*, 461 U.S. at 603-04 (rejecting free exercise claim on ground that eradicating racial discrimination is a compelling state interest); *see also Roberts*, 468 U.S at 624 ("[E]liminating discrimination . . plainly serves compelling state interests of the highest order"); *Jews for Jesus, Inc v Jewish Cmty. Relations Council, Inc.*, 968 F.2d 286, 295 (2d Cir 1992) (preventing discrimination on the basis of religious belief is a compelling state interest), *Gay Rights Coal. of Georgetown Univ. Law Ctr. v Georgetown Univ* , 536 A.2d 1, 5, 32-38 (D.C. Cir. 1987) (preventing discrimination on the basis of sexual orientation is a compelling state interest).

As an initial matter, to the extent CLS is suggesting that a religious association (or religious speech) claim automatically requires strict scrutiny, notwithstanding the deficiency of the component claims, CLS' position is intellectually incoherent. If an associational religious practice is prohibited by a law of general application, minimal scrutiny is applied to the free exercise claim. Likewise, if the associational religious practice is prohibited in a limited public forum (assuming it does not discriminate based on viewpoint), the association claim also is subject to minimal scrutiny. The law of general applicability does not become less generally applicable because the religious adherent is with a group of co-religionists. Nor does the limited public forum become more open because religion is at issue. The whole should not be greater than the sum of the parts.

The only explanation that could be offered to treat the independently deficient claims as sufficient in combination is that they involve religion. However, such a preference for religious speech or religious associations raises significant constitutional issues. First, it would transform a regime that currently is viewpoint neutral, *see supra* Section I.A., into a regime that discriminates decidedly in favor of religious viewpoints. *See* Alan E. Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 79-80 (2006); *see also* Alan E. Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 172 (2002). Such viewpoint discrimination clearly is impermissible under the First Amendment. *Capitol Square Review & Advisory Bd. v. Pinette*,

515 U.S. 753, 766 (1995) (plurality opinion) ("Of course, giving sectarian religious speech preferential access to a forum . . . would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination).").

Second, creating an exemption for religious speech or association where, as here, the religious group is not being disparately treated, would raise significant Establishment Clause concerns. This Court frequently addresses Establishment Clause issues in its religious speech cases, and has found that granting religious groups equal access in schools does not constitute the establishment of religion. *See Good News Club*, 533 U.S. at 114; *Rosenberger*, 515 U.S. at 839; *Lamb's Chapel*, 508 U.S. at 395. Granting CLS an exemption from the Open Membership Policy, however, does not promote equal access, but rather grants CLS (and other religious groups) *unequal* access. Such preferential treatment plainly violates the Establishment Clause. *See, e.g.*, *City of Boerne*, 521 U.S. at 536-37 (Stevens, J., concurring) (describing the Religious Freedom Restoration Act of 1993 as "a law respecting an establishment of religion" because "the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain" (internal quotation marks omitted)); *Capitol Square Review & Advisory Bd.*, 515 U.S. at 766.

Finally, and more generally, granting CLS an exemption to the Open Membership Policy in this case will set a precedent that likely will result in the same concerns regarding entangling this Court in religion that this Court sought to put to

rest in *Smith*. While CLS seeks an exemption from the Open Membership Policy for itself, it is beyond debate that CLS would not be the only organization to which such an exemption would apply. At a minimum, every single religiously-oriented student organization could claim it. *See Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 685 (1992). However, because the basis for the exemption is religious belief—not religious status—it seems inescapable that secular groups acting under cover of their religious beliefs would try to shield their discriminatory conduct in the exemption as well.

Given the inherent difficulties with evaluating beliefs, and religious beliefs in particular, if this Court were to grant CLS' request for an exemption from the Open Membership Policy, it would effectively be creating a limitless and uncontrollable exemption in the name of religious beliefs. That is exactly what this Court sought to prevent in *Smith*:

> Laws . . . are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878)).

CONCLUSION

In the final analysis, CLS is not seeking redress from a facially discriminatory policy, nor is it seeking redress from a neutral policy that has been discriminatorily applied to it. Rather, what CLS seeks is preferential treatment relieving it from the obligation to comply with a neutral, generally-applicable policy that comprises a fundamental aspect of Hastings' educational program, and that every other student organization at Hastings—including three religious groups—has satisfied. There is no precedent for granting such preferential treatment to a religious group, and SALT respectfully submits that such a precedent should not be set here.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

v.

LEO P. MARTINEZ, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF STATE UNIVERSITIES AND STATE UNIVERSITY SYSTEMS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are ten public universities and university systems. Each amicus conditions official recognition of student groups on compliance with nondiscrimination principles.

Amici believe strongly that these requirements are entirely consistent with the First Amendment, and file this brief to explain why petitioner's contrary position is inconsistent with the Court's jurisprudence, and would have dramatic adverse consequences for amici's ability to allocate public funds and access to public facilities. Amici consist of the following institutions:

• Rutgers, The State University of New Jersey, the eighth oldest institution of higher learning in the United States, which is a comprehensive public research and land-grant university with over 55,000 students enrolled in 27 schools and colleges at three campuses across the state.

• The Pennsylvania State University, an institution that is privately incorporated, but has been deemed by the Commonwealth of Pennsylvania to be a public instrumentality, performing many of the functions of a public university. The University's 25 campuses enroll nearly 93,000 students, more than 44,000 of which are found at its main campus at University Park.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

• University of Rhode Island, a land-grant public research institution of higher education with its main campus in Kingston, Rhode Island, and other campuses located throughout the state.

• The University System of Maryland, which has 11 universities, two research institutions, and two regional higher education centers that serve more than 150,000 undergraduate, graduate, and professional students.

• The University of Kentucky, which is a land-grant public research institution fully engaged in teaching and research.

• The University of Montana, a state higher education institution comprised of some 19,000 students with campuses in Missoula, Butte, Dillon, and Helena, Montana.

• The University of Oregon, a public teaching and research university that is part of the Oregon University System. The University has over 20,000 students, most of whom are located on its campus in Eugene, Oregon.

• Oregon State University, a public research and land-grant university that is part of the Oregon University System. OSU is composed of 11 academic colleges, with most of its more than 20,000 students enrolled at its main campus in Corvallis, Oregon.

• Portland State University, which is the largest university in the Oregon University system, and provides access throughout the life span to a quality liberal arts education for undergraduates and an appropriate array of professional and graduate programs especially relevant to metropolitan areas.

• The Board of Trustees of the California State University, which governs the California State University system, which has 23 campuses and educates over 440,000 students.

• The Regents of the University of California, which governs the University of California system, which consists of ten campuses and educates over 220,000 students.[2]

SUMMARY OF ARGUMENT

University students' participation in voluntary organizations is an integral part of their educational experience. Members of student organizations gain opportunities to learn about particular areas of endeavor and persons different from themselves, as well as being part of a group, managing their time, and acting in a leadership capacity—experiences that may not be found within the walls of a lecture hall.

Most, if not all, public universities have adopted student group recognition standards to determine

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[2] The Regents of the University of California is a public corporation, upon which the California Constitution confers governing authority over the University of California. See Cal. Const. Art. IX, § 9. Although Hastings College of the Law is "affiliated with" the University of California (Cal. Ed. Code § 92201), it is governed by a separate Board of Directors (Cal. Ed. Code § 92204). Hastings and University of California officials set policies relating to registered student groups for their respective institutions independently and pursuant to separate authority delegated by their respective governing boards. The Hastings officials named as defendants in this action are subject to the authority of the Hastings Board of Directors, not The Regents of the University of California.

which student organizations are eligible for university support—support that typically includes preferential access to university facilities and communication systems; use of the university logo; and financial assistance. Student organizations that are not eligible for support are permitted to meet on campus, but they do not receive the support extended to recognized groups.

Membership nondiscrimination policies are a common requirement for recognition of student organizations. These policies fall into two broad groups: those prohibiting discrimination based upon particular student characteristics and those requiring that participation in the student organization be open to all students. They rest on three basic interests: implementing the public policies reflected in federal and state nondiscrimination laws; ensuring the availability to students on a nondiscriminatory basis of publicly-funded (and/or student-funded) resources; and furthering universities' educational missions by demonstrating the importance to our society of nondiscrimination principles as well as providing students with the experience of participating in organizations with individuals of different backgrounds and points of view.

University student group recognition programs plainly constitute a limited public forum under this Court's First Amendment jurisprudence. They are created for a specific purpose and are accompanied by specific admission requirements and application processes tied directly to the legal standards that govern public universities as well as those universities' educational missions. Universities accordingly may impose standards governing access to these forums "that are reasonable and viewpoint-neutral."

Pleasant Grove City v. *Summum*, 129 S. Ct. 1125, 1132 (2009).

Nondiscrimination policies are viewpoint neutral. They distinguish among student organizations on the basis of conduct, not on the basis of point of view. Contrary to petitioner's claim, these policies do not single out religious organizations. They apply to all student organizations, whether religious or not.

These policies are also reasonable. Prohibitions of discrimination based on specified categories reflect policies embodied in federal and state law, prevent distribution of public resources to groups that discriminate, and promote schools' educational missions. Requirements that student organizations accept all students give all students an equal opportunity to utilize publicly-funded facilities and public funds, and they allow students to arrive at their own views by interacting with persons with different perspectives.

Finally, petitioner is wrong in asserting that these policies can be abused to prevent an organization from fulfilling its mission: There are numerous nondiscriminatory means of protecting an organization against that extremely remote possibility. Indeed, the broad range of recognized student groups on campuses across the country—including religious groups—by itself demonstrates the fundamental errors underlying petitioner's position.

Petitioner's free association claim fails for the same reasons as its free speech claim. Viewpoint-neutral, reasonable standards for access to government resources are plainly permissible under this Court's precedents.

ARGUMENT

I. PUBLIC UNIVERSITIES TYPICALLY PURSUE THEIR EDUCATIONAL MISSIONS BY CONDITIONING RECOGNITION OF STUDENT ORGANIZATIONS ON AGREEMENT TO ABIDE BY NONDISCRIMINATION POLICIES.

University campuses—like other places in which people live or work—give rise to thousands of different aggregations of individuals. Some of these groups are transitory, formed for a week, a month or a semester; some exist for years or decades. Some involve social activities or hobbies; others address issues of national concern. Some are formal, others entirely ad hoc.

Students' participation in these groups enhances their educational experience. As the University of Colorado explains:

> The cultural, intellectual, social, spiritual and recreational activities conducted by student organizations provide students with opportunities to socialize, learn about people who are different from themselves, and feel involved with the University. Organizing the groups and their activities also provides opportunities for students to acquire leadership skills and experiences. The intellectual and personal development of students in this manner is an important contribution to the University's mission of preparing educated, responsible citizens for our society.

University of Colorado, *Relationship Statement: University of Colorado and Student Organizations* 1

(2005), *at* www.colorado.edu/StudentAffairs/sofo/forms/relationship_statement.pdf.[3]

Some student groups may seek to use university resources in conjunction with their activities—for example, exclusive use of particular university rooms or grounds for meetings or other activities; use of university communication systems to provide notice of their activities; use of the university's logo; and access to other university resources. In addition, many universities maintain a fund for use by student organizations, which is drawn from the university's general budget or from a discrete student activity fee assessed on all students.

To avoid ad hoc determinations regarding which of hundreds of student groups may obtain these university resources and which may not—as well as to promote use of these resources in a manner that is consistent with important government interests, including furthering the university's educational mission—many universities have adopted criteria with which a student group must comply in order to obtain "recognized" or "registered" status. That status, in turn, entitles the group to specified privileges such as preferential access to university facilities and use of the university's name and logo, and, frequently, university funding. Groups that do not obtain recognized status are not banned from university cam-

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[3] Academic research supports this conclusion. See E. Pascarella & P. Terenzini, *How College Affects Students: Findings and Insights From Twenty Years of Research* (1991); D.X. Cheng, *Students' Sense of Campus Community: What It Means, and What To Do About It*, 41 NASPA Journal (Issue 2, 2004); K. Hernandez et al., *Analysis of the Literature on the Impact of Student Involvement on Student Development and Learning: More Questions than Answers?*, 36 NASPA Journal (Issue 3, 1999).

puses; they simply do not obtain the benefits that come with that status.

This case involves the First Amendment standard applicable to the criteria utilized by public universities to determine which student groups receive recognized status.

A. Many Public Universities Apply Nondiscrimination Requirements Similar To The Hastings Policies At Issue In This Case.

Hastings is not at all unique in limiting recognized status to student organizations that comply with a nondiscrimination policy. Nondiscrimination policies are a common requirement for recognition of student organizations at public universities throughout the country.

These policies take a variety of forms, with each public university or university system adopting a policy based on its determination regarding the applicable educational and other governmental interests. They fall primarily into two broad groups—policies prohibiting discrimination based upon particular student characteristics ("category-based" policies) and policies requiring that participation in the student organization be open to all students ("all-comers" policies).[4]

Category-based policies prohibit discrimination on the basis of specified characteristics (*e.g.*, race,

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[4] Much of petitioner's argument appears to rest on disputes over the meaning of Hastings' policy. Amici take no position on the content of Hastings' policy, and file this brief to explain why policies that require nondiscrimination on specified grounds and/or acceptance of all comers are constitutionally permissible.

gender, ethnicity, age, religion, sexual orientation, etc.). For example, Rutgers University explicitly prohibits student organizations from discriminating on the basis of identified protected categories:

> Clubs and organizations may not deny membership to anyone on the basis of race, creed, color, religion, national origin, ancestry, age, sex, disability, marital status, familial status, affectional or sexual orientation, or veteran status; with the exception of social sororities or fraternities which are entitled by law to remain single-sex organizations if tax exempt under 504a of IRS code 1954.

Rutgers, The State University of New Jersey, Student Involvement Office, *Student Organization & Advisor Handbook 2008-2009* at 26 (2008), *at* http://getinvolved.rutgers.edu/documents/organizations/student-organization-and-advisor-handbook-fall08.pdf. The University of Delaware,[5] the University of Kansas,[6] and West Virginia University[7] similarly condi-

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[5] "RSOs may not discriminate on the basis of race, creed, color, gender, age, religion, national origin, veteran, handicap status, or sexual orientation." University of Delaware, Student Centers' Policies, http://www.udel.edu/student-centers/policy/policy_freedomofassoc.html#membership.

[6] "The established policy of the Board of Regents of the State of Kansas prohibits discrimination on the basis of age, race, color, religion, sex, marital status, national origin, physical handicap or disability, status as a Vietnam Era Veteran, sexual orientation or other factors which cannot be lawfully considered, within the institutions under its jurisdiction." Kansas Board of Regents, *Policy and Procedures Manual* 37 (1995), *at* http://www.kansasregents.org/download/aca_affairs/policymanual/061208%20Policy%20Manual%20revised%20links_1.pdf.

tion recognition of student groups on compliance with category-based nondiscrimination policies.

Many schools choose to include sexual orientation on a list of protected categories, while others do not[8]; similarly, some schools choose to include veteran status or height and weight on the same categorical list.[9] Some institutions may choose to grant

[7] West Virginia University, *WVU Student Organizations Services Resource Guide 2009-2010* at 2-3, *at* http://sos.wvu.edu/r/download/42256 (Student group constitutions must include a statement that "the organization will not deny membership on the basis of race, sex, age, disability, veteran status, religion, sexual orientation, color or national origin."). See also University of Alabama, Student Handbook, Guidelines for Non-Fraternal Student Organizations, http://www.studenthandbook.ua.edu/nonfratguidelines.html; University of Arkansas, Student Handbook, Code of Student Life, Non-Discrimination Policy for Student Organizations, http://handbook.uark.edu/chapters.php?chapter=8&p=6; Georgia Institute of Technology, *Constitution Checklist*, *at* http://involvement.gatech.edu/pdf/Constitution%20Checklist.doc; University of Hawai'i at Mānoa, *Registered Independent Organizations (RIO): Application for Registration* 3 (2009), *at* http://www.hawaii.edu/caps/rio/documents/RIO_App_AY09-010-1.pdf; University of Illinois, Registered Organization Registration, http://www.union.illinois.edu/involvement/rso/registration.aspx; University of New Mexico, Chartered Student Organization Policy, http://pathfinder.unm.edu/policies.htm#charteredstudentorg.

[8] For example, the University of Delaware and the University of Arkansas include sexual orientation, while the University of Alabama does not. University of Delaware, Student Centers' Policies, *supra*, note 5; University of Arkansas, Student Handbook, *supra*, note 7; University of Alabama, Student Handbook, *supra*, note 7.

[9] Michigan State University, *Constitution Sample for Student Organizations* (2007), *at* http://www.studentlife.msu.edu/current_students/rso/documents/sample.pdf (height, weight, and veteran status).

an exception to religious organizations that wish to limit membership or leadership on the basis of shared religious beliefs, as the University of Georgia does[10]; others do not provide for such an exemption.

All-comers policies mandate that—in order to obtain recognition—a student group permit all enrolled students to join. These policies sometimes include an enumeration of specific grounds on which discrimination is prohibited, but go on to require that recognized groups permit all students to join. For example, the policy of the University of Iowa states:

> In no aspect of its programs shall there be any difference in the treatment of persons on the basis of race, national origin, color, creed, religion, sex, age, disability, veteran status, sexual orientation, gender identity, or associational preference, or any other classification which would deprive the person of consideration as an individual. The organization will guarantee that equal opportunity and equal access to membership, programming, facilities, and benefits *shall be open to all persons*.

University of Iowa, *Constitutional Guidelines* 1 (2009), *at* http://wiki.uiowa.edu/download/attachments/19468875/Constitutional+Guidelines.pdf (emphasis added).[11]

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[10] University of Georgia, *Creating a Constitution* 1, *at* http://www.uga.edu/stuorgs/policies/pdfs/newconstitution.pdf. See also Arizona State University, University Student Initiatives Manual, http://www.asu.edu/aad/manuals/usi/usi1302-01.html (same).

[11] For another example of an all-comers policy, see University of Idaho, Student Organizations, Start a New Club, http://stuorgs.uidaho.edu/New.

The University of California ("UC") system similarly requires that "[m]embership in a Registered Campus Organization shall be open to any student, consistent with the [the UC Nondiscrimination Policy Statement], with the exception that membership in an official recognized sorority or fraternity may be limited by gender." University of California, *Policy on Registered Student Organizations* § 70.10 (2004), http://www.ucop.edu/ucophome/coordrev/ucpolicies/aos/uc70.html (all Internet authorities last visited Mar. 13, 2010).[12]

B. Nondiscrimination Policies Further The Principles Underlying Antidiscrimination Laws, Universities' Educational Missions, And Other Important Government Interests.

The nondiscrimination elements of student group recognition policies rest on three basic interests: implementing the public policies reflected in nondiscrimination laws, ensuring the availability to students on a nondiscriminatory basis of publicly-funded (and/or student-funded) resources, and furthering universities' educational missions.

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[12] The nondiscrimination policy, which applies to "admission, access, and treatment in University programs and activities," bars discrimination "on the basis of race, color, national origin, religion, sex, gender identity, pregnancy, physical or mental disability, medical condition (cancer related or genetic characteristics), ancestry, marital status, age, sexual orientation, citizenship, or service in the uniformed services." University of California, Nondiscrimination Policy Statement for University of California Publications Regarding Student-Related Matters, http://www.ucop.edu/ucophome/coordrev/ucpolicies/aos/ucappc.html.

First, the states and the federal government recognize the importance of prohibiting discrimination—the federal government and all 50 states have enacted numerous antidiscrimination laws. These statutes prohibit discrimination on the basis of race, gender, religion, national origin, sexual orientation, disability, veteran status, and other bases. They extend to a variety of areas, such as employment, housing, education, and public accommodations. See Age Discrimination in Employment Act of 1967, 29 U.S. §§ 621-634; Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4311; Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-2; Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 *et seq.*; Lexis-Nexis 50 State Survey, Anti-Discrimination, *available at* www.lexis.com. In many instances, these requirements, like university nondiscrimination policies, are linked to the receipt of public resources. See, *e.g.*, 20 U.S.C. § 1681.

While state antidiscrimination laws and university student organization nondiscrimination policies do not always mirror each other, the university policies both ensure compliance with applicable legal provisions and reflect the principles embodied in these laws.

Second, universities have a strong interest in ensuring that student- and taxpayer-funded resources are not distributed in a discriminatory manner. Public universities are funded, in significant part, by state taxpayers. At many universities, all students must pay activity fees that support the school's recognized student organizations. An all-comers policy reflects a university's judgment that all students should have an equal opportunity to obtain the benefit of these resources. Similarly, a policy barring

category-based discrimination embodies the conclusion that the best use of the resources is to allocate them to organizations that do not bar students from utilizing these resources on the basis of protected characteristics.

Third, this Court has recognized that public schools—including public post-secondary schools like amici—do more than teach students the "three Rs"; they also prepare students to become full, contributing citizens of their communities and of the nation. Society has "an interest in teaching students the boundaries of socially appropriate behavior," *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 681 (1986), and "schools must teach by example the shared values of a civilized social order," *id.* at 683. See also *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 493 (1954) (explaining that education is a "principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment").

This Court in *Fraser* said that "schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct." 478 U.S. at 683. Schools similarly may determine that essential lessons of tolerance and nondiscrimination cannot be conveyed in a school that provides support to student groups with discriminatory membership policies.

In addition, the presence within student groups of individuals holding different views provides an educational opportunity, allowing members to learn to voice disagreements respectfully and think critically about their own beliefs. Students who are un-

certain of their own views are afforded the opportunity to learn through exposure to the views of others, rather than being limited to joining organizations that reinforce already-established beliefs.

Finally, although the speech of recognized student groups is not attributed to the university itself, those groups are, by definition, linked publicly to the university. They are listed on the university website, use the university's logo, hang fliers on university bulletin boards, obtain university email addresses, and often obtain financial resources from the university. The Court has recognized the concerns associated with affirmatively promoting "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 271 (1988). Schools therefore may further their interest in teaching nondiscrimination by declining to grant recognized status to groups that engage in discriminatory activity.

C. Nondiscrimination Policies Have Not Been Used To Undermine University-Recognized Groups.

One objection sometimes voiced to category-based and all-comers nondiscrimination policies is that they allow students opposed to an organization's mission to join en masse, elect themselves into leadership positions, and undermine the organization's purpose (or destroy it altogether). See Pet. Br. 28 ("If the Democratic Caucus sent its members out to spread its views to the public, Republican participants would be able to sabotage the enterprise and wreak havoc on the group's chosen message. If numerous enough, the Republican *agents provocateurs*

could muster a majority vote to invite Karl Rove to be the Caucus's keynote speaker.").

In amici's collective experience, the theoretical possibility of a "takeover" attempt virtually never is realized; actual attempts are extraordinarily rare. And student organizations and universities retain ample tools to prevent any attempt from achieving success. For that reason, amici have concluded that the benefits provided by nondiscrimination policies, discussed above, far outweigh the highly theoretical possibility of disruption.

Petitioner claims that "[t]his [takeover] scenario is not speculative," and promises that amicus Foundation for Individual Rights in Education (FIRE) will provide "numerous examples of similar incidents" in its amicus brief. See Pet. Br. 29 n.4. In fact, petitioner and FIRE between them point to only a *single* example of such a hostile takeover ever occurring: in April 1993, when Republican students at the University of Nebraska "showed up at the Young Democrats' election meeting and, outnumbering the Young Democrats, elected themselves as the new officers of the group." *Ibid.*[13]

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[13] FIRE discusses one situation where opponents of an organization *discussed the possibility* of a takeover but does not indicate that the plan ever was carried out. FIRE Am. Br. 8-9. FIRE's other examples are wholly inapposite, involving students destroying/stealing other groups' property/signs or trying to disrupt those groups' events, *id.* at 16-20, or complaining about the discriminatory policies or practices—or calling for derecognition based on those policies or practices—of those groups, *id.* at 10-11. These "examples" do not involve takeovers of groups—they involve other types of interference with the activities of student organizations that, if unjustified and abusive, can be prohibited and punished by a university.

Moreover, student organizations can employ a variety of nondiscriminatory tools effective in preventing the rare "hostile takeover" attempt from succeeding. For example student groups may adopt rules limiting voting membership or officer positions to individuals who have been members for more than a year (or a longer period) or who have attended a prescribed number of meetings within the past year. Such attendance requirements prevent a critical mass of an organization's "opponents" from spontaneously deciding to show up at the last meeting of the year, vote themselves into leadership, and sabotage the organization's mission. Indeed, the record in this case indicates that some recognized organizations at Hastings utilize such attendance requirements. J.A. 173, 178.

Finally, the Court has recognized in a related context that "conduct by [a] student, in class or out of it, which for any reason * * * materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). Students whose sole purpose is to invade the rights of others by disrupting an organization and preventing it from fulfilling its stated mission might well be subject to disciplinary action. Indeed, many universities have policies prohibiting students from engaging in disruptive activities.[14]

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[14] *E.g.*, Or. Admin. R. 571-021-0120 (2009); Rutgers, The State University of New Jersey, *University Code of Student Conduct* § 10 (2007), *at* http://www.rci.rutgers.edu/~polcomp/judaff/docs/UCSC.pdf.

The lack of any substance to the "takeover" chimera is demonstrated by the large number of recognized student organizations that exist today, including organizations focused on the very matters of public controversy that petitioner claims would be targets for disruption.

UCLA, for example, lists over 800 student organizations on its website, categorizing them as academic, arts, cultural, Greek, health, recreation, religious, service, and special interest groups. University of California, Los Angeles, UCLA Student Groups: A-Z, http://www.studentgroups.ucla.edu/home/?page_id=3644. The University of Delaware, a significantly smaller institution, has over 250 student organizations. University of Delaware, Student Organizations, http://www.udel.edu/RSO/.[15]

Recognized student groups on the campuses of the University of California—to pick just one example—include organizations supporting Second Amendment rights, groups for and against abortion rights, groups affiliated with Young Americans for Freedom and other politically conservative organizations, and groups promoting the socialist perspective.[16]

Religious-oriented organizations also exist as recognized student groups in large numbers at universities with nondiscrimination policies. The New

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[15] See also University of Nebraska-Lincoln, Recognized Student Organizations (RSOs), http://involved.unl.edu/organizations/ (over 400 RSOs); University of Wyoming, Recognized Student Organizations, http://www.uwyo.edu/RSO/ (over 200 RSOs).

[16] See, *e.g.*, University of California, Berkeley, Campus Life & Leadership, http://students.berkeley.edu/osl/studentgroups/public/index.asp?todo=listgroups.

Brunswick campus of Rutgers University, for example, is home to more than 40 religious and religious cultural organizations.[17]

D. Students Can And Do Participate In Groups Not Formally Recognized By Their University.

The nondiscrimination policy at issue here—and the ones just discussed—apply only with respect to official recognition of student organizations. Amici, and to amici's knowledge all public universities, permit students to gather together in non-registered groups.

The University of Colorado, for example, explains how non-registered groups fit into the University community: "Independent student organizations are free to exist or disband and are fully responsible for their own activities. Student organizations must comply with University policies and procedures in scheduling and conducting activities on campus, but the groups' goals, membership and activities are de-

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[17] Rutgers University-New Brunswick, Religious Life, http://www.getinvolved.rutgers.edu/organizations/religious-life. California State's Long Beach campus has 26 religious groups. California State University, Long Beach, CSULB Religious Clubs, http://www.csulb.edu/divisions/students/sld/campus_organizations/religious/. The University of California, Los Angeles, lists 84 religious student groups, University of California, Los Angeles, UCLA Student Groups: Religious, http://www.studentgroups.ucla.edu/home/?page_id=6040, while Berkeley lists 71. University of California, Berkeley, Religious Student Organizations, http://students.berkeley.edu/osl/studentgroups/public/index.asp?todo=listgroups&GROUPTYPEID=1718. The University of Delaware has 24 religious student organizations. University of Delaware, Student Organizations: Religious, http://www.udel.edu/RSO/religious.html.

termined solely by the groups themselves." University of Colorado, *Relationship Statement: University of Colorado and Student Organizations* 3 (2005), *at* www.colorado.edu/StudentAffairs/sofo/forms/relationship_statement.pdf.[18]

Student groups thus have the option of agreeing to comply with their universities' nondiscrimination policies in order to gain the benefits that come from university recognition, or acting as a group of students without university recognition and thereby avoiding the restrictions imposed by university policies. See Pet. Br. 11 (Hastings CLS afforded opportunity to meet on campus although not a recognized student organization).

In addition, large numbers of religious organizations are present on university campuses, not as student groups but rather as independent entities that use their own resources to enable students to participate in religious life. For example, the University of Oregon has over 20 such groups encompassing a variety of religious denominations.[19]

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[18] See also University of Alaska Board of Regents, Regents' Policy P09.07.01, http://www.alaska.edu/bor/policy/9p/p09-07.html ("While student organizations may be informally formed within the university community, those that register with the university in accordance with Regents' Policy 09.07.04 [which, among other things, forbids discrimination] will acquire privileges as well as concurrent responsibilities."); Ohio State University, Student Organizations/SOURCE: Organization Registration & Management, http://ohiounion.osu.edu/studentorgs/orgs_manage.asp (including "unregistered" as a status for student organizations that do not complete registration requirements and so do not receive benefits or resources).

[19] University of Oregon, Student Organizations: Religious, http://diversity.uoregon.edu/students-religious.htm. See also

II. UNIVERSITY NONDISCRIMINATION POLICIES DO NOT VIOLATE THE FREE SPEECH GUARANTEE.

Petitioner asserts repeatedly that this case is controlled by this Court's decisions in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), and *Rosenberger* v. *Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995). In fact, the issue presented here was not addressed by the Court in those cases.

Widmar and *Rosenberger* involved attempts to limit speech by groups that the government had admitted to a limited public forum. The Court held that the government entities could not discriminate on the basis of a speaker's viewpoint among speakers that satisfied the criteria for admission to a limited public forum.

Indeed, the Court in *Rosenberger* specifically observed that the petitioners' student organization had agreed to abide by university-created standards that were preconditions to admission into the limited public forum. 515 U.S. at 823, 824 (to be eligible to have University pay bills, a student group had to become a "contracted independent organization," which required, among other things, that the organization "pledge not to discriminate in its membership"; petitioners' organization had acquired that status). See also *Widmar*, 454 U.S. at 265 (student organization had been recognized by the university).

Those cases accordingly did not address the issue here, the extent to which the First Amendment limits government's ability to prescribe the rules governing entry into the limited public forum. This Court's

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Rutgers University-New Brunswick, Religious Life, http://getinvolved.rutgers.edu/organizations/religious-life.

precedents make clear that the government may adopt viewpoint-neutral standards for entry to a limited forum, such as a student group recognition program, that are reasonably related to its purpose. Nondiscrimination policies plainly satisfy that standard.

A. A University May Condition Recognition Of Student Organizations Upon Compliance With Viewpoint-Neutral Standards Reasonably Related To Its Educational Mission.

"[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the Government." *USPS* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). Access to student organization recognition programs—plainly a limited public forum created by universities for specific purposes—may be governed by reasonable, viewpoint-neutral standards.

1. Not all government-controlled forums for speech are created equal: "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). Under the forum analysis utilized by this Court, the government's ability to regulate access to a particular forum—whether physical or programmatic—turns upon the nature of that forum.

The government has the least latitude to limit speech in traditional public forums. These are areas, like streets and parks, that "have immemorially been held in trust for the use of the public and, time out of

mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *CIO*, 307 U.S. 496, 515 (1939). Exclusionary regulations in this context are subject to a strict scrutiny standard. *Perry Educ. Ass'n*, 460 U.S. at 45.

Designated public forums, places where "the Government has intentionally designated a place or means of communication" for *public use*, are subject to similar restrictions; in these forums, "speakers cannot be excluded without a compelling governmental interest." *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); see, *e.g.*, *City of Madison, Joint Sch. Dist. No. 8* v. *Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 (1976) (school board meeting open to the public); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 555 (1975) (municipal theaters "designed for and dedicated to expressive activities").

Alternatively, "a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Pleasant Grove City*, 129 S. Ct. at 1132. "When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." *Good News Club* v. *Milford Central Sch.*, 533 U.S. 98, 106 (2001) (quoting *Rosenberger*, 515 U.S. at 829).

A limited public forum may be subject to "restrictions on speech that are reasonable and viewpoint-neutral." *Pleasant Grove City*, 129 S. Ct. at 1132; ac-

cord *Rosenberger*, 515 U.S. at 829; *Cornelius*, 473 U.S. at 806.[20]

The Court explained in *Rosenberger* that the "necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." 515 U.S. at 829; accord *Greer* v. *Spock*, 424 U.S. 828, 836 (1976) ("[N]o less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." (quotation marks and citation omitted)).

In contrast to the compelling interest and narrow tailoring requirements that apply to limits on access to a traditional public forum, standards governing access to a limited public forum "need only be reasonable; [they] need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808. Reasonableness is context-specific, "assessed in the light of the purpose of the forum and all the surrounding circumstances." *Id.* at 809.

Restrictions may be justified in terms of the government's managerial autonomy and interest in avoiding certain associations or entanglements. For example, the Court has upheld limitations designed to "avoid[] the appearance of political favoritism" and

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[20] Although the Court in *Cornelius* used the term "nonpublic forum" to refer to the government-sponsored fundraising campaign at issue in that case, it has in subsequent opinions characterized *Cornelius* as a case involving a "limited public forum" and applied the standard set forth in *Cornelius* in determining the permissibility under the First Amendment of the standards prescribed for entry into a limited public forum. See *Good News Club*, 533 U.S. at 106-107; *Rosenberger*, 515 U.S. at 829.

minimize "controversy that would disrupt the [governmental] workplace and adversely affect" the forum itself. *Id.* at 809-810. Furthermore, the state has wide discretion in determining the dangers that certain topics or speakers pose to the integrity of a limited forum; "[it] need not wait until havoc is wreaked to restrict access." *Id.* at 810.

Once it has opened a limited public forum, of course, "the State must respect the lawful boundaries it has itself set." *Rosenberger*, 515 U.S. at 829. The government is obligated to apply its standards even-handedly and in particular may not discriminate between otherwise eligible groups on the basis of their viewpoint. *Cornelius*, 473 U.S. at 806.

2. Public universities' programs for recognition of student groups clearly qualify as limited public forums under this Court's jurisprudence.[21]

The distinction between public and limited public forums turns largely on the government's intent in creating the forum, *Cornelius*, 473 U.S. at 803. The Court has inferred intent to create a limited or entirely nonpublic forum from government attempts to restrict access through, for example, admission criteria and application processes, *id.* at 804, or permis-

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[21] The limited public forum here is the university student group recognition program, which may provide recognized groups with a means of communication, use of a university logo, monetary support, and preferred access to university property. In defining a given forum, the Court has "focused on the access sought by the speaker" (*Cornelius*, 473 U.S. at 801), even when the resulting forum is "more * * * metaphysical than * * * spatial or geographical." *Rosenberger*, 515 U.S. at 830. See, *e.g.*, *Perry Educ. Ass'n* (intra-school mail system); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (advertising space on public buses); *Cornelius* (a federal employee fundraising campaign).

sion requirements, *Perry Educ. Ass'n*, 460 U.S. at 47. The Court has also considered the purpose of the forum, and the policy underlying the limitations on entry or subject matter.

Thus, in *Cornelius*, it was significant that the Combined Federal Campaign, the fundraising program to which petitioners sought entry, had been designed to limit the disruption that unlimited and ad hoc fundraising solicitation had created in the past—making it unlikely that the government intended to allow open access to any and all tax-exempt charitable organizations. 473 U.S. at 805.

Another consideration is the character of the property implicated by the forum, with the Court presuming a limited or nonpublic forum where the property is itself inconsistent with, or would be unduly disrupted by, expressive activity. In such cases, "the Court is particularly reluctant to hold that the government intended to designate a public forum." *Id.* at 804; see also *id.* at 805-806.

Each of these factors weighs in favor of finding student group recognition programs to be limited public forums. Universities do not open their facilities, funds, and communication media for use by the general public, or even by an undifferentiated class of university students. Student groups must actively apply for recognition and meet certain requirements aimed at promoting the educational goals of the university before they will be admitted to the forum. These requirements include nondiscrimination and anti-hazing policies, size requirements, faculty sponsorship rules, and policies requiring that students be in good standing. Some schools even limit the number of organizations with a given mission or constituency. Such requirements are far from "ministerial"

(*Cornelius*, 473 U.S. at 804), but directly serve and promote the educational mission of the university. See pages 13-15, *supra*.

By imposing these criteria, the university "reserve[s] eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it." *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 679 (1998) (quoting *Cornelius*, 473 U.S. at 804) (internal citations omitted). Schools do not intend to create a forum for unlimited public discourse through their student group programs, and it is clear that such forums are not open to just any group of students who wish to participate. "[S]elective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum." *Cornelius*, 473 U.S. at 805.

Finally, the "nature of the Government property involved," *ibid.*, in student group recognition—access to university facilities and funds—and the university context reinforce the limited nature of the forum, as the Court has long recognized that government may exercise autonomy over its educational mission, internal affairs, and resources.

Public universities therefore may limit access to this forum "so long as the distinctions drawn are viewpoint neutral and reasonable in light of [its] purpose." *Davenport* v. *Washington Educ. Ass'n*, 551 U.S. 177, 189 (2007) (citing *Cornelius*, 473 U.S. at 799-800, 806).

B. Petitioner's Compelling Interest Standard Is Not Supported By The Court's Precedents And Would Dramatically Limit The Government's Ability To Manage Use Of Its Resources.

Petitioner asks this Court to transform the public educational domain into a public forum by ignoring the settled principles of the Court's forum cases and subjecting virtually every university decision relating to speech to strict scrutiny review, with the result that public universities would have little ability to manage access to university facilities and funds. That approach is not just legally unsupportable; it would lead to unacceptable practical consequences.

Indeed, petitioner acknowledges that "[t]he right that CLS is asserting * * * is by no means limited to religious groups." Pet. Br. 19. Granting petitioner's argument would mean that "a public university [would not be allowed to] * * * require [any] * * * student groups to admit as leaders and voting members those who disagree with their core beliefs and viewpoints." *Ibid.*

We agree. Accepting petitioner's argument would require all public universities to recognize, sponsor, and carve out exceptions from their nondiscrimination policies for the "White Supremacist" group, the "Anti-Semitic" group, the "Atheists Only" group, the "No Mixed-Race Couples Allowed" group, and countless other groups asserting that discriminatory conduct is an integral part of their message. Under petitioner's logic, requiring such groups to admit African-American, Asian, Jewish, or religious students, or mixed-race couples, as a condition of granting them registered status would unconstitutionally im-

pede their ability to "control their own message and identity." Pet. Br. 18.

Nothing in the First Amendment requires that result in the context of access to government facilities and funds. The flaw in petitioner's argument is its failure to recognize that university student group recognition programs are limited public forums—not "public forums" as petitioner repeatedly states—access to which may be governed by reasonable viewpoint-neutral standards.

C. Nondiscrimination Policies Are Reasonable Viewpoint-Neutral Standards For Universities' Recognition Of Student Groups.

Nondiscrimination policies for recognition of student organizations, such as those in effect at universities across the country, are reasonable viewpoint-neutral standards that do not violate the First Amendment rights of students who wish to engage in discrimination prohibited by those policies.

1. *Registered Student Organization Nondiscrimination Policies Are Viewpoint Neutral.*

A governmental institution discriminates on the basis of viewpoint when it targets "particular views taken by speakers on a subject." *Rosenberger*, 515 U.S. at 829. Neither category-based nondiscrimination policies nor all-comers policies contravene this ban on viewpoint discriminatory restrictions.

a. Prohibitions of discrimination on the basis of protected categories are viewpoint neutral. In *Roberts* v. *U.S. Jaycees*, 468 U.S. 609 (1984), the Court held that a Minnesota act prohibiting discrimination

in public accommodations "because of race, color, creed, religion, disability, national origin or sex" does not, on its face, "aim at the suppression of speech, [and] does not distinguish between prohibited and permitted activity on the basis of viewpoint * * * ." *Id.* at 615, 623. See also *Wisconsin* v. *Mitchell*, 508 U.S. 476, 487 (1993); Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919, 1930 (2006) ("[A]ntidiscrimination rules are content-neutral. They do not treat expressive associations differently based on what the associations say.").

Requiring compliance with nondiscrimination policies simply does not target "particular views." *Rosenberger*, 515 U.S. at 829. An organization is not denied recognized status because of its particular beliefs, message, or speech. Rather, it is denied recognized status because it refuses to agree not to engage in discriminatory conduct. A school's nondiscrimination policy regulates how a group must act in order to be recognized as a student organization—it may not violate the university's nondiscrimination policy in determining who can be a member or a leader—but it does not single groups out on the basis of their beliefs. All groups must abide by the nondiscrimination policy, and the policy is accordingly viewpoint neutral.[22]

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[22] This case is therefore entirely different from *Widmar*, in which the challenged restriction was a "discriminatory exclusion from a public forum based on the religious content of a group's intended speech." 454 U.S. at 269-270; see also *Good News Club*, 533 U.S. at 107 n.2 ("exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination"); *Rosenberger*, 515 U.S. at 831 (university "selects for disfavored treatment those student journal-

b. Petitioner asserts that prohibiting discrimination on the basis of religion constitutes viewpoint discrimination as applied to religious groups, because it supposedly prevents only religious groups from controlling their message by selecting leaders based on their beliefs, and that the policy therefore is not viewpoint neutral. That simply is not true.

First, universities' nondiscrimination policies apply to restrictions on membership; they do not require that students with conflicting beliefs join a group or win votes to lead it. Members of a religious group may individually exercise their vote to place someone in a leadership position based on that person's beliefs or conduct, just as any other member of any other group may vote in support of a candidate he or she believes will best serve the purposes and goals of the organization.

Second, petitioner's argument, if accepted, could not be confined to religious groups, because other forms of discrimination can similarly be claimed to be integral to a group's ideology. The "Anti-Integration" group that "believes" that whites are superior to blacks—and would like to be able to use university funds to express that belief—is equally subject to a nondiscrimination-on-the-basis-of-race policy, *and* the "Atheists Only" group is limited by a nondiscrimination-on-the-basis-of-religious-belief policy. Nondiscrimination policies apply to *all* groups, including groups with discriminatory ideolo-

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istic efforts with religious editorial viewpoints"); *Lamb's Chapel* v. *Center Moriches Sch. Dist.*, 508 U.S. 384, 393 (1993) (finding "discriminat[ion] on the basis of viewpoint" because of exclusion of speech "dealing with the subject matter from a religious viewpoint").

gies, because access to the limited public forum is reserved to those who agree not to discriminate.

Restricting access to a limited public forum on the basis of a group's conduct (here, discrimination) is viewpoint neutral, whether or not the limitation has a disproportionate effect on groups with certain beliefs, for the additional reason that the focus of the inquiry is on the *government's* purpose, not the effect on those subject to the government's regulation. See, *e.g.*, *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) ("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."); Volokh, *Freedom of Expressive Association*, at 1931-1932 (many content neutral—and therefore viewpoint neutral—rules affect speakers differently). Disparate impact does not alter the fact that the government's purpose for managing the forum is viewpoint neutral.

Third, even if petitioner's argument could somehow be limited to nondiscrimination on the basis of religion, it would mean that all student organizations, including non-religious ones, would be free to engage in religious discrimination. A nonreligious group could contend that the ability to engage in religious discrimination is essential to its mission—for example, a group dedicated to promoting adherence to scientific methods could seek to exclude fundamentalist Christians on the ground that a belief in creationism would taint their message. Or an anti-immigration group could seek to exclude persons other than Christians and Jews on the ground that they sought to maintain the religious "purity" of the Nation's population.

And requiring universities to permit religious discrimination by religious groups would open the door to debate on what qualifies as a religious student organization. A university would be forced to pass judgment on each and every group that wanted to engage in religious discrimination, declaring whether or not it considered the group sufficiently "religious." Universities that wish to avoid drawing such viewpoint-based lines instead can choose to require the same nondiscrimination policy compliance from all groups, an option petitioner seeks to remove.

c. Petitioner also argues that the sexual orientation provision of Hastings' nondiscrimination policy (which petitioner interprets as a category-based policy) is viewpoint discriminatory.[23] It contends that a sexual orientation nondiscrimination policy "selects for disfavored treatment 'those whose beliefs differ from the College on this disputed question.'" Pet. Br. 40 (quoting *Rosenberger*, 515 U.S. at 831). As with religion, however, all groups are subject to the same standards for recognition—they must agree to comply with the nondiscrimination policy. Petitioner's argument would apply equally to a requirement barring discrimination on the basis of gender or veteran status or any other ground: Groups that believe in

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[23] Petitioner does not argue that an all-comers policy is viewpoint discriminatory with regard to sexual orientation. In fact, the example that petitioner uses to argue that the categorical policy is viewpoint discriminatory—that an animal rights group would be able to exclude a hunter because he did not conduct himself "in accordance with the group's stated beliefs," Pet. Br. 39-40—demonstrates why such an argument cannot be asserted in that context. Under an all-comers policy, no group would be able to base membership on requiring students to "practice what they preach." Pet. Br. 39.

discrimination on the prohibited basis would not be eligible for recognition and would claim "disfavored treatment" because their views differed from the university.

For example, a gay-rights group seeking to exclude heterosexuals, on the theory that individuals who engage in heterosexual conduct cannot sufficiently appreciate the gay rights mission to be effective leaders of the organization, would also be denied recognized status under a sexual orientation nondiscrimination policy. Just because an organization feels it will be affected by such a policy does not mean that the government's purpose in enacting that policy was viewpoint-discriminatory.

2. *Registered Student Organization Nondiscrimination Policies Are Reasonable.*

Standards for access to a limited public forum must also be reasonable; such reasonableness "must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809.

It is reasonable for educational institutions to craft nondiscrimination policies that reflect the principles underlying federal and state laws and policies. As government institutions, public universities are subject to the enforcement of these laws and prepare students who will have to understand, appreciate, and work within that legal landscape.[24] It is simi-

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[24] Petitioner seems to contend that a category-based university policy is *per se* unreasonable unless it replicates precisely the antidiscrimination provisions of state and federal regulatory statutes. Pet. Br. 44, 46. But a government entity surely may reasonably determine that a broader, and more easily administrable, rule may be applied with respect to access to govern-

larly reasonable for a university to ensure that its student- and taxpayer-funded resources are distributed on a nondiscriminatory basis. Beyond that, such policies are consistent with the universities' educational missions. See pages 12-15, *supra*.

Petitioner argues that all-comers policies are irrational. See Pet. Br. 49-53. But these policies, which have been adopted by a number of institutions (see pages 11-12 & note 11, *supra*), serve the plainly-reasonable government interest in ensuring that no student is deprived of the opportunity to utilize taxpayer- and student-funded facilities and activities, as well as enable students uncertain about their views to participate in organizations and learn from their peers in order to decide what views to espouse, rather than restricting them to organizations that will reinforce their pre-existing views. See pages 14-15, *supra*. And petitioner's argument that all-comers policies can be abused to prevent an organization from fulfilling its mission is simply wrong: There are numerous nondiscriminatory means of protecting an organization against that extremely remote possibility. See page 16, *supra*.

III. UNIVERSITY NONDISCRIMINATION POLICIES DO NOT VIOLATE THE RIGHT OF FREE ASSOCIATION.

Petitioner relies on *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), and earlier expressive association cases. But those cases involve the government acting as regulator, reaching into a private organization and *mandating* compliance with nondiscrimination principles.

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ment resources and funding, given the different consequences than in the regulatory context.

A university's student group recognition program, by contrast, "establishes a subsidy for specified ends," *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 543 (2001). That subsidy takes the form of preferential access to government resources as well as direct government funding. "[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991). A nondiscrimination policy, as a reasonable, viewpoint-neutral condition on student group recognition, is therefore entirely consistent with this Court's precedents regarding government subsidies. See, *e.g.*, *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575-576 (1984); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 602-604 (1983).

The Court held in *Grove City* that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept. * * * Requiring Grove City to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the BEOG program infringes no First Amendment rights of the College or its students." 465 U.S. at 575-76. Petitioner's argument here is directly contrary to the rationale and holding in that case.

Petitioner also errs in relying on *Healy* v. *James*, 408 U.S. 169 (1972). There, members of a prohibited student organization tried to meet at "[a] coffee shop in the Student Center * * * but were disbanded on the President's order since nonrecognized groups were not entitled to use such facilities." *Id.* at 176. Here, what is at issue is preferential use of government facilities and access to government subsidies.

Petitioner was not banned from meeting on campus.[25]

Nor was petitioner compelled to change its membership requirements. This case is therefore unlike *Dale*, in which the regulation "forced [the Boy Scouts] to accept members it [did] not desire." 530 U.S. at 648 (quoting *Roberts* v. *U.S. Jaycees*, 468 U.S. at 623). In contrast, petitioner remains free to ignore the university's nondiscrimination principle at no expense to its "internal structure or affairs," *ibid*; it simply cannot obtain the preferential access and funding that comes with participation in the recognized student organization program.

Finally, it would be peculiar if a rule governing access to a limited public forum passed muster under free speech principles but ran afoul of the First Amendment principles protecting expressive association. This Court has treated the two as closely linked. See, *e.g.*, *Roberts*, 468 U.S. at 622 (describing expressive association rights as "correlative" to and "implicit" in First Amendment speech, worship, and

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[25] Then-Justice Rehnquist concurred in the result in *Healy*, declining to endorse the majority's reasoning. He interpreted the majority's holding as "sen[ding] [the case] back for reconsideration because respondents may not have made it sufficiently clear to petitioners that the decision as to recognition would be critically influenced by petitioners' willingness to agree in advance to abide by reasonable regulations promulgated by the college." 408 U.S. at 201. Going on to observe that "[p]rior cases dealing with First Amendment rights are not fungible goods," he found in those decisions an "important distinction"—"[t]he government as employer or school administrator may impose upon employees and students reasonable regulations that would be impermissible if imposed by the government upon all citizens." *Id.* at 203.

petition rights). Applying the limited public forum standard to expressive association claims avoids any inconsistency while taking into account the recognized interests of the government as educator, property owner, and appropriator of public funds.[26]

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[26] To the extent a Free Exercise claim is before the Court, *Employment Division* v. *Smith*, 494 U.S. 872 (1990), requires the conclusion that the application to a religious group of a public university's general nondiscrimination rule does not violate the Free Exercise Clause. Also, the rationale of *Locke* v. *Davey*, 540 U.S. 712 (2004), which held that the government could decline to fund students pursuing degrees in theology, would appear to permit government entities to decline to provide funding to religious groups in some circumstances, at least in states with legal constraints similar to the one imposed by the Washington Constitution.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 08-1371

In the
Supreme Court of the United States

Christian Legal Society Chapter of University of California, Hastings College of Law, *Petitioner,*
v.
Leo P. Martinez, *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Amici Curiae Students for Life America, College Republican National Committee, and Republican National Lawyers Association in Support of Petitioner

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Questions Presented

1. Whether Hastings' policy unconstitutionally infringes upon student groups' expressive associational rights protected by the First Amendment.

2. Whether Hastings' policy creates an unconstitutional condition, forcing student groups to choose between exercising one of two constitutional rights.

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Students for Life America, http://www.studentsforlife.org. 1

Statement of Interest[1]

Students for Life America (SFL), the College Republican National Committee (CRNC), and the Republican National Lawyers Association (RNLA) are organizations with student chapters on state college and university campuses nationwide. Each organization operates under a policy that maintains the respective ideological or political integrity of its local student chapters.

SFL is comprised of students seeking to communicate a pro-life message. It provides administrative and informational resources to local chapters whose mission includes "educat[ing] pro-life college students about the issues of abortion, euthanasia, and infanticide"[2] and whose official membership includes those who believe, inter alia, that "life is a promising choice."[3]

CRNC "help[s] elect Republican candidates, support the Republican agenda, and [helps College Repub-

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] Students for Life of America, Mission, http://www.studentsforlife.org/index.php/about/mission/ (last visited February 1, 2010).

[3] Students for Life of America, Sample Constitution, *available at* http://www.studentsforlife.org/index.php/resources/start-a-group/ (last visited February 1, 2010).

licans] become the future leaders of the conservative movement," as well as "campaign[ ] for Republican candidates, and mobiliz[e] the youth vote."[4] The CRNC requires student chapters to include in their organizing documents prohibitions on members endorsing or supporting non-Republican candidates.

The RNLA preserves its Republican message and ideology by mandating that "[e]ach member . . . and every local chapter . . . ascribe to the accomplishment of the[ ] missions" of RNLA, which include, among others, "[a]dvancing Republican [i]deals" by establishing "a nationwide network of supportive lawyers who understand and directly support Republican policy, agendas and candidates."[5]

Without the ability to maintain ideological or political consistency, the organizations' respective missions and messages would be compromised. These organizations bring to the attention of this Court a relevant matter not already brought by the parties—the effect Hastings' policy, and those like it, would have on the First Amendment rights of politically and ideologically minded student groups.

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[4] College Republican National Committee, http://www.crnc.org ("About," "Students," and "Supporters") (last visited February 1, 2010).

[5] Republican National Lawyers Association, About RNLA, http://www.rnla.org/AboutRNLA.asp (last visited February 1, 2010).

Summary of Argument

An "all comers" policy like Hastings' infringes upon the First Amendment rights of all student groups. Such policies require student groups to accept as members those who reject the groups' beliefs, thereby altering the message of the groups in violation of their right of expressive association. The policy also conditions the exercise of one constitutional right—participation in a forum—on the relinquishment of another—expressive association, placing student groups in the untenable position of being forced to choose to exercise only one of two constitutionally protected rights.

Individuals who come together for the purpose of speaking engage in expressive association, and their right to do so is protected by the Free Speech Clause of the First Amendment. The right to expressively associate includes the right to develop and disseminate a message. If a group determines that inclusion of an individual would alter its message, the group has the right to exclude that individual. As a corollary, the government cannot force groups to accept members that the group believes would alter its message.

Hastings' nondiscrimination policy requires student groups to agree to accept all students as members and potential leaders, even if doing so would alter the groups' message. Such a policy violates student groups' expressive association rights. If the policy is upheld, Hastings, as well as colleges and universities nationwide, will be able to change the message of groups they disagree with—a result antithetical to the First Amendment.

The policy also creates an unconstitutional condition. The doctrine of unconstitutional conditions recognizes that conditioning access to a benefit on the relinquishment of a constitutional right, such as the freedom of speech, is prohibited. Such conditions, which are indirect limitations on the exercise of a right, are unconstitutional if government could not directly limit the same right. The most egregious and malignant form of unconstitutional conditions is present when persons are forced to choose between exercising one of two fundamental rights—a situation to which this Court "has always been particularly sensitive." The protection under the doctrine of unconstitutional conditions is at its apex in such situations.

Under Hastings' policy, student groups are required to surrender the First Amendment speech and expressive association rights in order to exercise their First Amendment speech and equal access rights. Hastings has conditioned access to the limited public forum on student groups' acceptance of all students as members, even if the new members would alter the groups' message. Hastings' condition commands indirectly what it cannot require directly—the alteration of the membership and leadership, and therefore the message, of an expressive association—to exercise the constitutional right of access to a forum. Hastings' policy if therefore unconstitutional.

Argument

In its decision below, the Ninth Circuit failed to address the protection of expressive association afforded by the First Amendment and to consider the doctrine of unconstitutional conditions.[6] This brief will focus on these failures, particularly as related to political and ideological student groups.

I. Hastings' Policy Unconstitutionally Infringes Expressive Association.

The Ninth Circuit should have addressed the expressive associational right of CLS and considered whether Hastings' policy infringed on it; and, if so, whether the State could meet its burden to justify the infringement.[7] Had it done so, the appeals court would have found that (1) student groups have expressive associational rights; (2) compelling groups to accept as members and officers those whose message they do not wish to convey infringes those rights; and (3) the denial of recognition as a student group to associations that will not admit everyone as members and officers, regardless of message, likewise infringes those rights. Because infringement of CLS's expressive association

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[6] In its three-sentence opinion, the Ninth Circuit reasoned that Hastings' policy is "viewpoint neutral and reasonable," and thereby constitutional. *Christian Legal Society v. Kane*, 2009 WL 693391, Pet. App. 1a, 2a (9th Cir.) (memorandum).

[7] The Ninth Circuit found that Hastings' policy requires "all groups [to] accept all comers as voting members even if those individuals disagree with the mission of the group." Pet. App. 2a.

cannot be constitutionally justified, the court below should have found Hastings' policy unconstitutional.

A. Expressive Association Is Constitutionally Protected.

When individuals come together for the purpose of speaking, they engage in "expressive association" protected by the First Amendment. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47, 68 (2006). As with other First Amendment freedoms, the right to engage in such expressive association is incorporated against the states by the Fourteenth Amendment. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). This protection reaches the student members of organizations such as CLS, SFL, CRNC, and RNLA who do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 506 (1969). Rather, "[t]he First Amendment rights of speech and association extend to the campuses of state universities." *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981); *see also Healy v. James*, 408 U.S. 169, 180 (1972) (noting that the First Amendment does not apply "with less force on college campuses than in the community at large").

In *Buckley v. Valeo*, this Court recognized that political association is a manifestation of expressive association: "[t]he First Amendment protects political association as well as political expression." 424 U.S. 1, 15 (1976). In so concluding, the Court relied upon *Patterson* and explained that "[e]ffective advocacy of both public and private points of view, particularly

controversial ones, is undeniably enhanced by group association." *Id.* (*quoting Patterson*, 357 U.S. at 460).

Decisions prior to *Buckley* "made clear that the First and Fourteenth Amendments guarantee the freedom to associate with others for the common advancement of political beliefs and ideas, a freedom that encompasses the right to associate with the political party of one's choice." *Buckley*, 424 U.S. at 15 (internal citations and quotations omitted). In *Kusper v. Pontikes*, this Court explained that "freedom to associate with others for the common advancement of political beliefs and ideas is a form of orderly group activity protected by the First and Fourteenth Amendments." 414 U.S. 51, 56 (1973) (internal quotations and citations omitted). Likewise, in *Bates v. City of Little Rock*, this Court stated that "freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States." 361 U.S. 516, 523 (1968). And, in the context of state infringement upon a national political party's right to political association, this Court indicated that "'freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.'" *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 n.22 (1981) (*quoting* Laurence H. Tribe, *American Constitutional Law* 791 (1978)).

Political association is but one type of expressive association. This Court recognized this, noting that there are a "wide variety of political, social, economic, educational, religious, and cultural ends" for which

expressive association may take place. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Such expressive associational rights are entitled to "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995).

Student organizations like CLS, SFL, CRNC, and RNLA have exercised a fundamental First Amendment right by engaging in expressive association. CLS has a religious message. Amicus SFL has an ideological message and amici CRNC and RNLA have political messages. The First Amendment protects their right to speak and their right to determine their message.

B. Regulating Associations Based On Their Message Is Unconstitutional.

Included within the right to associate for expressive purposes is a corresponding right to *not* associate. An expressive group has a First Amendment right to exclude those with whom it does not wish to associate. *Jaycees*, 468 U.S. at 623; *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). Since the government is prohibited from dictating what people may say, *FAIR*, 547 U.S. at 61, the government is also prohibited from telling an expressive group that it must accept those who might compromise its chosen message. "[T]he fundamental rule of protection under the First Amendment" is that individuals and groups have "the autonomy to choose their own message." *Hurley*, 515 U.S. at 573. If a group did not have the ability to exclude those who would offer a message counter to theirs, the group would risk losing control of its message.

This freedom to not associate with those who would compromise a group's message ensures that the majority cannot force its views on groups that choose to express messages with which the majority disagrees. *Dale*, 530 U.S. at 647–48. It also allows groups to both choose and preserve their message—a protection that is vital for expressive association. If groups could not exclude those who disagree with them, they would lose the ability to control their message. *See, id.* at 648 (explaining that "[f]orcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express"); *Jaycees*, 468 U.S. at 623 (observing that regulations that force groups to accept members they do not want "may impair the ability of the original members to express only those views that brought them together").

1. Regulations Compelling Association Cannot Infringe A Group's Control Of Its Message.

On five prior occasions this Court has been asked to determine whether anti-discrimination regulations that compel groups to associate with those they would rather not are constitutional.[8] In evaluating these regulations, the Court has employed a heightened form of strict scrutiny, as first explained in *Jaycees*, 468 U.S. at 623 (to be constitutional, regulations compelling association must "serve compelling state interests, *unrelated to the suppression of ideas*, that cannot be

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[8] *Jaycees*, 468 U.S. 609; *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *New York State Club Assoc. v. City of New York*, 487 U.S. 1 (1988); *Hurley*, 515 U.S. 557; and *Dale*, 530 U.S. 640.

achieved through means significantly less restrictive of associational freedoms") (emphasis added). When confronted with laws compelling association, the primary question is whether the forced association infringes the ability of groups to control their message. If it does, the regulation is unconstitutional, and no further analysis is required. *Hurley*, 515 U.S. at 578–79 (finding compelled association unconstitutional when it altered a group's message, without undertaking strict scrutiny analysis); *Dale*, 530 U.S. at 657–59 (same). Only if the compelled association does not infringe groups' control over their message does the Court need to consider whether the regulation passes strict scrutiny.

In three of the cases—*Jaycees*, *Rotary Club*, and *Club Association*—this Court upheld anti-discrimination laws compelling association. Each time, the determinative factor was that the compelled association did not interfere with the group's message. Compelling the Jaycees and Rotarians to admit women as members would not impede their "ability to engage in [their] protected activities or disseminate their preferred views," *Jaycees*, 468 U.S. at 626–27, nor require them to "abandon or alter" their message or activities. *Rotary Club*, 481 U.S. at 548. And compelling various private clubs to accept as members all those who agreed with their message, while allowing them to exclude those who disagreed with their message, did not infringe their expressive associational freedoms, because the message of the clubs would remain the same. *Club Ass'n*, 487 U.S. at 13.

The *Jaycees* Court found it significant that the anti-discrimination law "impose[d] no restrictions on

the organization's ability to exclude individuals with ideologies or philosophies different from its existing members." *Jaycees*, 468 U.S. 627. The *Club Association* Court similarly emphasized that compelled association would be unconstitutional when a group demonstrated that it is "organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion." *Club Ass'n*, 487 U.S. at 13. And the *Rotary Club* Court indicated that if the evidence had shown that compelled association would "affect in any significant way the existing members' ability to carry out their various purposes," the outcome would have been different. *Rotary Club*, 481 U.S. at 548.

Thus, in each of the three cases in which this Court upheld anti-discrimination regulations compelling association, the crucial factor was that the compelled association did not infringe the group's ability to determine and control its message. Because the challenged regulations also passed strict scrutiny, they were constitutional. *Jaycees*, 468 U.S. at 623; *Rotary Club*, 481 U.S. at 549; *Club Ass'n*, 487 U.S. at 13–14, 14 n.5.

The Court reached the opposite result in *Hurley* and *Dale*. Once again, the crucial factor for the Court was whether the compelled association would infringe the groups' ability to express their chosen message. Because it would, the Court held the regulations unconstitutional without undertaking strict scrutiny analysis.

In *Hurley*, parade organizers sought to exclude from their parade certain marchers who intended to communicate a message that the parade organizers did not wish to convey. *Hurley*, 515 U.S. at 559. The Court noted that freedom of speech includes the right to determine both what one will say, and also what one will not say. *Id.* at 573. Otherwise, "[t]he government could require speakers to affirm in one breath that which they deny in the next." *Id.* at 576 (quotation marks and citation omitted). Because the parade organizers did not want to "include among the marchers a group imparting a message the organizers do not wish to convey," a unanimous Court held that they could not be forced to include them. *Id.* at 559. The Court never undertook a scrutiny evaluation. The fact that the anti-discrimination regulation would force the parade organizers to include a message they did not want to convey was sufficient to render the regulation unconstitutional.

In *Dale*, this Court concluded that anti-discrimination laws that directly impair a group's ability to espouse its own message cannot constitutionally be applied to that group. 530 U.S. at 659. The issue in *Dale* was whether an anti-discrimination law could be applied to the Boy Scouts to force them to accept a scoutmaster who openly advocated for homosexual behavior. *Id.* at 644. The Court explained that deference should be shown to the group's assertions regarding "the nature of its expression" as well as its "view of what would impair its expression." *Id.* at 653 (*citing La Follette*, 450 U.S. at 123–124). The Court found that forcing the Boy Scouts to accept the scoutmaster would impair their ability to express their chosen message

regarding morals and lifestyles, holding that the anti-discrimination law could not constitutionally be applied against them. *Dale*, 530 U.S. at 659. Just as in *Hurley*, there was no need for scrutiny analysis. The fact that the compelled association would threaten the group's ability to express its message was sufficient to render the compelled association unconstitutional.

In this Court's compelled association jurisprudence, the crucial question is thus whether compelled association threatens a group's ability to express its message. If not, the Court considers whether the compelled association satisfies strict scrutiny. *Jaycees*, 468 U.S. at 623; *Rotary Club*, 481 U.S. at 549; *Club Ass'n*, 487 U.S. at 13–14 and 14 n.5. If compelled association infringes a group's message, the Court does not conduct a scrutiny analysis: the regulation is unconstitutional. *Hurley*, 515 U.S. at 559; *Dale*, 530 U.S. at 659.

2. Hastings' Policy Suppresses Speech.

CLS's chapter at Hastings is in the same position as the Boy Scouts in *Dale* and the parade organizers in *Hurley*—the forced inclusion of those with a contrary message threatens its ability to communicate its chosen message. CLS cannot effectively espouse its Christian message if its members and officers do not subscribe to it. Nor can it express with credibility its chosen message concerning moral issues if it is forced to accept as members and officers those whose actions subvert that message. The district court below held that this was a "risk" that CLS must bear. *Christian Legal Society v. Kane*, 2006 WL 997217, Pet. App. 4a, 59a (N.D. Cal.). Forcing this risk upon expressive associations, however, goes beyond what the First Amendment will tolerate. Under this Court's prece-

dent, compelled association that threatens a group's ability to control its own message is unconstitutional.

CLS, SFL, CRNC, and RNLA face that threat as a result of the Ninth Circuit's decision upholding Hastings' requirement that groups accept as members and officers those who disagree with the groups' message. Hastings explained that under its policy, "the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization." App. 221. But if political and ideological groups are not free to exclude those who disagree with their message, they may be forced to have conflicting messages. Or, they might be overrun by students opposing their message, and thus altogether lose the ability to expressively associate as a student group.

Students for Life America, for example, is comprised of pro-life students seeking to communicate a pro-life message. If SFL is forced to admit those who reject the pro-life position, there is a strong probability that it will be unable to maintain a unified voice, but instead will have conflicting messages—one pro-life, the other pro-choice. On many campuses, pro-choice students outnumber pro-life students. On those campuses, SFL might be taken over by students opposing the pro-life position. They could then outvote the pro-life members and cause the group to espouse a pro-choice message. The original members of SFL on those campuses, who started their group in order to express a pro-life message, would lose their ability to do so. Their message would be silenced, and the "marketplace

of ideas," so foundational to our American democracy, would suffer.[9]

Because the Ninth Circuit failed to fully consider the impact of compelled association on CLS's members' expressive associational rights, it reached the wrong result. This Court should therefore reverse the Ninth Circuit's decision, and hold unconstitutional the requirement that expressive associations admit as members and officers even those who threaten their ability to control their message.

C. Derecognizing An Expressive Association Because Of Its Message Is Unconstitutional.

Just as compelling expressive associations to accept as members those who disagree with them impermissibly burdens their expressive associational rights, so does derecognizing them for refusing to comply with "all comers" policies.

There can "be no doubt that denial of official recognition, without justification, to college organiza-

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[9] In one instance, the University of Virginia initially refused recognition to the Edmund Burke Society, an ideologically conservative student organization; a decision that was reversed only after counsel for the Burke Society intervened. Luke Sheahan, *University of Virginia Officially Recognizes Conservative Group*, Foundation for Individual Rights in Education, 2008, *available at https://thefire.org/article/8912.html* (last visited January 25, 2010). For numerous additional examples of the various harms that befall unpopular student groups *see* Brief of *Amicus Curiae* Foundation for Individual Rights in Education in Support of Petitioner, Part I, *Christian Legal Society v. Martinez*, No. 08-1371 (U.S. 2009).

tions burdens or abridges [their] associational right." *Healy*, 408 U.S. at 181. Denial of official recognition may bring with it "denial of use of campus facilities for meetings and other appropriate purposes." *Id.* It also limits the association's ability "to participate in the intellectual give and take of campus debate" and "to pursue its stated purposes." *Id.* at 181–82. Consequently, "[s]uch impediments cannot be viewed as insubstantial." *Id.* at 182. Rather, denial of recognition is an "indirect" and "subtle governmental interference" that "stifle[s]" First Amendment freedoms. *Id.* at 183. As such, denial of recognition is a prior restraint on speech, which the college must justify. *Id.* at 184.

1. Derecognition Is Unconstitutional Unless Groups Break The Law Or Disrupt The Educational Process.

Once colleges decide to recognize student groups, the First Amendment permits denial of recognition to particular groups in only two circumstances. First, colleges may deny recognition to groups that advocate "inciting or producing imminent lawless action" and are "likely to incite or produce such action." *Healy*, 408 U.S. at 188 (*quoting Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). Second, they may deny recognition to groups that "materially and substantially disrupt the work and discipline of the school[ ]," *Healy*, 408 U.S. at 189 (*quoting Tinker*, 393 U.S. at 513), which occurs when groups "infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." *Healy*, 408 U.S. at 189.

Those are the only reasons identified by this Court that schools may deny recognition to student groups.

Disagreement with the group's philosophy or viewpoint is not sufficient to deny it recognition and attendant benefits. *Id.* at 187; *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819, 840 (1995). Nor can schools derecognize student groups because they are affiliated with unpopular organizations, *Healy*, 408 U.S. at 185–87, advocate changing or discarding school policies, *id.* at 192, have philosophies that are "antithetical to the school's policies," *id.* at 175, or hold views that are "repugnant" or otherwise unacceptable to the school's administration. *Id.* at 187. Instead, "the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and [unlawful or disruptive] action, which is not." *Id.* at 192.

The Courts of Appeal have followed this Court by consistently holding it is unconstitutional to deny recognition to student groups, unless they engage in unlawful or disruptive action. *See Gay Students Organization of the Univ. of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976); *Gay Lib v. Univ. of Missouri*, 558 F.2d 848 (8th Cir. 1977); *Gay Student Services v. Texas A & M Univ.*, 737 F.2d 1317 (5th Cir. 1984); and *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). In fact, the only Court of Appeals to hold otherwise was the Ninth Circuit in the underlying case, after more than twenty-five years of consistently applied precedent. Pet. App. 2a, 4a.

Walker is a case that is nearly identical to the one before this Court but was decided on expressive association grounds—grounds the Ninth Circuit ignored. At issue was whether the local chapter of the CLS at

Southern Illinois University (SIU-CLS) could be derecognized as a student group because it excluded from its voting membership and officers students who did not subscribe to its principles and beliefs. SIU-CLS welcomed all students to its meetings and events but it only let those students who agreed to "subscribe to certain basic principles and beliefs contained in CLS's statement of faith, including the Bible's prohibition of sexual conduct between persons of the same sex" be voting members or officers. *Walker*, 453 F.3d at 858. SIU claimed that requirement violated various university anti-discrimination policies. *Id.* As a result, SIU derecognized SIU-CLS and SIU-CLS sued. *Id.*

The *Walker* court found that SIU-CLS is an association that seeks to communicate a religious message, *id.* at 862, and that forced inclusion of persons who reject CLS's beliefs and standards of conduct would significantly affect SIU-CLS's ability to express its message. *Id.* at 863. The Seventh Circuit stated that "[i]t would be difficult for CLS to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct." *Id.* Because the Supreme Court made clear in *Dale* and *Hurley* that anti-discrimination regulations cannot be applied to expressive associations "with the purpose of either suppressing or promoting a particular viewpoint," the *Walker* court said that SIU had no acceptable interest "in forcing CLS to accept members whose activities violate its creed."[10] *Id.*

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[10] The Seventh Circuit explained that SIU-CLS's expressive association claim turned on "three questions: (1) Is CLS an

The *Walker* court then addressed SIU's claim that it was not forcing CLS to accept members, but rather was only withdrawing its status as a recognized student group. The appeals court said, "[t]he Supreme Court rejected this argument in *Healy*, a case that parallels this one in all material respects." *Id.* at 864. The *Healy* Court "drew a distinction between rules directed at a student organization's actions and rules directed at its advocacy or philosophy; the former might provide permissible justification for nonrecognition, but the latter do not." *Id.* Because CLS was derecognized for its advocacy, and not for its action, the derecognition was constitutionally impermissible. *Id.*

2. Hastings Derecognized CLS For A Constitutionally Impermissible Reason.

CLS is in the same position as was Students for a Democratic Society in *Healy* and SIU-CLS in *Walker*. Its expressive association rights have been infringed because it has been denied recognition. The facts in this case are nearly identical to those in *Walker*. In both cases, the CLS student group was derecognized

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expressive association? (2) Would the forced inclusion of active homosexuals significantly affect CLS's ability to express its disapproval of homosexual activity? and (3) Does CLS's interest in expressive association outweigh the university's interest in eradicating discrimination against homosexuals?" *Walker*, 453 F.3d at 862. Amici respectfully assert that the *Walker* court should not have reached the final question. Under *Dale* and *Hurley*, once the appeals court determined that CLS had a message, and that forced inclusion of others would threaten that message, the analysis should have ended. *See*, supra, Part I. B. 1. at 9–13.

because it refused to admit as members and officers those whose inclusion would alter its message. Neither SIU-CLS nor CLS has barred any student from attending its meetings and events. Just like SIU-CLS, CLS wants to restrict its voting membership and officers to only those students who agree with its message, and whose actions do not conflict with its message. Because of its refusal to comply with Hastings' "let everybody be members and officers, regardless of what it does to your message" policy, it was derecognized.

Yet, as this Court held in *Healy*, only two constitutionally permissible reasons exist for infringing the right to expressive association by denying recognition: unlawful activity, or materially and substantially disrupting the work and discipline of the school by infringing reasonable rules, interrupting classes, or substantially interfering with the opportunity of other students to obtain an education. *Healy*, 408 U.S. at 189–89. Otherwise, derecognition is not permissible.

No one has alleged that CLS engages in unlawful activity, or incites others to engage in such activity. Nor has anyone alleged that CLS is interrupting classes, or interfering with the opportunities of other students to receive an education. Rather, this case turns on whether CLS, by seeking to restrict its membership to those who agree with its statement of faith, infringes campus rules related to the work and discipline of the school.

Hastings asserts that CLS's membership policy violates its campus non-discrimination policy. Opp'n Pet. 4. Yet, this Court's compelled association jurisprudence teaches that anti-discrimination laws cannot be enforced against expressive associations when such

enforcement would imperil the association's message or cause the association to communicate what it does not want to.[11] CLS asserts that is what this rule does. Under *Dale*, deference is shown to CLS's reasonable assertion regarding both its message and the threat to it from compelled association. *Dale*, 530 U.S. at 653.

If CLS is forced to accept as members and officers those who hold a different set of beliefs, its particular Christian message will be compromised. The same result will happen to its message about non-marital sexual activity if CLS is forced to admit as members and officers those engaging in and advocating such activity. Hastings may find CLS's message "antithetical to the school's policies," but, under this Court's holding in *Healy*, that is not sufficient to justify derecognition. *Healy*, 408 U.S. at 175.

Hastings claims it can derecognize CLS because it wants to promote "tolerance, cooperation, and learning among students of different viewpoints." Opp'n Pet. 3–4. But, as this Court has emphatically explained, rules designed to ensure homogeneity on campuses are "repugnant" if they do so at the expense of First Amendment freedoms. *Healy*, 408 U.S. at 187; *Tinker*, 393 U.S. at 511 (*citing Meyer v. State of Nebraska*, 262 U.S. 390, 401 (1923)). That is exactly what Hastings' rule does: it sacrifices First Amendment freedoms in its attempt to create a more homogenous, tolerant society. Even if that were a worthy goal, it cannot be accomplished through unconstitutional means. *Meyer*, 262 U.S. at 402. Hastings' rule cannot therefore be a

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[11] *See supra* at 9–13.

"reasonable campus rule" regarding the "work and discipline of the school[ ]" when applied to religious, ideological, and political expressive associations. *Healy*, 408 U.S. at 189. CLS thus cannot constitutionally be derecognized for failing to follow it.

No constitutionally permissible justification exists for Hastings' derecognition of CLS. The Ninth Circuit should have found the requirement that CLS admit everyone, regardless of their beliefs and message, as members and officers or face derecognition as a student group, an unconstitutional infringement on CLS's members' expressive associational rights. This Court should find Hastings' policy unconstitutional and reverse the Ninth Circuit's decision.

II. Hastings' Policy Creates An Unconstitutional Condition.

A. Demanding Forfeiture Of One Fundamental Right To Exercise Another Is Unconstitutional.

Forcing groups into the "Hobson's choice" of exercising one constitutional right at the expense of another is impermissible. *Simmons v. United States*, 390 U.S. 377, 391 (1968). The basic doctrine of unconstitutional conditions prohibits government from "deny[ing] a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" *Rumsfeld v. FAIR*, 547 U.S. at 59 (internal citations omitted). Further, conditions, which are indirect limitations on the exercise of a right, are unconstitutional if government could not directly limit the same right. *See FAIR*, 547 U.S. at 59–60 (*citing Speiser v. Randall*, 357 U.S. 513, 526 (1958)). If a condition commands indirectly

what government cannot require directly—the alteration of membership and leadership, and therefore the message of an expressive association—the condition infringes upon the First Amendment rights of student groups.

Even where the benefit conferred by the government is discretionary and the beneficiary has no entitlement to the benefit, conditioning access to the benefit on the relinquishment of a constitutional right such as the freedom of speech is prohibited. *See, e.g.*, *Citizens United v. Federal Election Commission*, 2010 WL 183856, *26, 558 U.S. ____, No. 08-205, slip op. at 35 (explaining "[i]t is rudimentary that the State cannot exact as the price" of the "special advantages" of the corporate form "the forfeiture of First Amendment rights"); *FAIR*, 547 U.S. at 59 (noting that "'the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit'") (*quoting United States v. American Library Association*, 539 U.S. 194, 210 (2003) (internal citations omitted)); *Speiser*, 357 U.S at 518 (finding unconstitutional the denial of a tax exemption where the exemption was conditioned on a signed statement that the beneficiary would not advocate the overthrow of government by force or violent means).

The most egregious form of unconstitutional conditions is the "intolerable" situation in which persons are required to choose between exercising one of two fundamental constitutional rights—a situation to which this Court "has always been particularly sensitive." *Simmons*, 390 U.S. at 393. One court has called it an "especially malignant" form of the unconsti-

tutional conditions doctrine. *Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004).

This Court first recognized this especially problematic form of unconstitutional conditions in *Simmons*, 390 U.S. 377. Simmons was forced to choose between his Fifth Amendment right against self-incrimination and his right to assert a claim under the Fourth Amendment's protection against warrantless search and seizure. *Id.* at 394. The Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another" and struck down the "choice" as an unconstitutional condition. *Id.*

This Court reached a similar conclusion in *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). In that case a prominent political figure was required to "forfeit one constitutionally protected right as the price for exercising another." *Id*, 431 U.S. at 807–808 (*citing Simmons*, 390 U.S. at 394).[12] Lefkowitz was deprived of a political office under a New York statute in violation of "his [First Amendment] right to participate in private,

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[12] These are the only two cases in which this Court has applied this most egregious form of unconstitutional conditions. Later cases distinguished *Simmons* without diluting the absolute rule that it is impermissible to compel a person to forgo some constitutional right in order to assert another. *See, e.g., United States v. Kahan*, 415 U.S. 239, 242-243 (1974) (holding the doctrine of unconstitutional conditions inapplicable where no valid Sixth Amendment claim for appointment of counsel existed and defendant "was not, therefore, faced with the type of intolerable choice *Simmons* sought to relieve"); *Bordenkircher v. Hayes*, 434 U.S. 357, 363-364 (1978) (indicating that limiting a constitutional right is different from foreclosing the exercise of that right while asserting of another).

voluntary political associations" when he exercised his Fifth Amendment right and "refused to . . . give self-incriminating testimony." *Id.* This, the Court held, was an unduly coercive and unconstitutional condition. *Id.*

Simmons and *Lefkowitz* together show that the protection under the doctrine of unconstitutional conditions is at its apex when an individual is forced to choose between exercising one of two or more constitutional rights. Unlike conditions on the receipt of some generally available statutory or monetary benefit,[13] the constitution cannot tolerate one of its protections being conditioned on the relinquishment of another. Both *Simmons* and *Lefkowitz* involved conditions requiring individuals to relinquish their constitutional right (against self-incrimination protected by the Fifth Amendment) in order to exercise another (claim under the Fourth Amendment and the ability to associate under the First Amendment, respectively). *Simmons*, 390 U.S. at 393–394; *Lefkowitz*, 431 U.S. at 807–808. Such conditions are unconstitutional.[14]

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[13] *See, e.g.*, *FAIR*, 547 U.S. at 59, (holding that a condition on the availability of federal funding that requires universities to provide equal treatment to military recruiters as provided to other recruiters did not violate law schools' associational rights); and *Rust v. Sullivan*, 500 U.S. 173, 198 (1991) (holding that a condition on the receipt of federal funds requiring a funding recipient to engage in abortion-related activity separately from activities subsidized by federal funding did not violate its First Amendment right to educate and counsel about family planning).

[14] This Court identified two cases involving the rights of organizations to exist on college and public school campuses as

Characterizing the decision between exercising only one of two constitutional rights as a "choice . . . to give up [a] benefit" is improper because "situations in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights [pose] an ['intolerable' and] undeniable tension." *Simmons*, 390 U.S. at 394. This most egregious form of unconstitutional conditions often involves an involuntary relinquishment of a constitutional right. The Fourth Circuit helpfully noted the difference between voluntary and involuntary surrender of a constitutional right in *Tomai-Minogue v. State Farm Mut. Auto. Ins. Co.* 770 F.3d 1228, 1232 n.6 (1985). Voluntary surrender occurs when the right is relinquished, "not to assert another constitutional right, but to secure an obvious collateral benefit,"[15] the latter of which was the case before it. *Id.*

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being in the "spectrum" of unconstitutional conditions cases. *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 680 (1996) (*citing Healy*, 408 U.S. at 192–193, and *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 390–394 (1993)). In *Healy*, SDS was forced to choose between exercising its "associational right" and access to "campus facilities for meetings and other appropriate purposes" to "participate in the intellectual give and take of campus debate" and "to pursue its stated purposes." 408 U.S. at 181. In *Lamb's Chapel*, the petitioner was forced to choose between access to a forum and sharing a religious message. *Lamb's Chapel*, 508 U.S. at 388. In both cases, the unanimous Court held the constitutional rights of petitioners were violated. *Id.* at 394; *Healy*, 408 U.S. at 194.

[15] This Court made a similar point in a case involving the constitutionality of criminal plea bargains, *Bordenkircher*, in which the Court indicated that limiting a constitutional right

Thus, involuntary surrender of a constitutional right—a surrender that indicates the existence of an unconstitutional condition—occurs when the "choice" of exercising one right comes at the expense of exercising another.

B. Hastings Conditions Equal Access On The Surrender Of Expressive Association.

Hastings is doing indirectly what it cannot do directly—forcing student groups to surrender the First Amendment speech and expressive association rights by redefining their very essence, identity, and message—as a condition of equal access to a student forum that Hastings had the discretion to open in the first place. Hastings has conditioned access to the limited public forum upon relinquishment of expressive associational rights.[16] The forcibly-changed ideology that Hastings would have students endure in order to "foster a homogenous society" has not historically been nor should now be tolerated by this Court. *See Meyer*, 262 U.S. at 402.

Equal access to public forums on university campuses is a right protected under the First Amendment. *See Healy*, 408 U.S. at 184; *Widmar*, 454 U.S. at 269–270; and *Rosenberger*, 515 U.S. at 830. Government cannot deny equal access to a group to a public forum based on the content of a group's message. *Wid-*

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is different from foreclosing the exercise of that right merely by the assertion of another. 434 U.S. at 363–364.

[16] *See*, supra, Part I for an extended discussion of the expressive association rights of ideological and political student groups.

mar, 454 U.S. at 269–270; and *Rosenberger*, 515 U.S. at 830. The "'denial of recognition [i]s a form of prior restraint, denying to petitioners' organization [a] range of associational activities'" *Widmar*, 454 U.S. at 270 (*quoting Healy*, 408 U.S. at 194). In addition, denying benefits generally, and funding specifically, is denying free speech. *Rosenberger*, 515 U.S. at 837.

In *Widmar*, the University of Missouri–Kansas City routinely provided meeting space for student groups on campus. An organization of evangelical Christian students sought to use the space for prayer, study, and worship contrary to UMKC's policy. UMKC followed its policy and denied the Christians access to the space. *Widmar*, 454 U.S. at 265. Such a denial constituted impermissible "discriminat[ion] against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion." *Widmar*, 454 U.S. at 269.

More than a decade later the University of Virginia, which funded student publications, refused to fund one with a pervasively religious message. *Rosenberger*, 515 U.S. at 826–827. This case established that equal access means there can be no discrimination in eligibility for a right, benefit, or privilege, including funding, on the basis of viewpoint. *Rosenberger*, 515 U.S. at 834.

This point was echoed just few years later in *Southworth* when this Court determined that universities could exact mandatory fees from students to be used on a viewpoint neutral basis, as required by *Rosenberger*, to fund student groups. *Board of Regents v. Southworth*, 529 U.S. 217, 233 (2000)."Viewpoint neutrality is the justification for requiring the student

to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected." *Id.*

The baseline, then, is clear. Government may not exclude groups from a forum based on viewpoint. Thus, government may impose no substantive condition on equal access for student groups unless the government could impose such a condition directly and without violating some other right, except for conditions inherent in the creation of the forum. Hastings' policy imposes such an "intolerable" unconstitutional condition and should be struck down.

As a condition of recognition as a student group on Hastings' campus, student groups must agree with Hastings' "nondiscrimination policy," which includes an "all comers" requirement. Pet. App. 2a; Opp'n Pet. 3. The "all comers" requirement mandates that "all [student] groups accept all comers as voting members even if those individuals disagree with the mission of the group," Pet. App. 2a, and that groups must allow "*any* interested student to participate, become a member or seek leadership positions in the group, regardless." Opp'n Pet. 3 (emphasis in original). This means student groups would have to "tak[e] the risk" that students disagreeing with the groups' message would join. Pet. App. 59a. The condition therefore requires that students seeking to associate around a common set of ideals or beliefs include those who do not share those beliefs in exchange for access to the

limited public forum Hastings has created for student groups. *See* Pet. App. 30a.[17]

The condition commands indirectly what Hastings cannot require directly—student groups to alter their expressive association, thereby changing their message.[18] The existence of such a condition forces student groups into an unconstitutional dilemma: choose between the equally weighty expressive association rights and equal access rights. Thus, any student group must relinquish its ability to maintain ideologi-

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[17] Neither CLS nor Hastings challenge the District Court's finding that Hastings opened a limited public forum in establishing a recognition process by which student groups would be allowed to reserve meeting space, using the school's email list, mailboxes, etc.

[18] Some argue that a university's derecognition of and denial of benefits associated with the limited public forum to a student group is analogous to government denial of funding for abortion. *See Walker*, 453 F.3d at 873-874 (2006) (D. Wood, J., dissenting). However, in abortion funding cases the funding recipients (or those denied funding) are not forced to choose between exercising one of two constitutional rights; instead, the government is permitted to promote and fund its own message. *See Rust*, 500 U.S. at 196–198. In addition, unlike the abortion funding context, this case is not about funding; it is about recognition and access to the forum. *See*, infra, Part II. B. at 29, 30–31 (describing the forum created by Hastings and the benefits associated therewith). Also unlike the abortion funding context, student fee money is not "public funds" which can be used by the government at will; instead the funds are collected from students and must be distributed to student groups in a viewpoint neutral manner. *See Rosenberger*, 515 U.S. at 834; *Southworth*, 529 U.S. at 230 & 235.

cal or political identities and messages in order to access a forum designed to foster ideological and political give and take. Conditioning the benefit in such a way infringes upon the First Amendment rights of each of Hastings' student groups. This is an untenable unconstitutional condition.

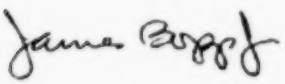
Hastings opened a limited public forum when it chose to provide a system of recognition and benefits to student organizations on campus. Pet. App. 30a. These benefits include bulletin board access, the ability to reserve a classroom for an activity, funding for travel and speakers, school mailbox use, and space at the student organizations fair, among others. *See* Pet. App. 7a–8a, 85a. The decision to open the limited forum and to provide the benefits was discretionary. But, once the forum is open, access cannot be limited on a basis that infringes upon the First Amendment speech and associational rights of a group seeking to partake in the benefit of participating in the forum.

Hastings' condition—requiring student groups to accept all comers as members—requires student groups to forgo their right to self-identify and define their respective messages in order to access the limited public forum. This unconstitutionally pits the exercise of one constitutional right against the exercise of another. This is exactly the type of condition that this Court has held "untenable." The Court should likewise hold so here.

Conclusion

Because Hastings' policy unconstitutionally infringes upon the expressive associational rights of student groups, and because Hastings' policy places an unconstitutional condition on student groups, it should be struck down.

Respectfully submitted,



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AMICUS CURIAE BRIEF

(19)

No. 08-1371

IN THE

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,

Petitioner,

—v.—

LEO P. MARTINEZ, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Union of Orthodox Jewish Congregations of America ("UOJCA") is a non-profit organization representing nearly 1,000 Jewish congregations throughout the United States.[1] It is the largest Orthodox Jewish umbrella organization in the nation. Through its Institute for Public Affairs, the UOJCA researches and advocates legal and public policy positions on behalf of the Orthodox Jewish community. The UOJCA has filed, or joined in filing, briefs with this Court in many of the important cases which affect the Jewish community and American society at large.[2]

Of particular relevance to the case at bar, the UOJCA is the parent organization of the National Conference of Synagogue Youth ("NCSY"). One of the world's most successful Jewish youth movements, NCSY provides educational, religious, and social programming for over 40,000 American teenagers annually

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[1] Pursuant to Rule 37.6 of this Court, no party or party's counsel authored this brief in whole or in part and no person or entity other than the *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

[2] The UOCJA filed *amicus* briefs in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Locke v. Davey*, 540 U.S. 712 (2004); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); and *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

through weekend retreats, summer trips, and after-school clubs. NCSY's mission is one that is religious, but the organization invites any Jewish teen, regardless of his or her level of affiliation or observance, to participate. The UOJCA is also the founder and operational partner of the Jewish Student Union ("JSU"), whose mission is to involve Jewish teens attending public high schools in Jewish activities. JSU facilitates regular club meetings in public schools during the lunch hour, or before or after school, and provides a variety of Jewish programming. Each club is governed by elected officers who meet on a regular basis to discuss program topics, outside activities, and other events. The case at bar has grave implications in the long term for youth organizations such as NCSY and JSU, as it may affect their future ability to develop and apply criteria for the selection of group leaders and members.

This case raises the question of whether a religious student organization may be denied the same recognition and rights granted to other student groups by a state institution where the group requires that its voting members and office holders make a statement of faith that they believe in and adhere to its religion. Citing to *Truth v. Kent School District*, 542 F.3d 634 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2889 (2009), but with no analysis, the court below held that the policy of the state university was "viewpoint neutral" and "reasonable" and, therefore, permissible. Since the court did not address either the right to the free exercise of religion or the right of expressive association, presumably it

rejected these arguments. In *Truth*, the Ninth Circuit held that a school district did not violate a Christian student group's First Amendment rights by requiring the group to remove its religious general membership requirements. *Truth*, 542 F.3d at 651.

Amicus supports petitioner because *amicus* believes that the decision below is at odds with this Court's precedents and has placed at risk the First Amendment free exercise and expressive association rights of America's many civic, cultural, and religious groups and associations. The decisions of the Ninth Circuit both in this case and in *Truth* could significantly affect the ability of student clubs and youth movements, such as NCSY and JSU, to prescribe requirements for their membership and leaders based on religious beliefs and commitments.

STATEMENT OF FACTS

Petitioner has provided the Court with a comprehensive statement of the case. *Amicus*, therefore, associates itself with petitioner's recitation of the facts and will only briefly highlight several key facts. Pet'r Br. 2-17.

The University of California-Hastings College of the Law ("Hastings") is a public law school that has various student groups to which it grants "Registered Student Organization" ("RSO") status. *Id.* at 3. RSOs represent diverse interests and viewpoints. RSOs may, among other things, access the University's communication channels by posting on designated bulletin boards, sending mass emails to the student body, distributing material through the Student Information Center, appearing on published lists of student organizations, and participating in the annual Student Organizations Fair. RSOs also may apply for funding to support group activities and use university rooms for meetings. *Id.* at 4.

The Christian Legal Society ("CLS") at Hastings is a small group of students who share religious beliefs. CLS welcomes all Hastings students to attend and participate in its meetings and activities, but it has specific requirements for voting members and officers of CLS—including those that lead its Bible studies. *Id.* at 5; J.A. 118. Voting members and officers must affirm and pledge to abide by the organization's "Statement of Faith." Pet'r Br. 5. Among other things, "[o]fficers must exemplify the highest standards of morality as set forth in

Scripture, abstaining from 'acts of the sinful nature'" set forth in enumerated Bible verses. *Id.* at 6. According to a national CLS resolution, "unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership." *Id.* at 7; J.A. 146. The resolution applies to "all acts of sexual conduct outside of God's design for marriage between one man and one woman, which acts include fornication, adultery, and homosexual conduct." Pet'r Br. 7.

Hastings has a Nondiscrimination Policy ("Hastings Policy") which states that the school "is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices," and that "[a]ll groups . . . are governed by this policy of non discrimination." *Id.* at 9. The Hastings Policy further states that Hastings "shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex, or sexual orientation." *Id.*

In 2004, CLS applied to become an RSO. Hastings rejected CLS RSO status because "CLS's by-laws were not compliant with the religion and sexual orientation provisions of the Nondiscrimination Policy." *Id.* at 11; J.A. 228. Hastings also informed CLS that to be an RSO, "CLS must open its membership to all students irrespective of their religious beliefs or sexual orientation." Pet'r Br. 11; J.A. 294, 228-229. According to petitioner, Hastings changed its position as to the terms of that policy mid-

litigation. Pet'r Br. 14; J.A. 93. Regardless, at bottom, CLS was refused RSO status because CLS's leaders and voting members were required by Hastings to affirm and live by the group's stated religious beliefs.

SUMMARY OF ARGUMENT

Hastings, a public university and an arm of the University of California, denied CLS's application for RSO status because CLS requires voting members and officers to affirm and abide by a statement of religious beliefs—its Statement of Faith—that Hastings deemed not compliant with the religion and sexual orientation provisions of its Nondiscrimination Policy. Because of its beliefs, CLS was denied benefits accorded all other student groups. Hastings's application of its policy, therefore, amounted to the regulation of CLS's and its members' religious beliefs. A regulation of belief is always prohibited under the Free Exercise Clause. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("[A] law targeting religious beliefs as such is never permissible."). On that ground alone, the decision of the court below upholding the Hastings Policy must be reversed.

Alternatively, the Hastings Policy is a regulation of religiously motivated conduct. It impermissibly forced the students who wanted to coalesce as a religious Christian group to choose between forming such a group but being denied the benefit of access to the forum, or being granted access to the forum but without the

ability to express a religious viewpoint. Where, as here, "the object of a law is to infringe upon or restrict practices because of their religious motivation," it is not neutral. *Id.* Even if the policy were considered neutral, however, Hastings's policy is an unconstitutional infringement of CLS's "hybrid" rights to the free exercise of religion and freedom of speech or freedom of association. *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990). Among other things, Hastings's policy infringes speech because it is an attempt to regulate the ability of CLS to have members make a particular *statement* of faith and thereby shape the message of the group.

As a regulation implicating these free exercise and "hybrid" rights, Hastings's policy is subject to strict scrutiny, meaning that it can survive only if Hastings used the least restrictive means to achieve a compelling interest. It did not. First, the freedom to insist that its leaders share its beliefs is the "means by which a religious community defines itself." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). To require a religious group like CLS to admit nonbelievers is a severe burden on its freedom of religious association. Second, a stated government interest in "nondiscrimination" is not sufficiently compelling to justify forcing a religious group to admit individuals as members and officers who do not adhere to its core principles and can and will interfere with the religious expression and conduct of the group itself.

Finally, Hastings violated CLS's right of expressive association by denying it status as a RSO based on the decision to allow only voting members and officers who share and abide by its core beliefs. This Court has long recognized the right of individuals to coalesce, without government intervention, around a particular set of ideas. In *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), this Court held that the state may not force a group to include an unwanted person, under the guise of a "non-discrimination" or "public accommodation" law, where the forced inclusion would substantially burden the contents of the group's speech and have the likely effect of changing its point of view. Hastings's "non-discrimination" policy is no different. It is an attempt to interfere with CLS's membership criteria and, therefore, its point of view. Moreover, even greater deference must be accorded a religious group's conviction that interference with the criteria by which it chooses its voting members, officers, and Bible study leaders would substantially burden its expressive association.

Nor does it cure any violation that the group can continue to exist without University recognition. In *Healy v. James*, 408 U.S. 169, 180, 184 (1972), this Court determined that the denial of the benefits accorded to recognized student organizations is sufficiently burdensome to establish a First Amendment violation. In addition, a government interest in eliminating discrimination has been held by this Court to

override an expressive association's rights only where enforcement of nondiscrimination statutes "would not materially interfere with the ideas that the organization sought to express." *Dale*, 530 U.S. at 657-658. There is no question that the regulation here materially interferes with the ideas that CLS seeks to express.

ARGUMENT

I. The Hastings Policy As Written and As Applied Deprives CLS and Its Students of the Right to the Free Exercise of Religion

A. The Ninth Circuit Abrogated the Rights of CLS and Its Members to Freely Express Their Religious Beliefs

The First Amendment's protection of freedom to believe is "absolute." *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940). Thus, the Free Exercise Clause "categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978); *see Lukumi*, 508 U.S. at 533 ("[A] law targeting religious beliefs as such is never permissible."); *Smith*, 494 U.S. at 877 ("[T]he First Amendment obviously excludes all 'governmental regulation of religious beliefs as such.'") (citations omitted); *Smith*, 494 U.S. at 877 ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.'"). A regulation of belief is always prohibited.

Here, CLS and its members expressed their religious beliefs by requiring CLS's officers and voting members to sign and affirm a statement of

belief in specific religious principles. Hastings denied recognition and all its benefits to CLS because of this requirement. As applied to CLS, the Hastings Policy amounted to the regulation of the religious beliefs of CLS and its members because they were denied benefits offered to others *because of* their profession of a particular religious belief. Any such regulation is categorically prohibited.

Alternatively, the regulation of the CLS membership requirement may be viewed as the regulation of religiously motivated conduct, which is not forbidden categorically. *See Cantwell*, 310 U.S. at 303-304. Typically, neutral, generally applicable laws may be applied to religiously motivated conduct even when not supported by a compelling government interest. *See Smith*, 494 U.S. at 883-884.[3]

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[3] *Amicus* submits (as it has done in previous cases) that the Court should revisit its decision in *Smith* and provide a clear safe harbor for the activities of America's religious associations and institutions. The holding of the court below that Hastings's non-discrimination policy is "viewpoint neutral and reasonable," *Christian Legal Soc'y Chapter of Univ. of California v. Kane*, 319 F. App'x 645, 646 (9th Cir. 2009), *cert. granted sub. nom. CLS v. Martinez*, ___ S. Ct. ___, 175 L. Ed. 2d 558 (Dec. 7, 2009), illustrates the risk religious associations are exposed to should the decision below be affirmed and this Court not revisit its decision in *Smith*. Religious associations will continue to be at the mercy of public universities, state and local legislatures, and other government institutions. In the absence of a robust protection for the free exercise of religion—one which insists that state laws or regulations that infringe upon that "first freedom" may do so only when serving a compelling state interest via the means least restrictive to religious liberty—nothing stands in the way of religious associations being coerced to disband or violate their tenets.

However, where the government regulation burdens religiously motivated conduct and imposes a choice between "religious beliefs and receiving a government benefit," the regulation is permissible only if it survives strict scrutiny, meaning that the government must have used the least restrictive means to achieve a compelling interest. *Locke v. Davey*, 540 U.S. 712, 720-21 (2004); *see also Smith*, 494 U.S. at 883.

This is such a case. Hastings offers a forum for its students to coalesce as groups to communicate ideas and beliefs. Hastings thus created a forum for the expression of free speech or expressive association. Hastings made participation in this forum dependent upon the Hastings Policy which required religious groups to permit non-adherents of the religion to become voting members and officers. As applied to CLS, Hastings denied CLS the right to have its voting members and officers sign an affirmation of faith. Since CLS voting members and officers lead Bible studies and define the goals of the organization, the Hastings Policy made it effectively impossible for CLS to ensure that it would remain a Christian group expressing Christian viewpoints. Hastings therefore impermissibly forced the students who wanted to coalesce as a religious Christian group to choose between, on the one hand, forming such a group but being denied the benefit of access to the forum or, on the other hand, being granted access to the forum but without being able to express a religious viewpoint. *See, e.g.*, *McDaniel*, 435 U.S. at 626 (holding that state statute violated the

Free Exercise Clause when it prohibited clergy from holding political office and therefore forced a minister to choose between the right of free exercise and the right to seek and hold office); *Sherbert v. Verner*, 347 U.S. 348, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

CLS has a First Amendment right to maintain its beliefs, require statements of faith from its members, and, at the same time, receive the same speech and expressive associational benefits as other student organizations. Any regulation which forces CLS to choose between these rights can be justified only if it serves a compelling interest which, as explained *infra*, does not exist here.

B. The Ninth Circuit Abrogated CLS's "Hybrid" Rights to Free Exercise and Expressive Association or Speech under *Smith*

1. "Hybrid" Rights are Implicated by the Hastings Policy

Alternatively, the Hastings Policy as applied to CLS is not governed by the general rule from *Smith* because it implicates both the Free Exercise Clause and either the freedom of speech or the right to expressive association. In *Smith*, the Court explained that "the First Amendment bars application of a neutral, generally applicable law to religiously motivated action" when the case involves "not the Free Exercise Clause alone, but the Free Exercise

Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." *Smith*, 494 U.S. at 881; *see, e.g.*, *Cantwell*, 310 U.S. 307 ("The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged."); *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943) ("It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.").

The Hastings Policy implicates CLS's and its members' right to the free exercise of religion. Governmental action that dictates how a religious group chooses its voting members and leaders burdens its right to free exercise. This is particularly true here, where the policy prevented CLS from requiring its members to affirm a statement of faith. Pet'r Br. 6. As Justice Brennan explained, "religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions." *Amos*, 483 U.S. 341 (Brennan, J., concurring) (internal quotation marks omitted); *see also Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (church has interest in effecting binding resolution of internal governance disputes); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952) (state statute purporting to transfer

administrative control from one church authority to another violates Free Exercise Clause).

The Hastings Policy also limits CLS's right to both free speech and expressive association. First, Hastings's attempt to regulate the ability of CLS to have members make a particular *statement* of faith and thereby shape the message the group expresses implicates the First Amendment speech rights of CLS and its members, as is evident from this Court's prior decisions. In *Hurley*, for example, the Court treated an entire parade as speech and held that the organizers had a First Amendment right "to control one's own speech." *Hurley*, 515 U.S. at 574. The Court explained that the organizers "clearly decided to exclude a message it did not like from the communication it chose to make and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another." *Id.*

Similarly, in *Healy*, the Court viewed the denial of recognition by the University of a student group as a regulation of speech. The Court held that the right to be recognized by a University as a student group is protected by the First Amendment which ensures "the right of individuals to associate to further their personal beliefs." *Healy*, 408 U.S. at 181. Here, it is all the more evident that Hastings's attempt to curtail the ability of CLS and its voting members and officers to make particular statements of core beliefs is an encroachment of free speech when considered in conjunction with the fact that the very purpose for which Hastings maintains

RSOs is "to ensure an ongoing opportunity for the expression of a variety of viewpoints." Pet. App. 82a, 74a.

Second, as discussed in more detail *infra*, this Court has held that where a governmental entity attempts to force inclusion of unwanted people in a group, this infringes the group's freedom of expressive association. *See, e.g.*, *Dale*, 530 U.S. at 657.

Since Hastings's actions implicate the "hybrid" First Amendment rights, they are subject to strict scrutiny. *Smith*, 494 U.S. at 881. Therefore, any burden to these "hybrid" rights caused by Hastings can be justified only if it is in furtherance of a compelling governmental interest and it is the least restrictive means of furthering that interest.

2. The Hastings Policy Creates a Significant Burden on "Hybrid" Rights

The Hastings Policy as applied imposes an undue government burden on CLS's "hybrid" religious and speech or expressive association rights. Hastings has conditioned access to its speech forum upon CLS allowing voting members and officers who do not share the core Christian beliefs of the group and a commitment to live life in accordance with these beliefs. These voting members and leaders conduct Bible studies and represent the organization at various events. If individuals who do not believe in CLS's principles could vote, lead CLS activities, and determine its agenda, they would be able to express religious viewpoints and teach the Bible

in a manner that was opposed to the core religious values CLS was created to express. CLS students would be denied the ability to express their religious beliefs as a group on campus. "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community." *Amos*, 483 U.S. at 342 (Brennan, J., concurring). The freedom to insist that its leaders share its beliefs is the "means by which a religious community defines itself." *Id.* To require a religious group like CLS to admit nonbelievers is a severe burden on its freedom of religious association.

As explained more fully *infra*, this Court has found that even for non-religious groups, forcing the inclusion of an individual who does not adhere to the group's beliefs "would significantly burden" the group's desire to promote the group's particular belief. *Dale*, 530 U.S. at 653. In *Dale*, the Court concluded that a requirement that the Boy Scouts retain an assistant scoutmaster who was a gay rights activist significantly burdened the Boy Scouts' desire to promote a specific message. Similarly, in *Hurley*, the Court held that organizers of a march had a right to exclude participants in order to propound a particular message. *Hurley*, 515 U.S. at 575. If the presence of a person with a different viewpoint would substantially burden the right of a secular organization to freely present its viewpoint, then surely forced inclusion on an avowedly religious organization would substantially burden the "hybrid" rights of the exercise of religion and religious expression.

Indeed, it is easy to understand the burden a religious organization would experience in exercising its religious identity if required to permit as voting members, officers, or prayer leaders individuals who do not adhere to its core beliefs and practices. Religious organizations, moreover, have an interest in defining who can participate in their activities—leaders or otherwise. Under the Ninth Circuit's decision, for example, JSU or NCSY would have to allow members who are missionaries. A Jewish campus organization such as Hillel would be compelled to admit adherents of Jews for Jesus into its membership. Not only would such requirements redefine the group, they would likely drive away members who wish to congregate with co-religionists, free from proselytizing. This alone suffices to meet the substantial burden requirement.

Regardless, CLS's assertion that the Hastings Policy substantially burdens its exercise of religion and its rights of free speech and expressive association is entitled to substantial deference. Pet'r Br. 11-12. In *Dale*, the Court deferred to the Boy Scouts' opinion that forced inclusion would be a substantial burden on its right to expressive association. *Dale*, 530 U.S. at 653. Certainly, a religious organization's opinion that a decision unduly burdens its exercise of religion and speech rights deserves as much if not more deference.

If the Court does not defer to CLS's understanding, it would be impermissibly interfering with decisions usually made by religious organizations. Indeed, the Court has

often refrained from interfering with or sanctioning government interference with a religious group's practices, including matters related to the appointment of religious leaders. *See Milivojevich,* 426 U.S. at 713 ("[C]ivil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law."); *see also Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969). The Court has also cautioned against government making independent value-laden judgments about a particular set of religious beliefs. "[R]epeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887; *see also Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981) ("[T]he resolution of [the question of what is a religious belief or practice] is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

C. There is No Compelling Governmental Interest Justifying the Hastings Policy

There is no compelling governmental interest to permit Hastings to burden CLS's free exercise or "hybrid" rights. While eliminating discrimination is an important state objective, it cannot

justify forcing religious groups to admit individuals as members and officers who do not adhere to its core principles and can interfere with the religious expression and conduct of the group itself.

Even when evaluating a non-religious organization, the Court concluded that the New Jersey public accommodations law forbidding discrimination did not "justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association" as requiring the Boy Scouts to have a leader whose beliefs and actions were opposed to their values. *Dale*, 530 U.S. at 659. Similarly, in *Hurley*, a gay rights group sought an order enforcing a Massachusetts public accommodations law to prevent "discriminatory treatment." *Hurley*, 515 U.S. at 578. The Court rejected this justification as sufficiently compelling to intrude upon a First Amendment right. *Id.* at 578-579 (internal citations omitted).

It is certainly therefore the case that such an interest would not justify the abrogation of the Free Exercise or the "hybrid" rights at issue here. If the Court upholds the Hastings Policy, it would permit government institutions to make access to rights and benefits contingent upon non-adherence to religious values under the guise of some secular value. State entities could exclude religious groups from a variety of benefits granted to other groups. This result would be contrary to the very purpose of the Free Exercise Clause. As Justice Brennan explained in his concurrence in *Amos*, the religious exemptions from Title VII anti-discrimination laws were necessary to protect the free exercise

of religion because "we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities." *Amos*, 483 U.S. at 342-343.

D. The Ninth Circuit's Decision Raises the Specter of Governmental Entanglement with Religion

A government policy like the Hastings Policy that regulates practices of religious groups including matters related to membership and the appointment of officers raises the specter of impermissible governmental entanglement with religion. Pursuant to this policy, or one like it, a governmental agency could in a more detailed and demanding fashion review the practices of a religious organization to ensure that they treated all people equally in all circumstances or for some other purpose. That would entail governmental review of the internal structure, organization, beliefs, and practices of religious organizations.

The Court in other contexts has cautioned against government making independent value-laden judgments about a particular set of religious beliefs and practices. *See id.* at 336 (recognizing a problem when government attempts to divine which ecclesiastical appointments are sufficiently related to the "core" of a religious organization to merit exemption from statutory duties); *id.* at 344-45 (Brennan, J., concurring) (same); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30

(1983) (avoiding potentially entangling inquiry into religious practice is desirable); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 674 (1970) (holding that it is desirable to avoid entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs).

Indeed courts "must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887; *see also Thomas*, 450 U.S. at 714 ("[T]he resolution of [the question of what is a religious belief or practice] is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."). In *Widmar,* the Court observed that a university risks "greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.'" This was true because "the University would need to determine which words and activities fall within 'religious worship and religious teaching.' . . . . There would also be a continuing need to monitor group meetings to ensure compliance with the rule." *Widmar v. Vincent*, 454 U.S. 263, 271 n.11 (1981) (internal citations omitted). As the Court noted, "[m]erely to draw the distinction would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with

religion in a manner forbidden by our cases." *Id.* at 269 n.6. The logic of the Ninth Circuit's decision raises similar concerns about future governmental review and entanglement.

II. The First Amendment Right to Expressive Association Does Not Permit Public Universities to Deny a Student Group Recognition Based on the Composition of the Group's Leadership or Voting Members

This Court has long recognized the First Amendment expressive association right of individuals to coalesce around a particular set of ideas, common interests, and values. Indeed, in the face of discrimination, organized groups have often done so. The purpose of the right to expressive association is not only "especially important in preserving political and cultural diversity," but also crucial to "shielding dissident expression from suppression by the majority." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

Whether it is to petition the government, to promote a set a values, to educate, or to pursue any other group objective, the ability of a group to express itself effectively and free from government intervention arises in part from the characteristics by which its individual members define the group and the criteria by which they freely choose their leaders. *Id.* at 633 ("[T]he association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."). The very capacity to

define membership confers upon the group the authority to speak with one voice against discrimination or otherwise.

Government actors have attempted to infringe upon this right in a variety of ways that "unconstitutionally infringe upon this freedom," including by "interfer[ing] with the internal organization or affairs of the group." *Id.* at 622-623. Time and again, this Court has invalidated such government-imposed mandates, including where these mandates impose membership requirements.

Both *Dale* and *Hurley* held that the state may not require a group to include an unwanted person or group, under the guise of a "non-discrimination" or "public accommodation" law, where inclusion would affect the contents of the group's speech and likely cause it to change its point of view. *Dale*, 530 U.S. at 648 ("[T]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."); *Hurley*, 515 U.S. at 573 ("[A] speaker has the autonomy to choose the content of his own message."); *see Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006) ("If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect.").

Government actions that burden freedom of expressive association, moreover, are subject to

the highest scrutiny. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-461 (1958) ("Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."). It can be satisfied only "'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623).

Here, both the expressive association right of the First Amendment and also its Free Exercise Clause are at stake. These rights were disregarded at the hands of government officials who, based on a professed "nondiscrimination policy," denied CLS status that it accorded all other student groups simply because CLS refused to confer voting membership or leadership status on individuals who would not or could not affirm a particular statement of faith. Infringement of the freedom of expressive association is particularly egregious where it bars a student religious group *because of its beliefs* from organizing as a group in the same fashion that all other students groups are permitted to coalesce.

In *Dale*, this Court used a three-part inquiry to conclude that the application of New Jersey's public accommodations law violated the Boy Scouts' First Amendment right of expressive association. *Dale*, 530 U.S. at 648, 650, 653. The

Court should apply that test here and likewise hold that Hastings's rejection of CLS violated the First Amendment.

A. Religious Organizations Presumptively Engage in Protected Expressive Association

Under *Dale*, the threshold question was whether a group engages in "expressive association" or whether it engages in "some form of expression." *Id.* at 648. The Court made this determination by independently reviewing the factual record because it was a First Amendment case where the conclusions of law were "virtually inseparable from findings of fact." *Id.* at 648-649. The Court reviewed the mission statement of the Boy Scouts and concluded that it was "indisputable that an association that seeks to transmit such a system of values engages in expressive activity." *Id.* at 650.

It should likewise be "indisputable" that CLS, as a religious group, engages in expression. *See Christian Legal Soc'y Chapter of Univ. of Cal v. Kane*, 2006 WL 997217, at *20 (N.D. Cal. Apr. 17, 2006) ("Hastings does not dispute that CLS engages in expressive association."), *aff'd*, 319 F. App'x 645 (9th Cir. 2009), *cert. granted sub. nom. CLS v. Martinez*, ___ S. Ct. ___, 175 L. Ed. 2d 558 (Dec. 7, 2009). CLS, among other things, invites speakers to give public lectures addressing how to integrate Christian faith with legal practice, and organizes Bible studies including discussion of the text, prayer, and other forms of worship. Pet'r Br. 5; J.A. 229, 302-303.

B. Forced Inclusion of Individuals Who Do Not Follow a Religious Organization's Tenets Significantly Burdens the Group's Ability to Advocate Its Viewpoint

In *Dale*, the Court next considered whether the forced inclusion of an individual who acts contrary to the values of the group would significantly affect or burden the Boy Scouts' ability to advocate public or private viewpoints. *Dale*, 530 U.S. at 650. The Court initially considered "the sincerity of the professed beliefs" by reviewing, "to a limited extent, the nature of the Boy Scouts' view of homosexuality." *Id.* at 650-651. But, here, the Court should not analyze the *sincerity* of the beliefs of a religious organization like CLS. *See Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").

The Court in *Dale* next evaluated whether the presence of an individual who does not adhere to the group's beliefs "would significantly burden" the group's desire to promote the group's particular belief. *Dale*, 530 U.S. at 653. The Court there concluded that the presence of an activist scoutmaster such as Dale did significantly burden the Boy Scouts' desire to promote their message. While giving "deference" to a considerable extent to the Boy Scouts' views on "what would impair [their] expression," the Court reviewed in some detail the Boy Scouts' justification for excluding Dale. *Id.*

Likewise, in *Hurley*, the Court reviewed a Massachusetts law that required the organizers of a private St. Patrick's Day parade to include among its marchers an Irish-American gay, lesbian, and bisexual group. The Court concluded that the organizers of the march had a right to exclude certain participants because, "whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 575.

Here, the Court should give greater deference to CLS, a religious organization, than it accorded to the Boy Scouts in determining the burden of forced inclusion on the ability of CLS to promote its particular belief. In fact, as explained *supra*, courts and other government officials have neither the competence nor the authority to determine independently how forcing religious groups to include individuals who do not adhere to the core beliefs and practices of the religious group will affect its ability to express its message.

In addition to the substantial burdens discussed above, Hastings's denial of registered group status to CLS also means that CLS was denied, among other things, equal access to a public university's meeting rooms and communication channels, such as posting on designated bulletin boards, sending mass emails to the student body, distributing material through the Student Information Center, appearing on published lists of student organizations, and participating in the annual

Student Organizations Fair. CLS also was deprived of the ability to apply for funding to support group activities. This Court previously determined that denial of these sorts of school benefits significantly burdens a student group's rights of expressive association.

In *Healy*, the Court found "no doubt" that a university denying recognition to Students for a Democratic Society, "without justification . . . burdens or abridges that associational right." *Healy*, 408 U.S. at 181. The university privileges denied SDS were virtually indistinguishable from those denied to CLS (except for funding). Denying use of "campus facilities for meetings and other appropriate purposes" is the "primary impediment to free association flowing from nonrecognition." *Id.* In order to remain viable on campus, a student organization must have the ability to communicate effectively with other students. *Id.* at 182. Nor does the ability to meet without official recognition or off campus "ameliorate significantly the disabilities imposed" by the school. *Id.* at 183.

As it relates to student organizations, denial of eligibility for funding by a state actor like a public university is equally an impermissible substantial burden. It is no different from denying communication channels—both require government expenditures for a particular benefit accorded all other student groups but CLS. In *Rosenberger*, the Court rejected the University's argument that denial of access is different in kind from denial of funding. The Court concluded that the denial of funding to a student newspaper espousing a religious

viewpoint while funding other newspapers with other perspectives was a sufficient burden to the group's First Amendment rights. *Rosenberger*, 515 U.S. at 845-846. Where a university "expends funds to encourage a diversity of views from private speakers," as opposed to where it directs its funds for specific purposes, it cannot "silence the expression of selected viewpoints." *Id.* at 834-835. Likewise, the governmental action here is "a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion." *Id.* at 845-846.

C. Hastings Has No Compelling Interest in Requiring That Religious Groups Accept Non-Adherents As Voting Members or Officers

The right to expressive association may be infringed only "'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Dale*, 530 U.S. at 680 (quoting *Roberts*, 468 U.S. at 623). There can be no compelling government interest in requiring that a student Christian group open its leadership and voting ranks to individuals who do not follow the core values of its religion.

As discussed *supra*, this Court has held that an interest in non-discrimination alone cannot justify forcing a group to accept members and officers who are not adherents of the group. In *Hurley*, the Court further explained:

> The very idea that a noncommercial speech restriction be used to produce thoughts and

> statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.

Hurley, 515 U.S. at 579 (internal citations omitted).

Moreover, government interference with membership requirements has been determined insufficiently compelling in a variety of other contexts. For example, the expressive association right has protected the NAACP from having to comply with an Alabama statute requiring it to disclose its membership lists, *NAACP*, 357 U.S. at 460-461, and the Democratic party from state-imposed national convention delegation requirements, *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981).

As CLS's brief points out, a government interest in eliminating discrimination has been held by this Court to override an expressive association's rights only where enforcement of nondiscrimination statutes "would not materially interfere with the ideas that the organization sought to express." Pet'r Br. 42-43; *see Dale*, 530 U.S. at 657-658 (citing cases where organizations failed to demonstrate that admitting women would seriously burden male members' freedom of expressive association). Hasting's policy falls into the category of regulations that do materially interfere with the message the group is seeking to express. It is trying to prohibit

exclusion of individuals who do not adhere to the group's core principles. Even worse, Hastings wants to require CLS to permit such individuals to enter its leadership and voting-member ranks. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579.

The First Amendment prohibits government from unnecessarily regulating a group's expression by manipulating its membership. A government entity cannot destroy these rights by invoking a policy that mandates a group to accept all members in the name of "nondiscrimination."

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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v.

LEO P. MARTINEZ, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS*

The United States Conference of Catholic Bishops ("USCCB") is a nonprofit corporation, the members of which are the 258 active Catholic Bishops in the United States, who preside over the 195 dioceses and archdioceses that span the entire country.[1] USCCB promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the Nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the importance of religious education. Values of particular importance to USCCB are the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of this Court's jurisprudence in that regard.

The Bishops of the United States are firmly committed to upholding the dignity of each and every human person, no matter how vulnerable or marginalized. This includes, among many other things, the twin commitments *both* to assuring that all people (including those with a same-sex sexual orientation) enjoy the equal protection of the laws and freedom from unjust discrimination, *and* to the enduring, widely held proposition that extramarital sexual conduct (including same-sex sexual conduct) is harmful to the person and morally illicit.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* state that they authored this brief, in whole, and that no person or entity other than *amicus* made a monetary contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court.

The Bishops are also deeply concerned that, increasingly and particularly in legal discourse, these two commitments are mis-described as mutually exclusive, so that affirming the latter is viewed as a renunciation of the former. This is usually accomplished by collapsing the distinction between the two, treating moral disapproval of same-sex sexual conduct as simply one species of unjust discrimination against persons with a same-sex sexual orientation. Such discrimination, in turn, is viewed as the moral equivalent of racism, a form of bigotry that the government has the strongest possible interest in eradicating from all sectors of society, overriding even the First Amendment rights of religious and other expressive associations. The decision below reflects this disturbing trend, both in condemning moral disapproval of same-sex sexual conduct as if it were sexual orientation discrimination, *see* Pet. App. 22a, and in concluding that the eradication of such discrimination, even from a religious expressive association, is a compelling government interest, *see* Pet. App. 61a-62a.

USCCB offers this brief *amicus curiae* in the event that this case calls upon the Court to assess the contours and strength of the government's asserted interest in prohibiting discrimination based on sexual orientation. We hope to aid the Court's analysis by urging precision in both identifying the government interest to be evaluated and evaluating that interest once identified; and by highlighting the grave implications that an overbroad ruling may have for religious liberty and for a vibrantly free and diverse civil society.

SUMMARY OF THE ARGUMENT

This brief focuses on the nature of one of the government interests asserted in this case—the prohibition of discrimination based on "sexual orientation." *See* Pet. App. 88a; J.A. 294.

The definition of that interest in the law is often vague, and this case is no exception. This uncertainty creates both legal-doctrinal and practical risks, which are now highlighted and amplified because this Court may address that interest in this case. *Amicus* therefore urges special care in handling the matter: in *describing* the interest, *evaluating* the interest, and considering the *consequences* of overbreadth in either description or evaluation.

First, the Court should *describe* the interest with sensitivity to context of this particular case. CLS does not exclude other students based on the mere status of orientation, but instead based on certain conduct—unremitting engagement in or advocacy for extramarital sexual activity. Thus, the broadly stated interest in prohibiting sexual orientation discrimination has no application on these facts. Nor does it take account of the fact that the government's interest varies depending on the kind of entity against which the interest is asserted: CLS is not the government itself, nor a commercial employer, landlord, or lunch counter, but instead a private, religious association of students organized to express certain unpopular views within a public university environment. These features of CLS do not just refine, but diminish, whatever interest the government might have in excluding CLS.

Second, the Court should *evaluate* only the government interest that takes account of the key

facts about CLS described above. A government university has no legitimate interest at all—none—in excluding a group of its own students that has these characteristics. If the Court nonetheless addresses the broader interest in prohibiting sexual orientation discrimination, it should find that interest less than "compelling." That is an extremely narrow class of interests, comprising only those "of the highest order," which may authorize government to override freedoms of speech and religious exercise, and freedoms from discrimination based on religion, race, or sex. This Court has already implicitly rejected the claim that eliminating sexual orientation discrimination belongs in this elite class, so it should either declare the same thing explicitly or, better still, not take up this broader question at all.

Finally, the Court should consider the practical *consequences* of an overbroad ruling on these issues. If this Court treats (or allows Hastings to continue to treat) CLS's moral and religious opposition to extramarital sexual conduct as "discrimination," CLS and very many others of like mind will be stigmatized as bigots and correspondingly marginalized and punished by government. The government's strong thumb on the scale will at once distort, stifle, and enflame our national conversation on these important questions. It will also trigger a host of religious freedom conflicts, of uncertain legal outcome, but of certainly large social cost. But if the Court also declares "compelling" the interest in suppressing one side of this moral debate over conduct—cloaked under the rubric of suppressing "discrimination"—then the outcome of the religious freedom conflicts will become virtually certain, as religious claimants will almost always lose.

ARGUMENT

I. The Court Should Describe with Precision and Care the Government Interest Relating to Sexual Orientation in This Case.

Lower courts have recently addressed the government's constitutional interest in prohibiting "sexual orientation discrimination," but few if any have described precisely what they mean by the term. *See, e.g., N. Coast Women's Care Med. Grp.* v. *San Diego Cy. Super. Ct.*, 44 Cal.4th 1145, 1158, 189 P.3d 959, 968 (Cal. 2008) (holding that the state has a compelling interest in prohibiting sexual orientation discrimination in access to medical treatment, but without explaining what "orientation" means or whether it includes conduct). *See also Varnum* v. *Brien*, 763 N.W.2d 862, 896 (Iowa 2009) (holding that a legislative classification based on sexual orientation must be examined under a "heightened level of scrutiny," but without explaining what "orientation" means or whether it includes conduct); *Kerrigan* v. *Comm'r of Pub. Health*, 289 Conn. 135, 174, 957 A.2d 407, 431-32 (Conn. 2008) (concluding that sexual orientation is a "quasi-suspect" classification under the state equal protection guarantee, but without explaining what "orientation" means or whether it includes conduct).

In accordance with this disturbing trend, the trial court opinion in this case, which was summarily affirmed by the Ninth Circuit, gave short shrift to two important fact-specific, contextual considerations urged by CLS, and went on to declare Hastings' ill-defined interest "compelling." Pet. App. 61a. *See Cutter* v. *Wilkinson*, 544 U.S. 709, 723 (2005)

("'[c]ontext matters' in the application of th[e compelling interest] standard") (quoting *Grutter* v. *Bollinger*, 539 U.S. 306, 327 (2003)). *Gonzales* v. *O Centro Espírita Beneficente União Do Vegetal*, 546 U.S. 418 (2006) ("[T]he strict scrutiny test ... contemplate[s] an inquiry more focused than the Government's categorical approach.").

First, the trial court dismissed in a footnote CLS's insistence that it does not discriminate based on sexual orientation, because its membership policies do not exclude persons based on same-sex orientation, but instead any person of any orientation who unrepentantly engages in or advocates for extramarital sexual conduct. *See* Pet. App. 22a. Second, the court took insufficient account of the religious and expressive character of the organization against which the interest is asserted. *See* Pet. App. 59a-62a.

Amicus respectfully submits that, before evaluating whether Hastings' asserted interest in this case is "compelling," this Court should first describe the interest with much greater care than did the court below. The Court should conclude that the interest to be evaluated on these facts is *not* the interest in prohibiting discrimination based on sexual orientation (*i.e.*, disadvantaging a person or group, regardless of their conduct or advocacy), but in suppressing controversial, moral disapproval of both extramarital sexual conduct and advocacy for that conduct. In addition, that more precise interest should not be described as if it applied with equal force in all societal contexts, but instead with reference to the particular kind of entity to which it is applied here—a religious, expressive association of students operating within a government university

environment.

In other words, the Court should not ask, as did the trial court below, "How strong is the government's interest in prohibiting sexual orientation discrimination?"—an oversimplified question that blurs many important distinctions. Instead, the Court should ask, "How strong is the interest of a government university in prohibiting moral and religious opposition to extramarital sexual conduct within a voluntary, religious association of students organized around the expression of that and other controversial views?" *See O Centro Espírita*, 546 U.S. at 431 (when applying strict scrutiny, the Court has "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants.").

A. The Court Should Distinguish the General Asserted Interest in Prohibiting Sexual Orientation Discrimination from the Particular Interest That Is Actually at Issue on These Facts—Curtailing Moral or Religious Criticism of Extramarital Sexual Conduct.

CLS has argued that, whatever interest the government may have in eradicating sexual orientation discrimination, that interest was not implicated in this case, because CLS's membership policies do not actually discriminate based on sexual orientation. Pet. Br. 5, 10, 39. Instead, CLS is opposed to "*all* acts of sexual conduct *outside* of God's design for *marriage* between one man and one

woman, which acts include fornication, adultery, and homosexual conduct," and so CLS excludes from membership anyone who engages in "unrepentant participation in or advocacy of" those acts. J.A. 146 (emphasis added).

The trial court dismissed this argument in a footnote as a "distinction without a difference," citing Justice O'Connor's single-vote concurrence in *Lawrence* v. *Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring). Pet. App. 22a. This Court should reject that assertion and conclude instead that the government's interest in eradicating sexual orientation discrimination is distinct from and does not include the government's interest in eradicating moral or religious opposition either to extramarital sexual conduct, or to advocacy for such conduct.

This is so for two reasons. First, the reasoning of the *Lawrence* concurrence does not support the trial court's conclusion on these facts and actually undermines it. Justice O'Connor concluded that the Texas law violated the Equal Protection Clause because it prohibited sodomy *only* between people of the same sex and not *also* between people of the opposite sex. *Lawrence*, 539 U.S. at 581. Here, CLS's policy does not make the same distinction, excluding those who unrepentantly engage in or support "*all* acts of sexual conduct outside of ... marriage," J.A. 146 (emphasis added), including fornication and adultery—not just homosexual conduct.

Second, to the extent that the *Lawrence* concurrence suggests that moral condemnation specifically of same-sex sexual *conduct* is no different under the Constitution from moral condemnation of *persons* who merely have the *inclination* to such

conduct, this Court should decline to adopt the reasoning of that opinion. Although same-sex sexual conduct may indeed be "closely correlated with being homosexual," *Lawrence*, 539 U.S. at 583, the correlation is by no means absolute, and what separates the two is critical—the exercise of morally responsible human will.

Whether in the context of human sexuality or otherwise, merely having an inclination to conduct is blameless; freely engaging in conduct, however, *is* subject to moral evaluation, as is advocacy for that conduct. Thus, moral condemnation of a person or group for their mere *inclination* is deeply problematic, but moral condemnation of *conduct*, or of advocacy for that conduct, is not. So if it really were the case that, under the law at issue in *Lawrence*, merely "*being* homosexual carrie[d] the presumption of being a criminal," *Lawrence*, 539 U.S. at 584, and that the law really did "brand[] all homosexuals as criminals," *id.* at 581, then there would indeed be a serious concern. But the law did no such thing, punishing only conduct—not being, but doing. This Court should reject any analysis that would blur or collapse the distinction between the two.

The Court should maintain this venerable distinction in part because it pervades the Anglo-American legal tradition, extending far beyond discussions of sexuality. Thus, in general, although the government may punish all manner of conduct, the Constitution forbids government from punishing a status, belief, or inclination. *See, e.g.*, *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 106-07 (2007) (noting that, at common law, mere attempt to commit an unlawful act was not a crime absent "some open deed"); *Church of the Lukumi Babalu Aye* v. *City of*

Hialeah, 508 U.S. 520, 533 (1993) (explaining that "a law targeting religious beliefs as such is never permissible," but a law targeting religious practices may be justified upon the satisfaction of strict scrutiny); *Robinson* v. *California*, 370 U.S. 660, 667 (1962) (holding that criminal punishment for "being" a drug addict, without the behavior of taking drugs, violates the Eighth Amendment); *Doe* v. *City of Lafayette*, 377 F.3d 757, 765 (7th Cir. 2004) ("the government cannot regulate mere thought, unaccompanied by conduct") (citing *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 67-68 (1973)). *See also Employment Div.* v. *Smith*, 494 U.S. 872, 877 (1990) (contrasting strong protection against government regulation based on religious status or belief with rational basis protection that generally applies to religious conduct).

More relevantly, the distinction between status or various mental states (such as belief, intent, or inclination) on the one hand, and overt acts (such as conduct or advocacy) on the other, plays an especially prominent role in antidiscrimination law. It is precisely the imposition of a disadvantage on the basis of a status (which is never culpable) rather than conduct (which may be) that most commonly elicits the pejorative legal label of "discrimination" from courts. *See, e.g., Loving* v. *Virginia*, 388 U.S. 1, 11 (1967) (noting that "[d]istinctions between citizens solely because of their ancestry" is "odious to a free people whose institutions are founded upon the doctrine of equality") (quoting *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)); *United States* v. *Virginia*, 518 U.S. 515, 532 (1996) (a law or government policy that denies women equal opportunity "simply because they are women" is

incompatible with the guarantee of equal protection).

Similarly, federal statutes provide the strongest protection from employment discrimination based on pure status, such as race, color, national origin, and sex. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* But for those categories that may encompass both status and conduct—such as religion and disability—the protection is highly circumscribed precisely to the extent it includes conduct. *See* 42 U.S.C. § 2000e(j) (limiting protection for employee's "religious observance and practice" to requirement that employer provide "reasonable accommodation" that does not impose "undue hardship" on employer); 42 U.S.C. § 12112(b)(5) (limiting protection for employee's "physical or mental limitations" or "impairments" to requirement that employer provide "reasonable accommodation" that does not impose "undue hardship" on employer); 42 U.S.C. § 12111(8) (excluding from protection against disability discrimination those employees who cannot perform essential job functions). *See also Trans World Airlines* v. *Hardison*, 432 U.S. 63, 84 (1977) (further weakening protection for "religious observance and practice" by finding "undue hardship" on employer to be anything "more than a *de minimis* cost").

The Court should maintain the distinction here as well, by refusing to treat CLS's opposition to same-sex (and other extramarital) sexual conduct and corresponding advocacy as if it were sexual orientation discrimination. The Court should conclude instead that Hastings' asserted interest in prohibiting such discrimination is not implicated on these facts and so fails to justify the exclusion of CLS.

B. The Court Should Not Describe the Government Interest as if It Applied With Equal Force in All Sectors of Society, but Instead by Reference to the Particular Religious Expressive Entity Against Which the Interest Is Asserted.

Another important consideration in defining an interest that the government asserts as "compelling" is the character of the particular entity against which the interest is asserted. *See O Centro Espírita,* 546 U.S. at 430-31 (strict scrutiny "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant" against whom the interest is asserted).

Although the trial court cited *Boy Scouts of America* v. *Dale,* 530 U.S. 640 (2000), and other cases recognizing that the government's interest in prohibiting discrimination is more "attenuated" when applied to private expressive associations, Pet. App. 61a, the court appeared to disregard that CLS is such an association, that it is a religious one, and that, in this case, it is operating on a government university campus. *Id.* 60a-61a.

This Court should take account of all of these factors when examining the government's interest in this case. *See Roberts* v. *United States Jaycees,* 468 U.S. 609, 620 (1984) (freedom of association analysis "unavoidably entails a careful assessment of where th[e association's] objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments").

For example, the government's interest in avoiding discrimination *for the government's own part* is often different from (and usually stronger than) its interest in prohibiting the same discrimination within *private* entities. This is illustrated most dramatically with respect to religion: the government has no interest at all in making distinctions based on religion or engaging in advocacy for religious beliefs, but has a compelling interest in protecting the freedom of private religious entities to do both. *See Capitol Square Review and Adv. Bd.* v. *Pinette*, 515 U.S. 753, 655-56 (1995) ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (quoting *Bd. of Educ. of Westside Comm'y Schs.* v. *Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J., concurring)).[2]

Among private entities, there are further distinctions that affect the strength of any antidiscrimination interest the government may have, including distinctions between commercial

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[2] While all government interests vary in strength depending on the type of entity against which they are applied, they do not all vary in the same way. For example, there is no constitutional provision that specifically protects the freedom of private actors to make race-based distinctions, as there is for private religion-based distinctions in the form of the Free Exercise Clause. Indeed, the opposite is true for race in light of the Thirteenth Amendment which, uniquely among constitutional provisions, proscribes private conduct. *See* U.S. CONST. amend. XIII. This additional axis of contextual variation represents still another reason why the Court should not address whether the asserted general interest in prohibiting sexual orientation discrimination is "compelling." *See infra* Section II.

associations and expressive or intimate ones. *See Roberts,* 468 U.S. at 620 ("[A]n association ... such as a large business enterprise ... seems remote from the concerns giving rise to this constitutional protection."). *See also id.* at 636 (O'Connor, J., concurring) ("Lawyering to advance social goals may be speech, *NAACP* v. *Button,* 371 U.S. 415, 429-30 (1963), but ordinary commercial law practice is not, *see Hishon* v. *King & Spalding,* 467 U.S. 69 (1984).").

And among private expressive associations, the government has still less of an interest in eliminating discrimination from within religious associations. *See Kedroff* v. *Saint Nicholas Cathedral,* 344 U.S. 94, 116 (1952) (reaffirming the freedom of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"). *See also Corp. of the Presiding Bishop* v. *Amos,* 483 US 327 (1987) (Brennan, J., concurring) ("[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions....'") (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,* 81 COLUM. L. REV. 1373, 1389 (1981)). Indeed, the Constitution divests the government of *any* interest in reaching into certain relationships constituting religious life. *See* Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses,* 53 VILL. L. REV. 273, 292-93 (2008) (stating that the "preservation ... of the churches' moral and legal right to govern themselves in accord with their own

norms and in response to their own calling is our day's most pressing religious freedom challenge").[3]

Even among government entities, the government's interest in prohibiting discrimination within government itself may vary as a function of the capacity in which the government acts—as regulator, as provider of financial benefits, as employer, or most relevantly here, as the institutional venue for the exchange of ideas, such as a public university. Taking once again the example of religion, the government operates under different constraints depending on its function. *Compare Employment Div.* v. *Smith,* 494 U.S. 872 (1990) (application of general criminal law that incidentally burdens religious exercise does not trigger strict scrutiny under Free Exercise Clause), *with Sherbert* v. *Verner,* 374 U.S. 398 (1963) (discretionary denial of unemployment benefits that incidentally burdens religious exercise triggers strict scrutiny under Free

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[3] *See, e.g., N.L.R.B.* v. *Catholic Bishop of Chicago,* 440 U.S. 490 (1979) (declining to construe federal labor relations statute to reach relationship between religious schools and their teachers based on risk of excessive entanglement); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925) (striking down law compelling attendance at public schools based on interference with freedom of parents to direct religious upbringing and education of their children); *Petruska* v. *Gannon University,* 462 F.3d 294 (3rd Cir. 2006) (declining to decide sex discrimination claim by religious university administrator based on "ministerial" status of employee); *Curay-Cramer* v. *Ursuline Academy,* 450 F.3d 130 (3d Cir. 2006) (declining to decide sex discrimination claim by religious school teacher that would entail resolution of religious-doctrinal questions of the relative severity of different moral offenses); *Bryce* v. *Episcopal Church in the Diocese of Colorado,* 289 F.3d 648 (10th Cir. 2002) (declining to decide sexual harassment claim involving religious-doctrinal dispute over homosexuality).

Exercise Clause), *and with Rosenberger* v. *Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (denial of funding of student publication at public university based on religious viewpoint triggers strict scrutiny under Free Speech Clause). *See also Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 366 n.7 (3d Cir. 1999) (Alito, J.) (suggesting that intermediate scrutiny may apply to public employment decisions based on religion).

The trial court ignored all of the above variables, but this Court should not.

First, the Court should consider the particular governmental function and setting at issue. Hastings is not exercising the police power, or regulating its own employees or sponsored organizations, but instead is a public university challenged for its decision to deny activities funding and facilities access to a private student group. Regardless of how this government function is categorized as a matter of forum analysis,[4] one would expect a top-rated public law school like Hastings to be an environment marked by vigorous academic debate, including about controversial moral questions. *See Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.") (internal quotations and brackets omitted). In turn, one would expect Hastings to claim no interest in shielding its

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[4] *Amicus*, of course, agrees with the forum analysis set forth by CLS in its principal brief. *See* Pet. Br. 22-23, 52-53.

students, all presumably in their twenties and older, from moral debates they may find disturbing. *See also New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (noting our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks"); *Cantwell* v. *Connecticut*, 310 U.S. 296, 310 (1940) (similar regarding religion).

Next, the Court should consider the character of the group whose access to this academic environment is being curtailed. CLS is a private, expressive, and religious association of Hastings students; it is not governmental, commercial, or secular, or a group of outsiders. That is, all factors based on the character of the entity against whom the government interest is asserted tend to "attenuate" the strength of that interest. Pet. App. 61a.

Finally, the Court should consider, as discussed above, *see supra* Section I.A., that the asserted general interest in prohibiting "sexual orientation discrimination" is not implicated on these facts, because CLS has not actually urged opposition to the sexual inclinations or status of any person or group, but instead to sexual conduct—and to all extramarital sexual conduct at that.

Putting it all together, the Court should describe as follows the government interest pertaining to sexual orientation in this case: it is the interest of a public university in prohibiting a private, religious, expressive association of students from organizing themselves within the academic community around the moral and religious criticism

of extramarital sexual conduct.

Only after identifying this interest with precision and care should the Court assess the strength of the interest.

II. Having Precisely Described the Government Interest Relating to Sexual Orientation in This Case, the Court Should Assess That Interest with Equal Care.

A. The Interest Actually Implicated on These Facts Is Not Even Legitimate.

In general, it is easy for the government to satisfy the requirement to have a "legitimate government interest." The government's asserted interest enjoys the presumption of rationality, which a plaintiff must rebut. *Kadrmas* v. *Dickinson Pub. Schs.*, 487 U.S. 450, 462-63 (1988). Interests that this Court has found illegitimate include "mere negative attitudes, or fear," *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985), and "'a bare ... desire to harm a politically unpopular group.'" *Romer* v. *Evans*, 517 U.S. 620, 634 (1996) (quoting *United States Dept. of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973)). Though deferential, this minimum standard of rationality is "'not a toothless one.'" *Schweiker* v. *Wilson*, 450 U.S. 221, 234 (1981) (quoting *Mathews* v. *Lucas*, 427 U.S. 495, 510 (1976)).[5]

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[5] *Amicus* does not mean to suggest that rational basis scrutiny is appropriate in this case, under the Free Speech Clause or otherwise. In fact, it believes Hastings' action here should be subject to strict scrutiny. But it offers this analysis to underscore that Hastings' exclusion of CLS fails even the least exacting constitutional scrutiny. *See also* Pet. Br. 44-45.

Here, Hastings has asserted an interest in prohibiting "sexual orientation discrimination." If, by this, Hastings means differential treatment of persons based on their actual sexual orientation, rather than conduct in addition, then the interest is generally legitimate—but then it is also inapplicable on these facts. Because CLS does not actually discriminate based on status, and because Hastings excluded CLS anyway, then Hastings' asserted interest can only be understood as the interest in prohibiting conduct- and advocacy-based "discrimination"—that is, the interest in prohibiting a private, religious, expressive association from excluding students who are engaged in or committed to conduct that the association opposes as immoral.

No government actor—least of all a public university—has a legitimate interest in this. As discussed above, CLS has every feature that diminishes the government's interest in eliminating discrimination within it—CLS is private, expressive, and religious and operates within a government environment dedicated to the robust exchange of ideas. And whatever meager antidiscrimination interest may be left as against CLS after this winnowing process, CLS has not even offended. In this context, the only purpose served by still denying CLS funding and access is to interfere with the ability of a private group to organize around a set of shared moral and religious ideas. That is because Hastings either disfavors the particular set of ideas, or disfavors the ability of any private group to organize around any ideas. The government has no interest—no business—in either of these; they are illegitimate government purposes.

The first is illegitimate because no government

entity (least of all a public university) should punish people or groups (least of all religious ones) based on their viewpoints. *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 345-46 (1992); *R.A.V.* v. *St. Paul*, 505 U.S. 377, 382 (1992); *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) ("Regulations which permit the Government to discriminate on the basis of content of the message cannot be tolerated under the First Amendment") (quoting *Regan* v. *Time, Inc.*, 468 U.S. 641, 648-49 (1984)).

The second is illegitimate because no government entity (least of all a public university) should hamper the ability of the voluntary associations (least of all religious ones) that constitute our vibrant civil society—and form a bulwark against the overweening power of the state—to create and perpetuate themselves. *See Dale*, 530 U.S. at 653-61, and cases cited therein; *Roberts*, 468 U.S. at 619 (noting that such associations "foster diversity and act as critical buffers between the individual and the power of the State").

B. The Broader Asserted Interest in Prohibiting Sexual Orientation Discrimination Should Not Be Addressed in This Case, but if It Is, It Should Not Be Found Compelling.

For the two reasons discussed above, this Court should decline to evaluate Hastings' broader asserted interest in prohibiting sexual orientation discrimination: (1) that interest is not implicated on these facts, because CLS has not actually engaged in such discrimination; and (2) interests so broadly

framed ignore that the government's interest varies depending on the entities against which the interest is asserted.

Only "paramount interests" of "the highest order" qualify for the designation of "compelling." *See Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 546 (1993); *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963). *See, e.g., Cutter* v. *Wilkinson*, 544 U.S. 709, 725 n.13 (2005) (prison security a compelling interest); *Nat'l Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 677 (1989) (avoiding disclosure of sensitive governmental information a compelling interest); *Skinner* v. *Ry. Labor Executives' Ass'n*, 489 U.S. 602, 633 (1989) (regulating railway safety a compelling interest); *United States* v. *Lee*, 455 U.S. 252, 260 (1982) (compulsory participation in the Social Security system a compelling interest).

The gravity of elevating a government interest to the status of "compelling" is illustrated by considering the facially repugnant governmental action that the interest may then justify: government preference among religious denominations, *see Larson* v. *Valente*, 456 U.S. 228, 246-47 (1982); government targeting of religious practices for special disfavor, *see Lukumi*, 508 U.S. at 533; government suppression of speech based on viewpoint, *see Regan*, 468 U.S. at 648-49; and government classification of citizens based on race, *see Johnson* v. *California*, 543 U.S. 499, 505-06 (2005).

A fortiori, interests deemed "compelling" may also justify government actions that trigger intermediate scrutiny, which may be satisfied by an interest deemed merely "important." *Craig* v. *Boren*, 429 U.S. 190 (1976) ("important" interest may justify

government classifications based on gender); *Caban* v. *Mohammed*, 441 U.S. 380 (1979) ("important" interest may justify government classifications based on illegitimacy).

Although this Court has not addressed the question squarely, its prior related decisions militate against the conclusion that the prohibition of sexual orientation discrimination is a compelling interest.

In *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), the asserted government interest was the elimination of sexual orientation discrimination. *Id.* at 647. Although the Court did not directly address whether that interest was "compelling," it reaffirmed that rights of expressive association may be overridden by a compelling interest, and then held that those rights were not overridden by the asserted interest in that case. *Id.* at 648. The fact that the interest in prohibiting sexual orientation discrimination did not override the Boy Scouts' expressive-associational rights would seem to imply that the interest was not "compelling."

One step farther removed, this Court has on two occasions declined to identify sexual orientation as a suspect classification of any kind, rejecting the laws on other bases instead. In *Romer* v. *Evans*, 517 U.S. 620 (1996), the Court found that the law at issue failed rational basis scrutiny because it was "born of animosity toward the class of persons affected." *Id.* at 634. In *Lawrence* v. *Texas*, 539 U.S. 558 (2003), the Court found not that the moral objection to the prohibited conduct was irrational, but that the conduct—whether done by same-sex or different-sex couples—fell within a zone of intimate association that the criminal law may not reach. *Id.* at 573-75.

The decisions of the political branches on related questions may also inform the Court's assessment. The federal Employment Non-Discrimination Act ("ENDA")—which would add "sexual orientation" to the list of nationally prohibited bases of employment discrimination under Title VII—has been proposed in some form or another in every Congress since 1975. *See* Speaker Nancy Pelosi, *Current Legislation: The Employment Non-Discrimination Act* (available at <http://www.speaker.gov/legislation?id=0121>) (last visited Feb. 3, 2010). In all that time, it has only passed the House once, over two years ago. *Id.* Most importantly here, even if ENDA were eventually to pass, it would not apply to private membership clubs or most religious employers—private expressive entities akin to CLS here. *Id.* The sexual orientation antidiscrimination laws that exist in approximately twenty states have similar exemptions. In other words, even where legislatures would prohibit sexual orientation discrimination, they do so in particular contexts rather than broadly, and avoid intrusion into religious or other expressive associations.[6]

In light of these considerations, the generalized government interest in prohibiting sexual orientation discrimination cannot fairly be called a "paramount interest" of "the highest order." *Sherbert; Lukumi.* This Court should not elevate this interest to the degree that it may justify the targeted regulation of religious exercise, viewpoint-based suppression of speech, race or sex discrimination, or any other government action that triggers strict or intermediate

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[6] *Cf. Dale*, 530 U.S. at 657 n.3 (noting that the New Jersey Supreme Court was unusual in construing the state's public accommodation law to include the Boy Scouts).

scrutiny. This Court has declined to take this major step in the past, and particularly in light of the political branches' remarkable consistency in avoiding all-encompassing prohibitions on sexual orientation discrimination, the Court should continue to exercise restraint as well.[7] Thus, if the Court addresses the question at all, it should make explicit what was implicit in *Dale*—that the general interest in prohibiting sexual orientation discrimination does not rise to the level of "compelling."

III. Overstating the Scope or Strength of the Government Interest in Prohibiting Sexual Orientation Discrimination Would Have Serious Implications for Religious Liberty and Would Distort the Ongoing Moral Debate over Sexual Conduct in Civil Society.

In addition to all of the foregoing, there are important practical reasons for this Court to avoid either describing the government's constitutional interest in prohibiting "sexual orientation discrimination" to encompass prohibiting moral criticism of conduct, or declaring the interest in prohibiting "sexual orientation discrimination" (however defined) as compelling.

First, to collapse the distinction between the act and the actor—that is, to treat moral condemnation of a person's conduct as no different than the moral condemnation of the person—is to

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[7] *Cf. O Centro Espírita*, 546 U.S. at 433 ("It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' ... when it leaves appreciable damage to that supposedly vital interest unprohibited.") (quoting *Lukumi*, 508 U.S. at 547) (some internal quotations omitted).

transform all debate about the morality of conduct into "discriminatory" personal attack. Instantly, the moral reasoner becomes the bigot. Conversation comes to a halt and name-calling begins. The conduct is effectively immunized from criticism, no matter how kindly or carefully formulated. This is problematic enough for interpersonal relationships and for public and private discourse within civil society. But add in the coercive power of the state, and result is simply disastrous.

In particular, if the "discrimination" consisting of the moral condemnation of conduct is penalized by law, then the government has weighed in on that disputed moral question in the strongest possible terms—not merely to adopt one side, but to rule the other side wholly out of bounds, subjecting it to coercive and financial sanctions. At a minimum, this would severely distort that ongoing moral debate and skew its results. Over time, might would make right. This is no role for government in a Nation that prizes its vibrant, free, and diverse civil society.

It would also give rise to a host of religious freedom conflicts. Many—though by no means all—of those with moral objections to same-sex sexual conduct are at least reinforced in their positions by religious belief. Once the government deems those beliefs bigoted, it may then unleash the full range of weapons that have proven so effective against racism in the latter half of the last century—civil rights laws directly forbidding the discrimination (in this case, moral opposition to conduct), paired with the targeted withdrawal of government benefits. Religious people and groups will resist, and First Amendment litigation will follow.

Indeed, this very case reflects this pattern, as the dispute all traces back to Hastings' decision to treat CLS's policy—which criticizes conduct rather than people—as "discrimination." Pet. App. 88a; J.A. 294. *See also* Marc D. Stern, *Same-Sex Marriage and the Churches*, in Douglas Laycock, Anthony Picarello, and Robin Wilson, Eds., SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1-59 (Rowman & Littlefield 2008) (cataloguing religious freedom disputes that have already arisen under sexual orientation antidiscrimination laws, in order to anticipate analogous disputes that would arise in the event of the legal redefinition of marriage).

Second, to declare broadly—as the trial court and others seem inclined to do—that "[t]he eradication of sexual orientation discrimination is a compelling governmental interest," *Gay Rights Coalition* v. *Georgetown Univ.*, 536 A.2d 1, 38 (D.C. 1987), would be equally disastrous. *See* Pet. App. 61a-62a. In short, the government can do just about anything with a "compelling government interest"; it can tear through precious freedoms like a buzz-saw. Among (many) other things, it would essentially predetermine the outcome of the religious freedom conflicts anticipated above—even where a religious plaintiff could convince a court to apply strict scrutiny, the plaintiff would still likely lose.

This Court should therefore hand out the "compelling" designation very sparingly indeed, and the interest in prohibiting "sexual orientation discrimination" simply does not qualify for elevation to this exalted state. This is true even if the interest is defined in a more precise and context-sensitive way, but it is especially true if the interest is described loosely or wholly without definition—as,

regrettably, seems more common recently. *Amicus* respectfully requests that the Court not follow that trend.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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